2022 LiveLaw (SC) 691

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
K.M. JOSEPH; J., HRISHIKESH ROY; J.
AUGUST 16, 2022
CIVIL APPEAL NO._____ OF 2022 (Arising out of SLP(C) No.4960 of 2021)
UNION OF INDIA & OTHERS *versus* **BHARAT FORGE LTD. & ANOTHER**

Summary: A company submitted bids for a tender floated for Diesel Locomotive Work. The company argued that since the HSN for GST rate was not mentioned in the tender document, it wrongly added 18% GST in its bid, and lost out to other bidders who included 5% GST - The company appraoched the High Court which directed that HSN code should be mentioned to ensure a "level playing field" - Supreme Court reversed the High Court's view.

Award of Tender - There is no public duty on the part of the State to indicate the HSN code for GST rates in the tender document - Para 56- We are at a loss to further understand how in the name of producing a level playing field, the State, when it decides to award a contract, would be obliged to undertake the ordeal of finding out the correct HSN Code and the tax applicable for the product, which they wish to procure. This is, particularly so when the State is not burdened with the liability to pay the tax. The liability to pay tax, in the case before us, is squarely on the supplier. *(Para 47)*

Writ jurisdiction - Judicial review in contractual matters- limited scope of interference- unless the state action is clearly arbitrary, illegal, mala fide or contrary to the statute, courts would be loathe to interfere. *(Para 23)*

For Appellant(s) Mr. N. Venkataraman, ASG Mr. Amrish Kumar, AOR.

For Respondent(s) Mr. Mahesh Agarwal, Adv. Mr. Ankur Saigal, Adv. Mr. Divyanshu Srivastava, Adv. Mr. Kaustubh Singh, Adv. Mr. E. C. Agrawala, AOR Ms. Reshmi Rea Sinha, AOR.

J U D G M E N T

K.M. JOSEPH, J.

1. Leave granted.

2. By the impugned Judgment, High Court has disposed of the Writ Petition filed by the first respondent (hereinafter referred to as the “Writ Petitioner”) with the following directions:

“We, therefore, find it expedient to Issue a direction to respondent no.2 namely, the General Manager, Diesel Locomotive Works, Varanasi that if the GST value is to be added in the base price to arrive at the total price of offer for the procurement of products in a tender and is used to determine Interse ranking in the selection process, he would be required to clarify the Issue, If any, with the GST authorities relating to the applicability of correct HSN Code of the procurement product and mention the same in the NIT (Notice inviting tender) tender/ bid document, so as 'to ensure uniform bidding from all participants and to provide all tenderers/bidders a 'Level Playing Field'.”

3. The appellants take exception to both the reasoning employed by the High Court and the final direction, as aforesaid.

4. A global tender was published on 11.04.2019 by the third appellant (Diesel Locomotive Work through its Manager, Varanasi). E-tenders were invited for procurement of turbo wheel impeller balance assembly 2BLW Part No. 16080385 (hereinafter referred as, 'the product'). The writ petitioner was one of the tenderers. So were among others Respondents 6 to 8 in the Writ Petition. Respondent No. 6 in the Writ Petition is arrayed as respondent No. 2 in this appeal. Respondent No.7 and 8 in the Writ Petition were initially arrayed as Respondents 3 and 4 in the Special Leave Petition but later deleted on the request of the appellants.

5. On the basis of the tabulation carried out by the third appellant, respondent no.2 in the appeal emerged as L1 whereas respondent nos. 7 and 8 to the writ petition emerged as L2 and L3, respectively. The writ petitioner emerged only as L4. It is thereupon that the first respondent filed the writ petition praying for the following reliefs:

"

i. a writ order or direction in the nature of mandamus commanding and directing the Respondent No.1, i.e., the Tendering Authority to clarify that the Procurement Product must be taxed @ 18% under the Relevant HSN Code, i.e., 84148030, to ensure a Uniform Bidding from the parties, and also to ensure a level playing field for all Bidders/ Suppliers;

ii. a writ order or direction in the nature of mandamus commanding and directing the respondents stay the effect of the opening of the Subject Tender No. 10191001 by the Respondent No.1 and subsequent awarding of the category/rank from L1-L6 to the various parties to the Tender;

iii. a writ order or direction in the nature of mandamus commanding and directing the respondents in light of the incorrect GST Rate /HSN Codes, as ought to have been correctly specified by the Bidders/ Suppliers to the Subject Tender, this Hon'ble Court may also be pleased to declare the opening of the Tender a nullity, and issued a Writ of Mandamus, directing the Tendering Authority, i.e., Respondent No.1, to invite fresh bids with the HSN Code duly specified; iv.writ order or direction in the nature of mandamus commanding and directing the respondents disqualify those Suppliers/Bidders who are not entering the correct HSN Code/GST Rate specification and are, thus, paying a GST of only 5%, as against the applicable rate of 18%."

