HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Case: OWP No. 1599/2013 c/w
OWP No. 61/2014

Reserved on 06.08.2026.
Pronounced on 08.09.2026.
Uploaded on: 08.09.2026
Full Judgment is pronounced

R.G. Buildwell Engineers Ltd.
Valeecha Engineering Ltd

.....Appellant/Petitioner(s)

Through :- Mr. Z.A.Shah, Sr. Advocate with
Mr. A. Hanan, Advocate
Mr. Nisar Ahmad, Advocate.

v/s

Union of India and others .....Respondent(s)
Union of India and others

Through :- Mr. T.M.Shamsi, DSGI with
Ms. Rehana Qayoom Advocate
Mr. Alla Ud Din Ganaie, AAG

CORAM:
HON'BLE THE CHIEF JUSTICE (ACTING)
HON'BLE MR. JUSTICE MOHD YOUSUF WANI, JUDGE

JUDGMENT

CHIEF JUSTICE (A)

1. The petitioners, through the medium of these two writ petitions, (OWP No.1599/2013 and OWP No.61/2014), essentially seek a declaration that (i) the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996; (ii) the Building and Other Construction Workers Welfare Cess Act, 1996; and (iii) the Building and Other Construction Workers Welfare Cess Rules, 1998, along with all Rules, Notifications and other instruments

issued thereunder, are *ultra vires* the Constitution of India and, consequently, liable to be struck down.

2. The matters were initially listed before a learned Single Judge of this Court. However, in view of the order/circular dated 28.05.2020 passed by the Hon'ble Chief Justice, whereby matters involving the constitutional validity of any Act, statutory Rule, Regulation or Notification are directed to be listed before a Division Bench, these matters have accordingly been placed before us.

3. For a better appreciation of the claim of the petitioners and for arriving at a just decision in the controversy raised in these petitions, it is necessary to take note of the factual antecedents leading to the filing of these petitions.

4. The case set up by the petitioners, as projected in these writ petitions, is that all of them are holding subsisting contracts with the J&K Economic Reconstruction Agency, respondent No.4 herein. Parliament enacted, in the year 1996, two legislations, namely, (i) the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (for short, "BOCW Act"); and (ii) the Building and Other Construction Workers Welfare Cess Act, 1996 (for short, "the Cess Act"). The Central Government, in exercise of the powers conferred under the BOCW Act, framed the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Central Rules, 1998. Likewise, the Central Government framed the Building and Other Construction Workers Welfare Cess Rules, 1998 under the Cess Act. So far as the erstwhile State of Jammu and Kashmir

is concerned, it is stated that the State Government, in exercise of the powers conferred by the BOCW Act, framed, for the first time, the Jammu and Kashmir Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2006 vide SRO 232 dated 17.07.2006. Thereafter, the State Government, vide SRO 274 dated 31.07.2007, constituted the Jammu and Kashmir Building and Other Construction Workers Welfare Board [“Board”]. The members of the Board were nominated by the Government vide SRO 439 dated 01.12.2010. The State Government also issued a Circular dated 11.03.2011 in this regard.

5. According to the petitioners, after issuance of the aforesaid Notifications/Circulars, respondent No.4 started deducting cess at the rate of one per cent from the bills of the petitioners. The said action was communicated by the Chief Executive Officer, J&K Economic Reconstruction Agency, to the Principal Secretary to Government, Planning and Development Department, vide communication dated 12.06.2013. The petitioners objected to the proposed deductions by submitting separate communications. Notwithstanding such objections, the respondents persist in their decision to deduct one per cent of the amount of the bills of the petitioners towards cess.It is further pleaded that one of the petitioners had approached the Court of the Principal District Judge, Srinagar, under Section 9 of the Arbitration and Conciliation Act, 1996 by filing an application. The said application, however, came to be dismissed by the learned Principal District Judge, Srinagar, vide order dated 26.08.2013.

6. The petitioners claim to be the contractors engaged in the execution of various construction works, most of which have been awarded by respondent No. 4. namely, J&K Economic Reconstruction Agency. It is their case that the contracts in question had been awarded prior to the issuance of SRO 439 dated 01.12.2010 and were already under execution, some of them being at the stage of completion. However, from the year 2012, cess at the rate of one per cent of the value of their bills was levied and deducted under the Cess Act, 1996. The petitioners apprehend that such cess may also be demanded in respect of payments already made. They further contend that, presently, one per cent of the amount payable under their running bills is being deducted at source towards cess.

7. The petitioners challenge the constitutional validity of the impugned legislations, inter alia, on the ground that Parliament lacked legislative competence to legislate these laws in respect of the erstwhile State of Jammu and Kashmir. The first question, according to them, is whether the levy under the Cess Act is in the nature of a **tax or fee**. They contend that the nature and character of a levy must be determined with reference to the purpose for which it is imposed. Section 3 provides for levy and collection of cess at the prescribed rate, including deduction at source and deposit in the Welfare Fund. Since the levy is compulsory and involves deduction of one per cent from the amount payable to them, it is, according to the petitioners, a **tax and not a fee**, particularly as no corresponding service is rendered to them.

