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Articles

Labour welfare cess and its implications for the construction industry

By **Anup Koushik Karavadi**

The construction industry in India is witnessing a boom fuelled by growing demands for infrastructure, commercial space and residential accommodation for the aspirational middle class. The industry is intricately tied to economic growth and creation of jobs, which in turn results in increasing consumer spending and growth, so the cycle is complete. While it is acknowledged that the industry is a labor intensive one, the persons, including a large number of women employed in the industry are unskilled, temporary and therefore unorganized and tend to work under inhuman and pitiful conditions.

The plight of the construction labourer seeks to be at least legally addressed in certain legislations. The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (BOCW Act) stipulates the welfare measures that have to be undertaken by the employers for its workers in the construction and building industry. Further, The Building and Other Construction Workers Welfare Cess Act, 1996, (Cess Act) has been enacted for levy and collection of cess on the *'cost of construction'* incurred, from the relevant *'employer'* with a view to augment the resources for the Building and Other Construction Workers' Welfare Boards constituted under the BOCW Act.

Both the Acts have imposed the obligation of implementation on the respective state governments and hence, though the Acts have been in force since 1996-97, the implementation of the Acts has been erratic warranting directions from the Supreme Court of India in the *National Campaign Committee for Central Legislation on Construction Labour* v. *Union of India*[1] to the governments of various states and union territories to implement the Acts and constitute the Welfare Boards and collect the Cess as contemplated under the said Acts. Thus it is relevant for the developers, employers' and the contractors who are in the business of construction to be aware of the implications of the said Acts. This article proposes to highlight two of the many implications which may result due to the implementation of the said Acts.

Acts and their implications

The said Acts apply to every *'establishment'* which employs ten or more *'building workers'* in any *'building or other construction work'* anytime during the preceding twelve months. The BOCW Act requires every employer in relation to an establishment to which the BOCW Act applies to make an application to the registering officer for registration of establishment within sixty days from the date of commencement of the construction work. Further, the Cess Act mandates every *'employer'* in relation to an establishment who carries on building and construction work to pay a cess of 1%[2] of the *'cost of construction'*.

Registration of the establishment under the BOCW Act

The term 'establishment' includes an establishment belonging to the contractor and also the es-

[1] 2012 (2) SLJ471 (SC)

[2] The Government of India vide Notification No. S-61011/9/95-RW [SO.2899] dated the 26th September, 1996 has provided that cess for the purposes of the BOCW Act, shall be levied at 1% of the cost of construction incurred by an employer.

tablishment where building and other construction work have commenced or proposed to commence. It is relevant to understand that the term 'building or other construction works' has a wide meaning and includes alteration, repairs, maintenance or demolition, of or, in relation to, any public works, infrastructure projects or buildings and residences (Not included when the construction cost of residences does not exceed INR 1,000,000). From the provisions of the BOCW Act it could be inferred that registration under the Act is establishment specific and not employer specific. It is a moot point as to whether the employer has to register the site where the building and other construction work have commenced (or proposed to be commenced) or the establishment from where the employer carries out its business. However, as Section 46 of the BOCW Act requires the employer to give a notice of commencement of construction work to the inspector having jurisdiction in the area where the site is located, the employer may register the establishment from where it carries out the business and issue a notice of commencement whenever it initiates a building or construction work.

Liability to pay cess

As per the Act, the employer in relation to an establishment means, the owner thereof and includes the contractor in case where the building or other construction work is carried on by or through a contractor. Section 3 (charging section) of the Cess Act along with such a definition certainly does not specify whether the cess has to be paid by the owner or the contractor with respect to an establishment. Such a query has been partially addressed by the Courts in *Builders Association of India* v. *UOI*[3] and *New India Construction Company* v. *State of Haryana*[4] by observing that under the scheme of the BOCW Act, the intention was not to confine the applicability of the Acts to the owner or the contractor but to cover both. The cess should be collected from either the owner or the contractor. The Court has also suggested that if the cess is not collected from the contractor then the same may be collected from the owner.