THE CASE OF THE WRIT PETITIONER

6. The complaint of the Writ Petitioner can be noticed at this stage as follows:

A reading of the Notice Inviting Tender (hereinafter referred to as, the 'NIT'), would reveal that the bidders were directed to specify the percentage of local content of the material being offered, in accordance with the 'Make in India' Policy. In terms of the said Policy, preference would be given to those projects, which have at least 50 per cent local content ordinarily, such purchase preference being limited to a margin of 20 per cent. The sixth respondent in the writ petition (2nd Respondent in this appeal) (L1) is a trader, importing the product from Walbar Corporation, Mexico. It was contended that the tabulated statement of all the financial bids, would show that the entities, which emerged as L1 to L3, had quoted their payment of GST at a rate of 5 per cent on the base rate. The writ petitioner had quoted its GST rate as 18 per cent. The writ petitioner, in fact, had quoted its base price as rupees seven lakh and three thousand. L1 had quoted its rate as rupees six lakhs. There is a difference of just about 17.1 per cent in the base price of L1 and the writ petitioner. But only on account of the fact that L1 has shown the rate of GST at five per cent whereas the writ petitioner has shown with GST liability at 18 per

cent, the total price of the writ petitioner became Rs. 8,29,540/- whereas the total price of the L1 became Rs.6,30,000/-. On account of this, a unilateral act of L1 in showing the GST rate at 5 per cent, generated a difference of about 31.6 per cent in the total price quoted by L1 and the writ petitioner. It is the further case of the writ petitioner that the GST rates of each product and service have been duly clarified by the GST Council (for short, 'the Council'), using the Harmonised System of Nomenclature (for short, 'the HSN Code), in accordance with Chapter 84. It is the case of the writ petitioner that the Council has declared in the Code that as far as the product is concerned, the rate has been shown as 18 per cent. The further case of the writ petitioner is that, neither the NIT nor the bid documents, mention the relevant HSN Code applicable to the product. It has sabotaged the preservation of the level playing field. This is for the reason that while the writ petitioner honestly revealed the correct GST rate, L1 to L3 showed the GST rate at a far lower rate, *viz.*, 5 per cent. This has distorted the tendering process. Though the writ petitioner had given, on earlier occasion, representation to the appellants about earlier instances of such unfair practices, in the subject NIT, no corrective steps were taken, thus, culminating in the writ petitioner being relegated to the position of L4. It also had the propensity to completely frustrate the 'Make in India' Policy and deprive local manufacturers of the legitimate preference, it was otherwise entitled.

7. The appellants joined issue and filed their pleadings opposing the reliefs sought by the writ petitioner. Rejoinder and further affidavits were filed. The High Court, in the impugned Judgment, found, *inter alia*, as follows:

It refers to Clauses 2.7.6, 2.8.6.2, besides Clause 2.9.2 of the Tender Document, which we shall advert to in detail. It was found that there is no dispute that the writ petitioner is a local manufacturer included in the list of Approved Vendors. It was further found that the opening of the subject tender may not be possible as the offer period had expired due to the interim order passed by the High Court. Moreover, a subsequent tender in regard to the product was granted to the writ petitioner. Prayer nos. 2 and 3 have become infructuous. However, thereafter the Court posed the question as to whether there was any flaw in the procedure adopted by the appellants. The dimension about the 'Make in India' Policy engaged the attention of the Court. The case of the appellants that they are not concerned with the GST rates and it was the responsibility of the bidders to quote the HSN number and GST rate was found not sound as the GST rate is integral to the tendering process. Noting that a contract is a commercial transaction, it was found that the Court cannot examine the detail of the terms of the contract. The High Court articulated the limitations on the Court exercising power of judicial review. Thereafter, the Court has found that the Court can certainly examine as to whether the decision-making process was reasonable, rational and not arbitrary. Support was drawn from Judgment of this Court in ***Reliance Energy Ltd. and another v. Maharashtra State Road Development Corpn. Ltd. and others***[1]. Thereafter, it was found that the bid documents contemplated that the applicable GST has to be deducted from the bid of the successful tenderer under the reverse charge mechanism and the deposit of the same is to be made with the concerned Tax Authority. There will be disparity in the total price offered on account of the difference in the GST rate, thus,

[1] (2007) 8 SCC 1

denying fair competition or level playing field. The mentioning of the concerned HSN Code is necessary to determine the GST rate, which is to be added to the base price to arrive at the final price. Applying the said process, it was found that the rate quoted by the writ petitioner was more than 20 per cent of the rate quoted by L1 and also L2 and L3, on account of writ petitioner quoting much higher rate, which was the correct rate, whereas L1 to L3 did not quote the correct rate. It was further found that, if the GST value is to be added in the base price, to arrive at the total price, and it is used to determine the *inter se* ranking in the selection process, it was the duty of the appellants 1 and 2 to clarify the HSN Code. It is further found that, mentioning of the HSN Code in the tender document itself, will resolve 'all disputes' relating to fairness and transparency, by providing a level playing field in the true spirit of Article 19(1)(g) of the Constitution of India. It is on this reasoning that the relief, as already noted, was granted.