8. The second question is with regard to identification of relevant legislative Entry under which Parliament could enact the impugned statutes for Jammu and Kashmir. The petitioners submit that the relevant Entries could be **Entry 49 of List II, Entries 23 and 24 of List III, or residuary Entry 97 of List I**. They contend that the impugned legislations do not fall within Entries 49 of List II or 23 and 24 of List III; moreover, List II did not apply to Jammu and Kashmir and the Concurrent List is applied only with modifications. Their case is that the impugned legislation falls under **Entry 97 of List I**.

09. Having regard to Article 370 (now abrogated w.e.f. 05.08.2019) and the constitutional scheme governing application of the Constitution of India to Jammu and Kashmir as then existed, the petitioners contend that Entry 97 of List I was not extended in its original form to the State. It was applied with modifications notified by the President under Article 370. They refer to the Constitution (Application to Jammu and Kashmir) Amendment Orders of **1963, 1965, 1969, 1972 and 1985**, by which Entry 97 was omitted, substituted or modified. In its modified form, Entry 97 dealt principally with prevention of activities affecting sovereignty, territorial integrity, terrorism and specified taxes on foreign travel, air travel and postal articles, as reproduced in the petition.

10. `On the strength of Article 248 and the modified Entry 97 as applicable to Jammu and Kashmir, the petitioners contend that Parliament lacked power to extend the impugned legislation to the State. Its application was therefore void ab initio for want of legislative competence. Consequently, the compulsory levy of one per cent on their bills was without authority of law, without jurisdiction, illegal and void.

11. The petitioners challenge the constitutional validity of the impugned statutes, rules, orders and circulars, on the following grounds:

(i) Entry 97 of List I, as applicable elsewhere in India, covers matters not enumerated in Lists II and III, including taxes not mentioned therein. Parliament may therefore impose a tax under its residuary power only where the subject does not fall within List II. Where List II and Entry 97 compete, the State List Entry must receive a broad interpretation.

(ii) The **Building and Other Construction Workers Welfare Cess Act, 1996** is complementary to the **Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996**. Section 3 of the Cess Act provides for levy and collection of cess at a rate between one and two per cent of the cost of construction incurred by an employer and permits collection by deduction at source. The proceeds are to be paid to the Board after permissible collection expenses.The petitioners contend that the levy is imposed for the purposes of the BOCW Act and is collected from every "employer". Under Section 2(1)(i) of the BOCW Act, a contractor is treated as an "employer" where the construction work is carried out through or by a contractor. It is on this basis that one per cent is deducted from the petitioners' bills.They further submit that the levy is essentially imposed on the **cost of construction incurred by the employer** and that the taxable event is the activity of construction. Since "building or other construction work" includes construction, alteration, repair, maintenance and demolition, the levy is, in substance, a compulsory levy on expenditure incurred on construction. According to the petitioners, Parliament has no power to impose such a levy in Jammu and Kashmir, particularly when taxation of buildings and constructions falls within the State legislative field (which did not apply to Jammu and Kashmir).

(iii) The petitioners further contend that the one per cent levy is ultimately utilised for giving effect to the welfare measures envisaged in the BOCW Act, and the proceeds are transferred to the Board under Section 3(3) of the Cess Act. Even if the levy is treated as a **fee**, no corresponding service is provided to the petitioners, therefore, such levy cannot be collected from employers working in Jammu and Kashmir under the impugned Parliamentary legislation. Thus, whether the levy is treated as a tax or a fee, Parliament may have the power to enact the legislation under Entry 97 of List I, but it lacked the power to **extend it to Jammu and Kashmir**.

(iv) The petitioners clarify that they do not challenge Parliament's power to enact the impugned legislation in respect of its subject matter, which, according to them, falls under Entry 97 of List I. Their challenge is only to its **application to Jammu and Kashmir**. Since Entry 97 was applicable to the State in a modified form, Parliament lacked legislative competence to impose the compulsory deduction. Therefore, whether the levy is treated as a tax or a fee, the legislation, insofar as it applies to Jammu and Kashmir, is void and cannot be sustained.

(v) The petitioners contend that there is no Entry in List I empowering Parliament to enact the impugned legislation except its residuary power. Jammu and Kashmir enjoyed a special constitutional position and greater constitutional autonomy than other States. According to the petitioners, the impugned legislation takes away that constitutional autonomy and adversely affects the basic features of the State Constitution, autonomy being one of them.

They further contend that even a laudable object or an attempt to implement the Directive Principles cannot save legislation enacted by a legislature lacking legislative competence. Consequently, the Rules framed and the orders and circulars issued by the State Government under the impugned statutes are also unsustainable if the parent statutes themselves are unconstitutional in their application to Jammu and Kashmir.