Conclusion

While it is commendable that the government has woken up to the long neglected construction worker's welfare, there has been lack of clarity and will in implementation and enforcement until the courts have stepped in to fill the gap. It is understood that the Central Government is also planning to table amendments[5] to the Acts which shall widen the scope of applicability of the Acts to enable the respective state governments to implement the Acts with ease and it is hoped that the cess so collected will truly benefit the construction workers by providing better and safer work conditions. This is a wake up call to owners, employers and contractors engaged in construction activity to ensure strict compliance and take this cess into account while calculating project costs.

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[3] (139) 2007 DLT 578

[4] Unreported – Cited in (2011) ILLJ 307 P&H

[5] Press note released by the Cabinet on 1st November, 2012, detailing the proposed amendments is available at http://pib.nic.in/newsite/erelease.aspx?relid=88755

Case note on Ajay Devgn Films v. Yash Raj Films

By **Sundar Ramanathan**

The informant in Case No. 66 of 2012 (decided by Competition Commission of India on 5-11-2012), Ajay Devgn Films, alleged that the respondents had released its mega starrer *Ek Tha Tiger* on 15th August, 2012 in theatres across India, including single screen theatres. At the time of its release, the informant alleged that the respondents imposed a condition on the single screen theatres that they would get the right to exhibit *Ek Tha Tiger* only if they also simultaneously agree to exhibit *Jab Tak Hai Jaan* on Diwali. It was alleged that some theatres entered into this arrangement and some did not.

Allegations

It was alleged by the informant that such an arrangement was a 'tie-in arrangement' opposed to Section 3 (4) (a) of the Competition Act, 2002. Furthermore, it was alleged that the respondents are abusing their dominant position in the market for 'film industry in India' under Section 4.

Section 3 – Anti-competitive Agreements

The Competition Commission of India held that a tie-in arrangement under Section 3 (4) is not per se illegal but it has to be demonstrated that the agreement / arrangement has to have an appreciable adverse effect on competition in India in the light of the factors enumerated in Section 19 (3).

A. Appreciable Adverse Effect on Competition:

It was held by the Competition Commission that

(a) The decision taken by the single screen theatres was a *legitimate commercial decision* taken in their own interest as the single screen theatres were aware at the time of entering into the arrangement with the respondents that other films would be released on Diwali and yet decided to screen only the films of the respondents; and

(b) Other single screen theatres which did not enter into this arrangement with the respondents were free to screen any film of their choice including that of the Informant; and

(c) Only 35% of the revenues in films comes from single screen theatres while 65% of the revenues comes from the multiplexes and the right of the Informant to exhibit his film on the multiplexes was not prohibited; and

(d) The distributors could pre-pone and postpone the release of a movie based on the availability of the screens.

Therefore, in the light of Section 19 (3) no entry barriers were created nor were existing competitors driven out of the market and nor was there any appreciable effect on the benefits accruing to the ultimate consumers (viz. viewers). Hence, there was no appreciable adverse effect on competition within India for the purposes of Section 3 (4) of the Competition Act.

B. Temporal Market & the Test of Appreciability:

It was held by the Commission that the *non-significant position* held by the single screen theatres does not have any adverse effect on competition. Furthermore, it was held that even amongst single screen theatres the distributors only like to exhibit the new releases in Category A single screen theatres and not in Category B or Category C single screen theatres.

Furthermore, the Commission held that a temporal market like Diwali or Eid Release cannot form the market and the entire year should be considered as the market. The Commission held

that when the mega starrers film compete with each other the Theatre owners have the liberty to choose which films they would like to exhibit and this cannot be viewed as an appreciable adverse effect on competition. The Commission held that *appreciability is of huge practical importance for competition* and restraint orders cannot be passed by the Commission in agreements of minor importance as the market was not the temporal market but the market in the entire year.