8. We heard Shri N. Venkataraman, the learned Additional Solicitor General (ASG), appearing on behalf of the appellant, Shri Amar Dave, learned Counsel appearing on behalf of the writ petitioner and Shri Girdhar Govind, learned Counsel, appearing on behalf of the second respondent.

9. Shri N. Venkataraman, learned ASG, would point out that the High Court has issued a Mandamus. A Writ of Mandamus can be issued, if there is a statutory duty. There is no statutory duty with the appellants to do the things, which have been directed in the impugned Judgment. He would further point out that a proper appreciation of the Clauses in the bid document, would reveal the following:

The bidders, on the one hand, undoubtedly, are called upon to declare the tax rate, as applicable (Clause 2.7.6). However, a perusal of Clause 2.9.2 would reveal that, in case, the information about the tax liability is not forthcoming in the bid, the bid will be considered as inclusive, and any liability on account of such tax, would be payable by the concerned bidder. It is further pointed out that Clause 2.8.6.2 declared that the appellants will not be responsible for payment of taxes and duties paid by the bidder on a misclassification or misapprehension of law. In other words, the contention of the appellants is that the terms of the bid contemplated that it is expected of the bidders to bid the correct rate of tax. If the rate of tax was expressed in the bid, then, the bid would be evaluated on the consideration of the base price, after adding the tax component. Should the bid of such a tenderer be selected, the appellants would, necessarily, have to pay the price to the bidder and absorb the tax also. On the other hand, in the case of a bidder, who does not reveal the rate of tax separately and merely quotes the base price, then, if he is selected, he would be entitled only to the payment of the amount quoted. In other words, the duty to pay the GST, being an indirect tax, is on the seller or supplier. He would have to file the return and assess the tax on self-assessment basis and pay the tax. This would equally be the position of the tenderer, who may quote the rate, which may not be the correct rate but a lesser rate. In both the cases last mentioned, *viz.*, where the tenderer does not include the tax component separately, or includes it, but shows tax rate at a lower rate, the tax element would have to be absorbed by the bidder. That is not the look out of the appellants. The appellants are concerned only with selecting the lowest of the bidders, who is, no doubt, otherwise compliant with the norms. The view taken by the High Court creates considerable impediments, is unworkable and would lead to greater problems. It also involves the appellants being obliged to seek

clarification regarding the HSN Code under the GST Act. There are Authorities under the concerned taxing Statute, *viz.*, the GST Act, who are charged with the duty of assessing and collecting the tax under the Act. The impugned Judgment casts the burden to discharge duties, which are essentially to be shouldered by the Taxing Authorities under the Taxing laws. While enviable advance has been made by the Courts in entertaining application seeking judicial review, even in contractual matters, the impugned Judgment represents a case, where the High Court has erred and overstepped its limits. He would submit that the judgments of this Court do not support the impugned Judgment of the High Court. The impugned judgment, in fact, runs counter to the law declared by this Court. He would contend that an indirect tax is ordinarily capable of being passed on. The liability, in the case of the indirect tax in question, is on the seller (the bidders). This is a liability, which it can, undoubtedly, pass on to the buyer under a contract but it may instead absorb it. On a conspectus of the terms, it is, however, clear that no liability is undertaken by the appellant to pay the tax except as provided in the terms. The liability remains the responsibility of the successful tenderer.

10. Shri Girdhar Govind, learned Counsel for the second respondent, adopts the contentions of the learned ASG and he would contend that, on facts, there is no occasion to pass the impugned Judgment. A short counter affidavit is also filed in this Court.