(viii) Although the impugned legislations were enacted in 1996, the necessary machinery for their implementation was not created in Jammu and Kashmir until recently. According to the petitioners, the legislations therefore could not effectively operate in the State until the Board was constituted and its members nominated. The petitioners had entered into their contracts before the creation of the Board. At the time of obtaining the contracts, they were neither informed nor aware that one per cent of the cost of construction would subsequently be deducted from their bills.

They further submit that several contracts executed after 1996 had already been finalised and completed, and the parties had been discharged from their contractual obligations, without any deduction having been made. The subsequent deduction therefore comes as a surprise and has caused prejudice to the petitioners. Had they known about the liability, they would have taken the proposed deduction into account while submitting their bids. The petitioners, therefore, contend that the burden should be borne by the authorities which allotted the contracts and cannot be transferred to them either in law or otherwise.

(ix) Some of the petitioners had filed petitions under Section 9 of the Arbitration and Conciliation Act, which were dismissed by the Principal District Judge, Srinagar, vide order dated **26.08.2013**. Since the present proceedings challenge the constitutional validity of the impugned statutes, the petitioners contend that such a challenge can be made only before the High Court in exercise of its constitutional jurisdiction.

(x) According to the petitioners, the direct effect of the impugned legislation is the compulsory deduction of one per cent from their bills without lawful legislative authority. Since the legislation under which the deduction is being made is unconstitutional in its application to Jammu and Kashmir, the consequential deduction from the petitioners' bills is also unconstitutional.

12. Upon notice, the respondents have appeared through their counsel and filed objections to this writ petition. It is contended that the subject under reference falls under Entries 23 and 24 read with Entry 47 of the Concurrent List and not under Entry 97 of List I of the Constitution of India. It is submitted that, in view of the J&K Constitution (Application) Order, 1954, the Concurrent List has been duly made applicable to the erstwhile State of Jammu and Kashmir and, therefore, the Acts under reference, as well as the competence and jurisdiction of Parliament to levy the cess, are well within the competence of the legislature, and the authorities of the State are duly competent to levy the same. It is no more res integra that cess has been held to be a fee and not a tax. It is submitted that the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and the Building and Other Construction Workers Welfare Cess Act, 1996 have been validly legislated by the Parliament of India and duly made applicable to the erstwhile State of Jammu and Kashmir through the medium of the J&K Constitution (Application) Order, 1954, as amended from time to time.

13. It is further submitted that the levy of cess is squarely referable to and falls within the Concurrent List, with special reference to Entries 21 to 23 read with Entry 47. Entry 97 does not deal with levy of cess or tax, therefore, the question of its applicability to the given facts of the case has no relevance.That apart, the petitioners, having

executed contract agreements with respondent No.4, have undertaken to pay the cess and, in the event of any dispute, the mechanism envisaged is by way of arbitration. Reference in this regard can be made to Clause 20.6d of the agreements.

14. Learned counsel for the petitioners would submit that the Building and Other Construction Workers Welfare Cess Act, 1996, and the rules and notifications issued thereunder are unconstitutional insofar as they were made applicable to the erstwhile State of Jammu and Kashmir. It is contended that one per cent cess is in the nature of a tax and not a fee, as it is compulsorily levied without any corresponding service to the petitioners. It is further submitted that Parliament lacked legislative competence to extend the impugned legislation to Jammu and Kashmir, as the relevant Entry 97 of List I stood modified under Article 370 of the Constitution. It is also contended that their contracts were executed before the constitution of the Welfare Board and, therefore, the subsequent deduction of one per cent cess from their bills is illegal.

15. Learned counsel for the respondents would submit that the impugned legislation is valid and falls within Entries 23 and 24 of the Concurrent List, read with Entry 47, and not under Entry 97 of List I. It is submitted that the Concurrent List had been validly extended to the erstwhile State of Jammu and Kashmir by the J&K Constitution (Application) Order, 1954, and, therefore, Parliament was competent to enact and apply the impugned legislation. It is further submitted that the cess is in the nature of a fee and not a tax and is utilized for the welfare of building and other construction workers. The respondents have also

relied upon the arbitration clause contained in the contracts for resolution of disputes relating to the deduction of cess.

16. **Having heard learned counsel for the parties and perused the record,** the following questions arise for determination:-

1. Whether levy imposed under Cess Act is a tax or a fee?

2. Whether the Parliament had the Legislative competence to enact and apply the BOCW Act and the Cess Act to the erstwhile State of Jammu and Kashmir in view of provisions of Article 370 of the Constitution of India and limited application of provisions of Constitution?

3. Whether the question no. 2 supra is no longer res-integra in view of law laid by Hon'ble Supreme Court in Dewan Chand Builders case upholding the view of High Court of Delhi that the Cess Act was referable to Entry 97 of List I of Seventh Schedule?