Section 4 – Abuse of Dominance

A. Standard of Evidence

The Commission held that to determine abuse of dominance under Section 4 of the Competition Act, 2002 it is necessary to determine the relevant market. It was held that the Informant failed to prove how the relevant market was the market for 'Film Industry in India' and how the respondents enjoyed a dominant position in the said market.

B. Dominant Position

The Commission held that the dominance has to be determined on the basis of the factors under Section 19 (4) and in the present case no data of market share or economic strength was demonstrated by the Informant and that dominance cannot be established merely on the basis of a big name or banner. Furthermore, the respondents only produce 2 to 4 movies in a year out of close to 100 films each year in Bollywood. Therefore, it was held that the respondents cannot be considered dominant in the Bollywood industry leave alone in the Film Industry in India.

On this basis, the Commission held that there was no prima facie case under Section 26 (1) and dismissed the case under Section 26 (2).[1]

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Circulars & Notifications

XBRL Mode Balance Sheet and Profit & Loss Account – Time limit for filing extended: Time limit to file the financial statements in the XBRL mode, for the financial year commencing from 1-4-2011, has been extended up to 15th December, 2012 or within 30 days from the date of Annual General Meeting of the company whichever is later. Ministry of Corporate Affairs General Circular No. 34/2012, dated 25th October, 2012 also states that no additional fee/ penalty would be payable.

Foreign currency for making payments to SEZ: Domestic Tariff Area (DTA) units were earlier permitted to purchase foreign exchange from AD Category I banks (AD) for making payments towards goods supplied to them by units in the Special Economic Zones (SEZs). Now, they have also been permitted to purchase foreign exchange from AD for making payment to a unit in the SEZ for the services rendered by the said SEZ unit. A. P. (DIR Series) Circular No. 46, dated 23rd October, 2012 has been issued by the RBI in this regard.

FIIs - Facilitating hedging of currency risk: Foreign Institutional Investors (FIIs) may now approach any branch of AD Category I banks (AD) for hedging their currency risk on the market value of investment in equity and/or debt in India. The facility of hedging for FIIs was available earlier only in designated branches of ADs maintaining accounts of FIIs. A.P. (DIR Series) Circular No. 45 dated 22nd October, 2012 issued for the purpose also lists certain con-

[1] It will be pertinent to note that the matter has been appealed before the Competition Appellate Tribunal and the Competition Appellate Tribunal has not stayed the order passed by the CCI but has issued notice to the opposite parties. Please see in this regard: <http://www.moneycontrol.com/news/entertainment/compat-refuses-to-stay-jab-tak-hai-jaan-screening_779950.html>

ditions like submission by FII of declaration of its global outstanding hedges across all AD category banks, on quarterly basis, to the Custodian bank.

SOFTEX – Procedure revised: A software exporter, whose annual turnover is at least Rs.1000 crore or who files at least 600 SOFTEX forms annually on all India basis, will be eligible to submit a statement in excel format to any Software Technology Park of India (STPI) for certification of exports declared through SOFTEX Form. RBI's A. P. (DIR Series) Circular No.47 dated 23rd October, 2012 issued for the purpose revises the procedure owing to good response received from the implementation of this procedure earlier in April 2012 at STPI units in Bangalore, Hyderabad, Chennai, Pune and Mumbai.

Arbitration Mechanism in Stock Exchanges: Terms of arbitral references in case of arbitration of disputes arising between a client and a member (Stock Broker, Trading Member and Clearing Member) have been modified. In terms of Circular No. CIR/MRD/ICC/29/2012 dated 7th November, 2012 time limit of six months for claiming exemption from payment of deposit for a claim/counter claim upto Rs. 10 lakh has been done away with. Further, expenses thus arising with regard to such applications shall now be borne by the stock exchanges. Circular No. CIR/MRD/DSA/24/2010, dated August 11, 2010 which established mechanism for arbitration of such disputes has been amended in this regard.