11. Shri Amar Dave, learned Counsel appearing on behalf of the Writ Petitioner, would address the following submissions:

He would support the impugned Judgment and he contends that all that the High Court has directed, is that, there must be a level playing field, in the matter of award of largesse by the State, an inevitable result of applying Article 14. He would contend that the crucial aspect is that when the appellants specifically contemplated the addition of the tax liability to the base price for determining the question as to who is to be the successful tenderer, then, it is imperative that there should be clarity and certainty about the tax rate and the HSN Code. This would produce actual equality of treatment as between the tenderers. The facts of the case exemplify a situation where tendering process becomes a mockery, having regard to the wide disparity between the rate of tax quoted by the writ petitioner and L1 to L3. A huge difference of 13 per cent has completely impaired and derailed the fair bid of the writ petitioner and, what is more, defeated the sublime object sought to be achieved in the ‘Make in India’ Policy. He would emphasise that what has been going on, before the High Court stepped in with the impugned Judgment, was clearly an unfair trade practice. The stand of the writ petitioner promotes the fundamental value of honesty. A bidder, who does not disclose the correct rate of tax, despite the injunction contained in Clause 2.7.6, will walk away with a contract, having indulged in a completely unfair practice. The implementation of the impugned Judgement would result in the extinguishment of this wholly undesirable practice. He would further contend that the appellants had, in fact, brought out tender notices, implementing the direction of the High Court. It is not something, which is incapable of being achieved. He next drew our attention to the circumstance, that even the appellant has purchased the product, showing the tax rate at 18 percent, as is evident from the document dated 21.03.2017. He would further contend that the Government of India, in the Ministry of Defence, has been showing the correct HSN Code, thus, facilitating the uniform disclosure of correct rate of tax for all the bidders. He next relied on Circular dated

31.12.2018 issued by the Government of India in the Ministry of Finance, Department of Revenue (Tax Research Unit). Therein, he points out the following:

"12.3 Turbo charger is specifically classified under chapter HS code 8414 80 30. It continues to remain classified under this code irrespective of its use by Railways. Therefore, it is clarified that the turbo charger is classified under heading 8414 and attracts 18% GST."

He would, therefore, contend that there is no impediment, in law or on facts, for the appellants to comply with the impugned Judgment. He next drew our attention to the Public Procurement (Preference to 'Make in India') Order, 2017 dated 15.06.2017. He emphasised the definition of the word 'local content':

"'Local content' means the amount of value added in India which shall, unless otherwise prescribed by the Nodal Ministry, be the total value of the item procured (excluding net domestic indirect taxes) minus the value of Imported content in the item (including all customs duties) as a proportion of the total value, in percent."

12. The learned Counsel for the writ petitioner would also seek to support the direction of the High Court with reference to Section 168 of the Goods and Services Act, 2017. This is apart from pointing out that there is a provision for advance tax ruling contained in Section 96 of the GST Tax. Therefore, it is not a case where the appellants can object to the impugned direction, on the basis that there is no provision to 'seek clarification'.

13. In the Rejoinder submission, the learned ASG would submit as follows:

He would contend that it is the Assessing Officer, relevant to the supplier of goods and not the Assessing Officer relevant to the purchaser, who would have authority in the matter and this adds to the woes of the appellants if they are compelled to comply with the impugned directions. As far as the Order dated 15.06.2017 is concerned, he would contest the version of the writ petitioner based on the definition of the word 'local content' and would point out that the maker of the Order, *viz*, the Government of India had, in fact, contemplated excluding the net domestic taxes. As far as the subsequent tenders issued is concerned, it is sought to be justified with reference to the action of the appellants seeking to comply with the impugned directions. He would contend that the impugned directions are wholly impracticable and far from putting an end to the disputes, it will only engender unending disputes.

14. Learned ASG would contend that the no reliance can be placed on the publication in the Business Standard about tax invasion in the Railways and the purport of the complaint can only be that if there is evasion, the Tax Authorities must be awake to their duty and vigorously pursue the evaders as per law.

ANALYSIS

SCOPE OF WRIT OF MANDAMUS

15. The learned ASG contended that the High Court erred in issuing the direction, which is in the nature of the Writ of Mandamus. It is his case that a Writ of Mandamus would lie only when a Statute imposes a duty and there is failure in discharge of duty. We would think that this is not a matter which is *res integra*. As early as in ***Comptroller and Auditor General of India, Gian Prakash, New Delhi and another v. K.S.***

Jagannathan and another[2] , a Bench of three learned Judges of this Court had this to say:

"18. The first contention urged by learned counsel for the appellants was that the Division Bench of the High Court could not issue a writ of mandamus to direct a public authority to exercise its discretion in a particular manner. There is a basic fallacy underlying this submission—both with respect to the order of the Division Bench and the purpose and scope of the writ of mandamus. The High Court had not issued a writ of mandamus. A writ of mandamus was the relief prayed for by the respondents in their writ petition. What the Division Bench did was to issue directions to the appellants in the exercise of its jurisdiction under Article 226 of the Constitution. Under Article 226 of the Constitution, every High Court has the power to issue to any person or authority, including in appropriate cases, any government, throughout the territories in relation to which it exercises jurisdiction, directions, orders, or writs including writ s in the nature of *habeas corpus, mandamus, quo warranto* and *certiorari* or any of them, for the enforcement of the Fundamental Righ ts conferred by Part III of the Constitution or for any other purpose. In *Dwarkanath* v . *ITO* [AIR 1966 SC 81: (1965) 3 SCR 536, 540] this Court pointed out that Article 226 is designedly couched in a wide language in order not to confine the power conferred by it only to the power to issue prerogative writs as understood in England, such wide language being used to enable the High Courts "to reach injustice wherever it is found" and "*to mould the reliefs to meet the peculiar and complicated requirements of this country."* In *Hochtief Gammon* v. *Sta te of Orissa* [(1975) 2 SCC 649 : 1975 SCC (L&S) 362 : AIR 1975 SC 2226 : (1976) 1 SCR 667, 676] this Court held that the powers of the courts in England as regards the control which the Judiciary has over the Executive indicate *the minimum limit* to which the courts in this country would be prepared to go in considering the validity of orders passed by the government or its officers.