17 **Question no. 1: <u>Whether levy imposed under Cess Act is a tax or a fee?</u>**

18. The first question that arises for consideration is whether the levy imposed under the Cess Act is a tax or a fee. This question is no longer *res integra*. The Hon'ble Supreme Court, in **Dewan Chand Builders & Contractors v. Union of India, (2012) 1 SCC 101**, while considering the same Cess Act and the challenge to its constitutional validity has examined its object and scheme and held that the levy imposed under the Act is a fee and not a tax. In the said case, the Hon'ble Supreme Court observed that the amount collected as cess is not part of the general revenue of the Government. It is collected for the specific purpose of augmenting the Welfare Fund and is to be utilized for the welfare of building and other construction workers. The Court, therefore, found a

sufficient connection between the levy and the purpose for which it is collected and upheld the levy as a 'fee'.

19. The plea of the petitioners that no service is rendered to them personally and, therefore, the levy cannot be treated as a fee, cannot be accepted. It is not necessary that the benefit of the levy must go directly to the person from whom it is collected. It is sufficient if there is a reasonable connection between the class of persons from whom the levy is collected and the welfare activity for which the amount is utilized. The BOCW Act is a welfare legislation intended to protect the interests of workers engaged in building and construction activities. The cess collected under the Cess Act is meant for the welfare of such workers. The Hon'ble Supreme Court, in **Dewan Chand Builders & Contractors**,(supra) has already found the necessary connection between the levy and the object of the legislation. This Court is, therefore, bound by the said declaration of law.Once the levy is held to be a fee and not a tax, the very basis of challenge of the petitioners based on Entry 49 of List II, relating to taxes on lands and buildings, no longer survives.

20. **Question no. 2. Whether the Parliament had the Legislative competence to enact and apply the BOCW Act and the Cess Act to the erstwhile State of Jammu and Kashmir in view of provisions of Article 370 of the Constitution of India and the limited application of provisions of the Constitution?**

21. The next question that arises for consideration is whether the Parliament had the legislative competence to enact and apply the BOCW Act and the Cess Act to the erstwhile State of Jammu and Kashmir in view of the provisions of Article 370 of the Constitution of India and the

limited application of other provisions of the Constitution of India to the State of Jammu and Kashmir.

22. Article 370 of the Constitution of India, as it existed till 5th August 2019, contained temporary provisions with respect to the then State of Jammu and Kashmir. Article 370, inter alia, provided that the power of Parliament to make laws for the State of Jammu and Kashmir would be limited to those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, were declared by the President to correspond to the matters specified in the Instrument of Accession as the matters with respect to which the Dominion Legislature may make laws for that State and also such other matters in the said Lists as the President, with the concurrence of the Government of the State, may by order specify. This was so specifically provided in clause (1) of Article 370 of the Constitution of India.It is in the exercise of this power conferred by clause (1) of Article 370, the President, with the concurrence of the Government of Jammu and Kashmir, promulgated the Constitution (Application to Jammu and Kashmir) Order, 1954 ["1954 Order"]. By virtue of the 1954 Order, various provisions of the Constitution of India, as amended from time to time, came to be extended/applied to the State of Jammu and Kashmir with certain exceptions and modifications. This position continued to exist till the President issued a declaration in the exercise of power conferred by clause (3) read with clause (1) of Article 370 of the Constitution, providing that all clauses of Article 370 shall cease to be operative except the following, which reads as under:

"370. All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise."

23. It is equally pertinent to note that prior to issuance of C.O. 273 dated 06.08.2019, the President of India, in the exercise of power conferred by clause (1) of Article 370, had issued the Constitution (Application to Jammu and Kashmir) Order, 2019, superseding the 1954 Order, as amended from time to time. This was done by the President in terms of C.O. 272 dated 05.08.2019.The case in hand, however, pertains to an era prior to 05.08.2019 and, therefore, has to be dealt with in the light of constitutional position vis-à-vis the then State of Jammu and Kashmir as it existed prior to 05.08.2019. The legislative relations between the Union and the States are enumerated in Chapter I of Part XI of the Constitution of India.

24. Article 245 of the Constitution was extended to and applicable to the State of Jammu and Kashmir as it is, without any exceptions and modifications, and the same reads as under:

"245. **Extent of laws made by Parliament and by the Legislatures of States.**

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of

India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

25. Article 246 of the Constitution, which deals with the subject-matter of laws made by Parliament and by the Legislatures of States, applied to the State of Jammu and Kashmir with exceptions and modifications. Article 246 of the Constitution of India reads thus:

"Article 246. Subject-matter of laws made by Parliament and by the Legislatures of States

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

26. In terms of the 1954 Order, the provisions of Article 246 would apply to the State of Jammu and Kashmir with the following modifications:

> "In Article 246, for the words, brackets and figures "clauses (2) and (3)" occurring in clause (1), the word, brackets and figure "clause (2)' shall be substituted, and the words, brackets and figure "notwithstanding anything in clause (3)", occurring in clause (2), and the whole of clauses (3) and (4), shall be omitted."