Loans against security of funds in NR(E)RA and FCNR(B) deposits – Ceiling removed: Banks can now sanction loans against the NR(E)RA and FCNR(B) deposits, either to the depositors or any third party, in the form of Rupee loans in India and foreign currency loan in India or outside India without any ceiling subject to usual margin requirement calculated in accordance with para 9(2) of Schedule-2 of Foreign Exchange Management (Deposit) Regulations, 2000. RBI's Circular A. P. (DIR Series) Circular No. 44, dated 12-10-2012 has been issued in this regard.

Name change for Beneficiary Owner (BO) Account – Documents required specified: Securities Exchange Board of India (SEBI) has decided to allow individual BO to change his/her name through submission of self attested copies of specified documents of which the original shall be verified at the time of submission. SEBI Circular No. CIR/MRD/DP/ 27 /2012, dated 1-11-2012 states marriage certificate/ copy of Passport showing husband's name/ publication of name change in official gazette in case of change of name on account of marriage and publication of name change in official gazette in case of change of name for reasons other than marriage and change in father's name, as the documents for the said purpose.

RATIO DECIDENDI

Appointment of arbitrators – Procedures therefor, cannot be bifurcated

The Supreme Court has held that the procedure followed by the Calcutta High Court in considering applications for appointment of arbitrator(s) under Section 11 of the Arbitration and Conciliation Act, 1996 in a piecemeal manner is legally impermissible.

The Calcutta High Court was considering applications for appointment of arbitrator(s) under Section 11 by following a two tier system, wherein, (i) at first instance, one Designate Judge sought to exercise the judicial power of the court to determine whether the preconditions for exercising power under Section 11 of the said Act had been met i.e. whether there were live disputes which

had to be resolved; and (ii) if held in the affirmative, then another Designate Judge or the Chief Justice himself, as the case may be, would proceed with appointment of arbitrator(s).

This piecemeal methodology of bifurcating procedures of appointment was held to be completely unknown to law and not sanctioned by Section 11. The Court reiterated the exposition of law given by it in the seven judge bench decision in the case of *S.B.P. & Co.* v. *Patel Engineering* - (2005) 8 SCC 618 to hold that the Chief Justice or Designate Judge while considering an application under Section 11 exercises judicial function and that such an application has to be dealt with in entirety by either the Chief Justice or his/her Designate Judge, and not by both, making it a two-tier procedure. [*Hindustan Copper Ltd* v. *Monarch Gold Mining Co. Ltd.* – Supreme Court Order dated 11-10-2012].

Exclusive dealership agreements when not anti-competitive

Exclusive dealership agreements with group companies do not lead to anti-competitive business practices. The Competition Commission of India (CCI) has held that agreement between group companies cannot be said to be falling under the category of contraventions of Section 3 of the Competition Act, 2002. It was held that the principle is in conformity with the internationally accepted doctrine of 'single economic entity'. The Opposite Party was alleged as violating provisions of the said Act by entering into exclusive distribution agreement with a particular company, thereby restricting the informant and other prospective dealers from operating in the market and by adopting a discriminatory pricing policy. The Commission further noted that while considering whether an enterprise is dominant in the market or not, factors such as market share, size and resources of the enterprise, the size and importance of competitors, dependence of consumers on the enterprise, economic power of the enterprise, entry barriers, market structure, etc. are taken into account and that the informant failed to prove majority of the said factors. It was observed that since the market of super sports cars in India was miniscule, no one company had commercial advantage of another and it was not necessary for the OP to have too many dealers. In the end, the CCI noted that every company has the right to open its subsidiary companies and offices and assign business contracts to them and that cannot be complained against as abuse of dominant position. Market for super sports cars was also found to be distinct relevant market within the auto industry. [*Exclusive Motors Private Limited* v. *Automobili Lamborghini S.P.A.* – CCI Order dated 6-11-2012 in Case No. 52 of 2012].