xxx xxx xxx

20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

16. Three years thereafter, in the decision reported in ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others v. V.R. Rudani and others***[3], while dealing with the word 'authority', used in Article 226 and also dealing with the issue as to whether Mandamus will lie even if the duty is not imposed under a Statute, this court held as follows:

"20. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the

[2] (1986) 2 SCC 679

[3] (1989) 2 SCC 691

fundamental rights as well as non-fundamental rights. The words “any person or authority” used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the bod y concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied.

xxx xxx xxx

22. Here again we may point out that mandamus cannot be denied on the ground that th e duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: “To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract.” [Judicial Review of Administrative Action, 4th Edn., p. 5 40] We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available “to reach injustice wherever it is found”. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the cont ention urged for the appellants on the maintainability of the writ petition.”

17. It is necessary to notice, what a Bench of two learned Judges spoke about the Writ of Mandamus in the judgment in ***Mansukhlal Vithaldas Chauhan v. State of Gujarat***[4]. Therein, this Court held as follows:

“22. Mandamus which is a discretionary remedy under Article 226 of the Constitution is requested to be issued, inter alia, to compel performance of public duties which may be administrative, ministerial or statutory in nature. Statutory duty may be either directory or mandatory. Statutory du ties, if they are intended to be mandatory in character, are indicated by the use of the words “shall” or “must”. But this is not conclusive as “shall” and “must” have, sometimes, been interpreted as “may”. What is determinative of the nature of duty, whether it is obligatory, mandatory or directory, is the scheme of the statute in which the “duty” has been set out. Even if the “duty” is not set out clearly and specifically in the statute, it may be implied as correlative to a “right”.

23. In the performance of this duty, if the authority in whom the discretion is vested under the statute, does not act independently and passes an order under the instructions and orders of another authority, the Court would intervene in the matter, quash the order and issue a mandamus to that authority to exercise its own discretion.”

18. Therefore, it is clear that a Writ of Mandamus or a direction, in the nature of a Writ of Mandamus, is not to be withheld, in the exercise of powers of Article 226 on any technicalities. This is subject only to the indispensable requirements being fulfilled. There must be a public duty. While the duty may, indeed, arise form a Statute ordinarily, the duty can be imposed by common charter, common law, custom or even contract. The fact that a duty may have to be unravelled and the mist around it cleared before its shape is unfolded may not relieve the Court of its duty to cull out a public duty in a Statute or otherwise, if in substance, it exists. Equally, Mandamus would lie if the Authority, which had a discretion, fails to exercise it and prefers to act under dictation of another Authority. A Writ of Mandamus or a direction in the nature thereof had been given a very wide scope in the conditions prevailing in this country and it is to be issued wherever there is a public

[4] (1997) 7 SCC 622

duty and there is a failure to perform and the courts will not be bound by technicalities and its chief concern should be to reach justice to the wronged. We are not dilating on or diluting other requirements, which would ordinarily include the need for making a demand unless a demand is found to be futile in circumstances, which have already been catalogued in the earlier decisions of this Court.

19. Having cleared the air with regard to the jurisdiction of the High Court in the matter of a Writ of Mandamus or a direction in the nature thereof, we may proceed next to the law relating to the ambit of the Court's jurisdiction in judicial review in contractual matters. It is, undoubtedly, too late in the day to countenance the contention that the mandate of fairness in State action does not extend to the realm of contract entered into by the State. We would not burden our judgment chronicling the catena of decisions, which have expounded the law in this regard. We deem it sufficient if we refer to the judgment of this Court in ***Reliance Telecom Ltd. and another v. Union of India* and another**[5]. After an exhaustive survey of case law, this Court, inter alia, held as follows:

"42. In *Global Energy Ltd.* v. *Adani Exports Ltd.* [*Global Energy Ltd.* v. *Adani Exports Ltd.*, (2005) 4 SCC 435], this Court reiterated the principles that: (SCC p. 441, para 10)

"*10.* … the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice."