27. It is, thus, evident that, in terms of clause (1) of Article 246, as applicable to the State of Jammu and Kashmir, Parliament had exclusive power to make laws with respect to any of the matters enumerated in List I of the Seventh Schedule (the Union List), subject, of course, to clause (1), and the Legislature of the State of Jammu and Kashmir had the power to make laws with respect to any of the matters enumerated in List III of the Seventh Schedule (the Concurrent List). Clauses (3) and (4), as noted above, stood omitted in relation to the then State of Jammu and Kashmir. There was, thus, no State List in relation to the State of Jammu and Kashmir.

28. The most important Article, i.e. Article 248, which reserved residuary powers of legislation in Parliament, was applicable in relation to the State of Jammu and Kashmir with exceptions and modifications. The Parliament was conferred exclusive power to make laws with respect to specified fields in relation to the State of Jammu and Kashmir. Article 248 of the Constitution, as was made applicable to the State of Jammu and Kashmir in terms of the 1954 Order, reads thus:

> **248. Residuary powers of legislation**
>
> **(1)** Subject to Article 246-A, Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

> **(2)** Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

29. From a reading of Article 248, it is abundantly clear that the residuary powers of legislation only in respect of matters enumerated in Article 248, as was made applicable to the State of Jammu and Kashmir, were reserved in Parliament. The rest of the residuary power remained with the State. The Seventh Schedule of the Constitution enumerates the matters in the Union List. Entry 97, which applied to the rest of India except the State of Jammu and Kashmir, is a residuary entry and reads thus:

> "Entry 97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

30. However, in this application to the State of Jammu and Kashmir, Entry 97 reproduced above was substituted in the following manner:

> ".(a) prevention of activities in involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people;
>
> (aa) prevention of other activities directed towards disclaiming, questioning, or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian Anthem and this Constitution; and
>
> (b) taxes on (i) foreign travel by seal or air;(ii) inland air travel; (iii) postal articles, including money orders, phonograms and telegrams.

Explanation.— In this Entry, the term "terrorist act" has the same meaning as in the explanation to Article 248 of the Constitution.

31. Needless to state that the State List in the Seventh Schedule was omitted in relation to its application to the State of Jammu and Kashmir. This was the constitutional position in relation to the State of Jammu and Kashmir.

32. Keeping the aforesaid discussion of the constitutional position vis-à-vis the then State of Jammu and Kashmir in the background, we now proceed to examine the challenge made by the petitioners to the twin legislations, the BOCW Act and the Cess Act, insofar as their application to the State of Jammu and Kashmir is concerned.

33. Mr. Z.A. Shah, learned Senior Counsel appearing for the petitioners, did not seriously pursue the challenge to the BOCW Act and fairly conceded that the Act is one which is traceable to Entries 23 and 24 of the Concurrent List. He, however, restricted his challenge to the Cess Act on the ground that the said legislation was enacted by Parliament in the exercise of its residuary powers of legislation and is clearly traceable to Entry 97 of the Union List.

34. Question no. 3. Whether the question no. 2 supra is no longer res-integra in view of law laid by Hon'ble Supreme Court in Dewan Chand Builders case upholding the view of High Court of Delhi that the Cess Act was referable to Entry 97 of List I of Seventh Schedule ?

35. The argument of Mr. Shah is that Entry 97, as it was applicable in relation to the State of Jammu and Kashmir, only conferred a limited power of legislation in relation to the State of Jammu and Kashmir. Entry 97, as was applied to the State of Jammu and Kashmir, clearly restricted the exercise of residuary powers of legislation in respect of enumerated matters, whereas the rest of the residuary powers of legislation remained with the State of Jammu and Kashmir.To buttress his submission, he placed strong reliance upon a judgment of the Supreme Court in the case of **Dewan Chand Builders** (supra) and vociferously contended that the Supreme Court, having held the source of legislation, i.e. the Cess Act, to be Entry 97 of the Union List as is applicable to the rest of India, there remains hardly any scope for discussion with regard to the legislative competence of Parliament to enact such law for the State of Jammu and Kashmir.

36. We have given our thoughtful consideration to the argument of Mr. Shah. We have no manner of doubt that Article 248 of the Constitution of India and Entry 97 of List I of the Seventh Schedule, as was made applicable to the State of Jammu and Kashmir in terms of the 1954 Order, did not confer upon Parliament legislative competence to legislate the Cess Act for the State of Jammu and Kashmir. If this is the simple position emerging from a reading of the relevant provisions of the Constitution as applicable to the State of Jammu and Kashmir, the issue raised will remain no longer *res integra*. However, when we look

to the Cess Act in its entirety and, particularly, its pith and substance, we clearly find that the Cess Act is a legislation which can be traced to Entries 23 and 24 of the Concurrent List and, therefore, can be very well saved from being declared *ultra vires.*

37. Mr. Shah would submit that, in view of the law laid down by the Supreme Court in **Dewan Chand Builders** (supra), this question is not open to debate, discussion or decision. The Cess Act shall be deemed to be an Act of Parliament enacted under Entry 97 of the Union List to the extent it was not applicable to the State of Jammu and Kashmir. He would urge this Court not to venture into discussion as to whether the Cess Act could be traced to Entries 23 or 24 of the Concurrent List. We are afraid we cannot agree with the learned senior counsel for the reasons which we will give hereinafter.

38. We are conscious that Hon'ble Supreme Court has, in Dewan Chand Builders case confirmed the view of High Court of Delhi that the Cess Act is referable to residuary Entry 97 of List I of the Seventh Schedule, yet for the reasons given hereinafter, we are of the view that the question as to whether vires of the Cess Act like BOCW Act can be saved by tracing it to Entry 23 and 24 of List III of Seventh Schedule is still open to determination at the instance of the then State of Jammu and Kashmir (now a Union Territory).

39. The *vires* of the Cess Act were called in question by the Builders Association of India and others before the High Court of Delhi. The cases were clubbed together under the lead case of **Builders**

Association of India and others v. Union of India and others and disposed of by the High Court of Delhi vide its judgment dated 28.02.2007. The constitutional validity of the Cess Act was challenged by the petitioners therein primarily on the ground that the levy of cess under the Act was, in essence and in effect, a tax on land and buildings and, therefore, the subject matter of the legislation was fully covered by Entry 49 in List II (State List), which pertains to "taxes on land and buildings". It was, thus, argued before the Delhi High Court that the enactment of the legislation, i.e. the Cess Act, was in the exclusive legislative domain of the State and, therefore, Parliament lacked legislative competence to enact the Cess Act providing for imposition of tax on land and buildings. In the counter-affidavit filed, the Union of India took a specific stand that the BOCW Act as well as the Cess Act were enacted for the welfare of building and other construction workers and, as such, they were clearly traceable to Entries 23 and 24 of List III. It was, however, in the alternative pleaded by the Union of India that if one were to accept that there was no specific entry in the Concurrent List concerning a tax or cess corresponding to Entries 23 and 24 thereof, the impugned statutes could be justified with reference to the residuary Entry 97 of the Union List.

40. It seems that during the course of arguments, the learned Additional Solicitor General appearing for the Union of India somehow did not pursue the line of his argument expressed in the counter-affidavit to the extent that the Cess Act was enacted with reference to Entries 23 and 24 in the Concurrent List. He somehow confined his submissions to

Entry 97 of List I. It is in this background that the High Court of Delhi considered only the following question:

> "whether the levy of cess under the Cess Act is a tax on land and buildings or a fee not traceable to any of the Entries in Lists II and III and, therefore, is an enactment referable to Entry 97 of List I.

41. In view of the reluctance of the Additional Solicitor General to pursue his argument that the Cess Act was enacted with reference to Entries 23 and 24, the High Court of Delhi did not venture into examining the pith and substance of the Cess Act and to render its opinion as to whether it was traceable to Entries 23 and 24 of the Concurrent List. The discussion was limited to determining as to whether the levy imposed under the Cess Act was in the nature of a tax or a fee. After a long debate, with reference to the case law on the subject, the High Court of Delhi held the levy under the Cess Act to be a fee and not a tax on land and buildings traceable to Entry 49 of List II. The High Court, thus, accepted the argument of the Additional Solicitor General that the cess leviable under the Cess Act was not a tax but a fee and, therefore, referable to Entry 97 of the Union List. The conclusion drawn by the High Court of Delhi is contained in paragraph 33 of the judgment, which reads as under:

> "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."

42. The matter was taken to the Supreme Court by the contractors in **Dewan Builders** case (supra). The appeal before the Supreme Court was by the contractors who were still contending that the levy of cess envisaged under the Cess Act was a tax on land and buildings and, therefore, referable to Entry 49 of List II. They challenged the judgment of the High Court of Delhi to the extent it held the levy as a fee not referable to any of the Entries in List II or List III and, therefore, could be said to have been enacted under Entry 97 of List I (residuary powers of legislation).Since the constitutional validity of the Cess Act had been upheld by the High Court of Delhi and, therefore, the Union of India had no occasion to contend before the Supreme Court that the Cess Act could have been enacted by reference to Entries 23 and 24 of the Concurrent List. The issue, thus, was never debated either before the High Court of Delhi in **Builders Association of India's case** (supra) or before the Supreme Court in **Dewan Chand Builders's** case.