xxx xxx xxx

44. In *Michigan Rubber (India) Ltd.* v. *State of Karnataka* [*Michigan Rubber (India) Ltd.* v. *State of Karnataka*, (2012) 8 SCC 216] , the Court, after referring to *Jagdish Mandal* v. *State of Orissa* [*Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517] and *Tejas Constructions & Infrastructure (P) Ltd.* v. *Municipal Council, Sendhwa* [*Tejas Constructions & Infrastructure (P) Ltd.* v. *Municipal Council, Sendhwa*, (2012) 6 SCC 464] , expressed the view that (at SCC p. 229, para 23) the basic requirement of Article 14 is fairness in action by the State, and nonarbitrariness in essence and substance is the heartbeat of fair play and actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose and if the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities. It further observed that fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers and greater latitude is required to be conceded to the State authorities in the matter of formulating conditions of a tender document and awarding a contract. The Court also laid emphasis on public interest and the prudence in applying the principle of restraint where the action is fair and reasonable and does not smack of mala fides. It was also emphasised that the courts cannot interfere with the terms of the tender prescribed by the Government simply because it feels that some other terms in the tender would have been fair, wiser or logical."

20. This Court also laid down paragraph 46 as follows:

"46. In *Census Commr.* v. *R. Krishnamurthy* [*Census Commr.* v. *R. Krishnamurthy*, (2015) 2 SCC 796 : (2015) 1 SCC (L&S) 589] , a three-Judge Bench of this Court, after noting several decisions, held that (SCC p. 809, para 33) it is not within the domain of the courts to embark upon an enquiry

[5] (2017) 4 SCC 269

as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved and the courts can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded on ipse dixit offending the basic requirement of Article 14 of the Constitution. It further observed that in certain matters, as often said, there can be opinions but the court is not expected to sit as an appellate authority on an opinion."

21. We must also bear in mind the judgment which is relied upon by the High Court in the impugned Judgment. The High Court has drawn support from the Judgment of this Court in ***Reliance Energy Ltd. and another v. Maharashtra State Road Development Corpn. Ltd. and others***[6]:

"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine Judges in *I.R. Coelho* v. *State of T.N.* [(2007) 2 SCC 1] , Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(*g*) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(*g*) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(*g*) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation". Decisions or acts which result in unequal a nd discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(*g*). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. On e of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

xxx xxx xxx

38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field"."

22. It becomes, however, necessary to notice the context in the said case, which persuaded the Court to make the aforesaid observations. The case involved a global tender floated to award a contract, which was to be done by effecting selection in two stages. The relevant clause in the tender document, *inter alia*, contemplated the fulfilment of certain financial requirements. We may refer to the following discussion, which gives the factual context:

---

[6] (2007) 8 SCC 1

"50. Taking into account the above principles, it is clear that there are two methods of "cash flow reporting" i.e., direct and indirect. Both give identical results in the matter of the final total. They differ only in presentation of the data. They differ only in presentation of the data contained in the cash flows from operational activities. No reason has been given by the consultants of MSRDC for rejecting the indirect method invoked by KPMG, chartered accountants of REL/HDEC in their letter dated 12-8-2005. The said method is known as "reconciliation method"."

23. The observations made by the Court, undoubtedly, draw inspiration from factual matrix essentially involved in the culling out of the principle of level playing field, which was found to be impaired on the basis of a lack of legal certainty, as found established by the material available on record. In the course of observations in paragraph-36, this Court held that Article 19(1)(g) confers a Fundamental Right to carry on a business to a company. We would accept it, subject to the caveat that Article 19 confers a right on the citizens, who are natural persons. However, we take it that, what the Court had in mind was, a situation where the company is in the party along with one or more shareholders, who are citizens of India. However, there can be no quarrel with the position at law, having regard to the undeniable and breath-taking advances made by the Courts, drawing inspiration from Article 14 that equals must be treated equally and more importantly, the other facet of Article 14, viz., that all actions of State must be fair, which constitutes the major plank of attack against State action in the arena of contracts. This again is subject to the selfrestraint in matters, the scope of which has been dealt with in regard to various aspects of the matter, starting with cases relating to challenge to the very terms of the tender and culminating in the actual award of the contract. Unless such actions are found to be clearly arbitrary, illegal, malafide or contrary to any Statute, the courts would be loathe to fetter even the limited area of freedom of the State has to take decisions which are fair in cases relating to contractual matters.

24. With these observations, the time is ripe to consider the facts.

THE RELEVANT CLAUSES

25. The Clauses in the Tender Document, which engaged the attention of the High Court are as follows. Clause 2.7.6 reads as follows:

"All the bidders/tenderers while quoting the rates should clearly indicate the rate of applicable duties and taxes included in the prices quoted by them. Any variation in tax structure/rate due to introduction of GST, shall be dealt with under Statutory Variation Clause."

26. The next provision to be borne in mind is Clause 2.8.6.2:

"The purchaser will not be responsible for payment of taxes and duties paid by the supplier under misapprehensions of law or misclassification."

27. Finally, we must advert to Clause 2.9.2:

"Tenderers must familiarize themselves about all the applicable taxes & duties, and in case the same is not indicated explicitly in their offer the same will be considered as inclusive. Any liability on such account will be payable on firms account."

28. We may also note the following Clauses, which is put into place on the basis of an amendment, which is described as Amendment No.1 to the Global Tender Bid Document. Clause 2.7.6 reads as follows:

2.7	Sales Tax/ Value Added Tax (VAT)/ CST:	Sales Tax/ Value Added Tax (VAT)/ CST/ GST:
2.7.6	Nil	(Added) For the tenders due to open before roll out of GST: All the bidders/tenderers while quoting the rates should clearly Indicate the rate of applicable duties and taxes included in the prices quoted by them. Any variation in tax structure/ rate due to introduction of; GST, shall be dealt with under Statutory Variation Clause.

29. Clause 2.7.7 reads as follows:

2.7	Sales Tax/ Value Added Tax (VAT)/ CST:	Sales Tax/ Value Added Tax (VAT)/ CST/ GST:
2.7.7	Nil	(Added) For the tenders opening after roll out of GST: All the bidders/ tenderers should ensure that they are GST compliant and their quoted tax structure/ rates are as per GST Law.

30. At this juncture, we may also notice that there is a reference to the statutory variation clause. We were unable to locate a statutory variation clause, as such, from the tender documents relevant to the bid in question. However, we would refer to the statutory variation clause, which is to be found at page 56 of the counter affidavit (in connection with another tender) filed by the writ petitioner before this Court which appears to be the standard clause:

"Statutory Variation In taxes and duties, or fresh imposition of taxes and duties by State/ Central Governments in respect of the items stipulated in the contract (and not the raw materials thereof), within the original delivery period stipulated in the contract, or last unconditionally extended delivery period shall be to Railways account. Only such variation shall be admissible which takes place after the submission of bid. No claim on account of statutory variation in respect of existing tax/duty will be accepted unless the tenderer has clearly indicated in his offer the rate of tax/duty considered in his quoted rate. No claim on account of statutory variation shall be admissible on account of misclassification by the supplier/contractor."

31. The High Court, in the impugned Judgment, has correctly noticed the contours of the jurisdiction of courts in the realm of judicial review of action of State in matters relating to contracts. It is correctly found that the Court cannot examine the details of the terms of the contract. The Judgment is apparently entirely premised on the observations made by this Court in ***Reliance Energy Ltd.*** (supra). It has proceeded to support its intervention in the Writ Petition, placing reliance on paragraphs 36 and 38 which we have already referred to above. Thereafter it poses the question, as to whether the classification of the HSN Code is integral to the tendering process and answers it by

holding that it is integral and then founds its interference in the manner done by finding that fair competition or level playing field would be denied to each bidder as someone may bag the tender by quoting the lesser rate of GST, creating a substantial difference in the total price. Undoubtedly, selection is based on aggregating the base price with the tax (GST). If there is lack of clarity, each bidder would be in a position to take a shot at the tender by understating the value of the tax.

32. We are of the view that in the facts of the case, the High Court has erred. The Court was dealing with a matter pursuant to the NIT dated 11.04.2019. The tenderers including the writ petitioner, participated in the tender and quoted their rates. We cannot be oblivious to the averments in the writ petition that even previously the same issue had arisen for the procurement of the identical product. The bids were opened on 23.11.2018, wherein, some other bidders quoted at the rate of 5 per cent as the tax liability. The writ petitioner had according to it, has written letter dated 07.12.2018, pointing out that the product fell under Chapter 84 and even the appellants had imported the same product under HSN Code 84148090 attracting GST at the rate of 18 per cent. It also drew inspiration from a letter from the Ministry of Finance, Department of Revenue, dated 30.04.2018, being Circular No.30/4/2018GST, wherein, it was stated that the Council took certain decisions. It also referred to customs invoice dated 21.03.2017, showing import of the product with GST rate being show at 18 per cent. There is also reference to a letter dated 04.06.2018, written by the writ petitioner to the Executive Director of Public Grievance, Ministry of Railways. Therefore, the writ petitioner must be treated as aware of the consequences that would flow from the effect of the terms of the Notification. We, however, notice that the writ petitioner went ahead and made its bid pursuant to the NIT dated 11.04.2017. The case of the writ petitioner, admittedly is, that the appellants opened the tender and made a tabulated statement and found that the writ petitioner would stand ranked at L4.

33. Before we embark on the scope of the Clauses, we have set out, it becomes necessary to refer to the nature and incidence of tax under the GST Act. The Central Goods and Services Act, 2017 was published in the Gazette on 12.04.2017 (hereinafter referred to as the 'Central Act'). It provides for an indirect tax. It is, as the very name of the Act suggests, levied on transactions of goods and services or both. Section 2 (11) defines the 'State Goods and Service Tax Act' as meaning 'the respective State Goods and Services Tax Act, 2017'. State enactments mirroring substantially similar provisions have been passed.