43. We have carefully gone through the judgments of the High Court of Delhi in **Builders Association of India and others** case (supra) as well as the Supreme Court in **Dewan Chand Builders's case** and we are of the considered opinion that the aforesaid judgments do not come in the way of the State of Jammu and Kashmir to urge and argue that the Cess Act is traceable and referable to Entries 23 and 24 of the Concurrent List and, therefore, was within the legislative competence of Parliament, notwithstanding that Article 248 read with Entry 97 of the

Union List were made applicable to the State of Jammu and Kashmir with exceptions and modifications. We, therefore, do not agree with the contention of Mr. Shah that the issue raised by the State of Jammu and Kashmir to sustain the constitutional validity of the Cess Act by bringing it within the purview of Entries 23 and 24 of the Concurrent List is no more open to debate and discussion in view of the judgment of the Supreme Court in **Dewan Chand Builders' case (supra)**.

44. Having said that, the issue that now calls for determination is whether the Cess Act is a revenue-collection legislation or legislation aimed at providing for the welfare of labour, including conditions of work, provident funds, employers' liability, workmen's compensation, etc. With a view to finding out the pith and substance of the legislation, we need to look at the Cess Act in its entirety.

45. In the year 1996, Parliament enacted the BOCW Act, 1996, with an aim 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. The BOCW Act, inter alia, envisages the constitution of Building and Other Construction Workers' Welfare Boards. Section 18 of the BOCW Act dealt with the constitution of State Welfare Boards. Section 24 prescribes constitution of a fund by the Board to be called the Building and Other Construction Workers' Welfare Fund. In the same year, the Parliament came up with the Building and Other Construction Workers Welfare Cess Act, 1996,

which was enacted to provide for levy and collection of cess on the cost of construction incurred by the employers with a view to augmenting the resources of Building and Other Construction Workers' Welfare Boards constituted under the BOCW Act.

46. From the Preamble of the Cess Act, it is quite evident that the Cess Act, 1996, is aimed at augmenting the resources of the Workers' Welfare Boards constituted under the BOCW Act and, therefore, must be seen to be an Act supplementing and complementing the aims and objects sought to be achieved by the BOCW Act. Viewed thus, the Cess Act must be considered and treated to be an extension and integral part of the BOCW Act.The Cess Act does provide for levy and collection of cess but clearly provides in Section 3 that the purpose of collection of levy and cess is for giving effect to the BOCW Act. The predominant object and purpose of the Cess Act is to garner finances and augment the resources for the Workers' Welfare Boards constituted under the BOCW Act.

47. It is true that the Cess Act lays down an elaborate procedure for collection of cess from the employer/contractor, as the case may be, but the fact remains that the Cess Act has been enacted with a predominant purpose of augmenting the resources for the Workers' Welfare Boards so that the Boards are in a position to discharge their duties effectively under the BOCW Act. It is beyond any pale of discussion that the BOCW Act is legislation for the welfare of labour and, therefore, referable to Entries 23 and 24 of the Concurrent List.The

Cess Act, being an enactment for augmenting the resources of the Workers' Welfare Boards constituted under the BOCW Act, cannot be said to be merely a revenue-collection legislation. Viewed thus, the Cess Act can very well be said to be an extension of the BOCW Act and enacted with the sole object of taking care of the social security and welfare of labour, including the conditions of work, provident fund, workmen's compensation, invalidity and old-age pensions and maternity benefits, etc. The legislation, in its pith and substance, is a labour welfare legislation and cannot be termed as merely a revenue-collection legislation.

48. Since the issue was not debated either before the High Court of Delhi in **Builders Association of India** case or before the Supreme Court in **Dewan Chand case**, as such, the Courts had no occasion to look at the enactment from this angle. The *vires* of the legislation was saved by holding that it was enacted in reference to Entry 97 of List I and this was so held by the Supreme Court by negativing the contention of the contractors that the levy of cess under the Cess Act was a tax on land and buildings referable to Entry 49 of the State List and, therefore, beyond the legislative competence of Parliament. The State of Jammu and Kashmir enjoyed a different constitutional status at the relevant point of time. Article 248 read with Entry 97 of the Union List was not applicable to the State of Jammu and Kashmir as it is, but was applicable with exceptions and modifications, which we have detailed hereinabove, in terms of the 1954 Order. The Parliament did not have legislative competence to enact laws in relation to the State of

Jammu and Kashmir by tracing its legislative competence to Article 248 read with Entry 97 of List I of the Seventh Schedule, which was applicable in relation to the State of Jammu and Kashmir with certain modifications and exceptions. The State of Jammu and Kashmir had, thus, no occasion to put forth its point of view. The concession by the Additional Solicitor General of India to the extent of not pressing his argument that the Cess Act was referable to Entries 23 and 24 of List III was during the course of arguments and, notwithstanding the fact that the Union of India in its counter-affidavit had clearly taken the stand that the Cess Act was referable to Entries 23 and 24 of List III. It had only pleaded in the alternative that if the Act was not covered under Entries 23 and 24, it could be saved by reference to the residuary Entry 97 of List I of the Seventh Schedule.

49. For the foregoing reasons, we are of the considered opinion that Parliament had the legislative competence in terms of Article 246 read with Entries 23 and 24 of List III of the Seventh Schedule and, therefore, the challenge to the constitutional validity of the Cess Act is meritless and must fail.

50. The last question that begs determination in this case is whether, in the absence of constitution of the J&K Building and Other Construction Workers' Welfare Board under the BOCW Act, the provisions of the Cess Act could have been implemented in the then State of Jammu and Kashmir.Reliance in this regard is placed by Mr. Shah on the judgment of the Supreme Court in **Prakash Atlanta (JV)**

v. National Highways Authority of India, **2026 SCC OnLine SC 1998**, in which it was held by the Supreme Court, though in a different context, that the constitution of Welfare Boards was *sine qua non* for giving effect to the BOCW Act and the Cess Act and the cess in connection therewith could not have been levied or collected before the constitution of such Welfare Boards. It was also held that the contractors could not have factored the cess component into their bid prices prior to a mechanism being put in place for its collection, as that would have led to unjust and unlawful enrichment on their part.

51. The observations of the Supreme Court in paragraph 50 of the judgment in **Prakash Atlanta's** case (supra) are relevant and are, therefore, set out below:

> "50. Having given our earnest consideration to all aspects of the matter, we find that the ultimate obligation to bear the statutory levy of the subject cess would lie with the 'employer', under Section 3(2) of the Cess Act. 'Employer' in relation to an establishment is defined by Section 2(1)(i) of the BOCW Act to mean the 'owner' thereof but includes the 'contractor', if the building or construction work is carried on by or through such contractor or by employment of workers provided by such contractor. This being one aspect of the matter, the crucial issue, insofar as 'contractors' are concerned, is whether they could have factored in the levy of such cess in their bid prices at the time they submitted their bids when such a levy was not even in existence then. This question would arise, irrespective of whether the contracts made a mention of the BOCW Act and the Cess Act. The answer is simple - the contractors could not have factored such cess component into their bid prices prior to a mechanism being put in place for its collection, as that would have led to unjust and unlawful enrichment on their part. In consequence, the question would arise as to when the liability to pay the

> subject cess commences. The observations in para 12 of A. Prabhakara Reddy (supra) are of guidance. This Court held therein that after the Cess Act and the Rules came into effect and the Welfare Board was constituted, with the notification specifying the rate of cess to be levied upon the cost of construction incurred by the employer already in place, the authorities were duty-bound to collect the cess by raising demands in respect of the ongoing construction works and it was not necessary to wait till such building and construction workers were registered under Section 12 of the BOCW Act or till welfare measures were provided to them. Therefore, the constitution of Welfare Boards is the sine qua non for giving effect to the BOCW Act and the Cess Act and the cess in connection therewith could not have been levied or collected before the constitution of such Welfare Boards".

52. In the case of Jammu and Kashmir, the J&K Building and Other Construction Workers' Welfare Board was constituted vide SRO 274 of 2007 dated 31.07.2007 and, therefore, a proper mechanism was put in place for collection of cess from the employer, i.e. owners/contractors, to be appropriated by the Board.

53. It is true that prior to 31.07.2007, the Cess Act and the Rules framed thereunder were not capable of being given effect to and, therefore, the petitioners could not have factored the cess into their bidding price. However, w.e.f. 1st August 2007, the petitioners became liable to pay the cess at the prescribed rate under the Cess Act and the Rules framed thereunder, irrespective of whether they had factored the payment of cess into their bidding price or not.All the works executed by the petitioners, having been allotted to them pursuant to NITs issued after 31st July 2007, will attract the levy of cess.

54. For the foregoing reasons and the discussion made hereinabove, we dispose of both the petitions by holding as under:

(i) The Parliament had the legislative competence to enact the BOCW Act and the Cess Act in relation to the then State of Jammu and Kashmir and, therefore, both the Acts are intra vires the Constitution.

(ii) The petitioners in both the petitions are liable to pay the cess envisaged under the Cess Act at the prescribed rate in respect of all the contracts executed by them pursuant to the NITs issued after 31.07.2007, i.e. the date when the J&K Building and Other Construction Workers' Welfare Board was for the first time constituted to give effect to the provisions of the BOCW Act and the Cess Act.

(iii) The Building and Other Construction Workers Welfare Cess Rules, 1998, framed under the Cess Act, 1996, are also held constitutionally valid. The cess amount payable by the petitioners in terms of this judgment at the prescribed rate shall be recoverable from the petitioners along with interest at the rate of 6% per annum from the date it was due till it is actually recovered.

(MOHD. YOUSUF WANI)
JUDGE

(SANJEEV KUMAR)
CHIEF JUSTICE (A)

JAMMU
08.09/2026
SANJEEV

Whether the order is speaking: Yes
Whether the order is reportable: Yes/No