34. Section 9 of the Central Act provides for levy of the tax called the Central Goods and Services Tax on all intra-state supply of goods and services, except as provided therein. Section 9(3) provides that the Government, may, on the recommendation of the Council, notify categories of supply of goods or services or both, where the tax is to be levied, assessed and recovered on the reverse charge basis. Section 22 provides that every supplier is duty-bound to be registered under the Act, in the State or the Union Territory, other than special category States, from where, he makes taxable supply of goods and services, subject to a certain limit in regard to the turnover. This is again made subject to the provisions of Section 24, which provides for compulsory registration. Under Section 37, there is duty to furnish return. Section 59 of the Central Act provides that every registered person shall self-assess the taxes payable under the Act and furnish a

Tax Return for each tax period, as specified in Section 39. Section 60 provides for provisional assessment. There are elaborate provisions relating to assessment. Chapter 17 provides for advance rulings. Section 97 thereunder provides that an applicant, which person has been defined as 'any person registered or desirous of obtaining registration under the Act' can make an application in proper form in regard to the questions which are mentioned in Section 97(2). The questions include a question as to the classification of any goods or services or both. There is a detailed procedure, which includes an original Authority, an Appellate Authority and a National Appellate Authority for Advance Ruling. Section 102 provides for rectification of advance ruling. Section 103 provides that the advance ruling shall be binding on an applicant and on the concerned officer or jurisdictional officer in respect of the applicant. Section 103(1A) inserted by the Finance Act, 2019, amplifies the scope of advance ruling, as provided therein. An advance ruling can become void in certain circumstances, which includes fraud or suppression of material or misrepresentation of facts (see Section 104). Section 105 provides for the powers of the Civil Court under the CPC in respect of discovery and inspection, enforcing attendance of any person and examining him on oath and issuing commission and production of books of account and other records. We may also notice Section 168, which has been relied upon by the writ petitioner. It reads as follows:

"168. Power to issue instructions or directions. — (1) The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the central tax officers as it may deem fit, and thereupon all such officers and all other persons employed in the implementation of this Act shall observe and follow such orders, instructions or directions.

(2) The Commissioner specified in clause (91) of section 2, sub-section (3) of section 5, clause (b) of sub-section (9) of section 25, sub-sections (3) and (4) of section 35, sub-section (1) of section 37, sub-section (2) of section 38, sub-section (6) of section 39, sub-section (5) of section 66, sub-section (1) of section 143, sub-section (1) of section 151, clause (l) of sub-section (3) of section 158 and section 167 shall mean a Commissioner or Joint Secretary posted in the Board and such Commissioner or Joint Secretary shall exercise the powers specified in the said sections with the approval of the Board."

At this juncture, we may notice that the Uttar Pradesh Goods and Services Act, 2017 essentially mirrors the Central Act. No doubt, the corresponding provision of Section 168 in the State Act (Uttar Pradesh) reads as follows:

"Section 168. Power to issue instructions or directions-

The Commissioner may, if he considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the State tax officers as it may deem fit, and thereupon all such officers and all other persons employed in the implementation of this Act shall observe and follow such orders, instructions or directions."

35. It is clear that the GST, be it under the Central Act and the State Goods and Services Act, are indirect taxes imposed on the supply of goods and services or both. Except in a case falling under the reverse tax mechanism, it is the supplier of the goods and services, who would remain liable to pay the tax. The supplier is obliged to file the returns which includes monthly returns and annual return. He is to self-assess and pay the tax in accordance with the provisions. There is provision for provisional assessment of tax in Section 60. It becomes the duty of the Taxing Authority to assess and recover the tax due. No doubt, under the reverse tax mechanism, in regard to the specified

transactions and persons covered thereunder, it would be the recipient of the goods and services or both, which would be liable to pay the tax due on the supply of goods or services or both, to it. Having borne in mind the above brief overview of the tax regime under the Central Act and the State Act, we may not proceed to consider the case in greater detail.

36. What is involved before the Court is not a direct challenge to the terms of the tender. The writ petitioner did not choose to challenge the terms of the NIT dated 09.04.2019 despite admitted understanding of the working of similar tender notification leading to some of the bidders showing the GST rate at 5 per cent and even writing about it. The writ petitioner chose to participate in it and filed its bid, showing the tax rate at 18 per cent. The entities, which were shown as entitled to rank as L1 to L3, have shown the tax GST liability as 5 per cent on the product. It is thereafter that the Writ Petition was filed seeking the reliefs, we have already noticed.

37. The appellants stand in the shoes of a purchaser of goods and services. By the global tender floated by the appellants, the appellants called for e-tenders from intending suppliers of the goods. The terms of the tender were well-known to the tenderers. Under Clause 2.7.6, undoubtedly, the bidders and the tenderers, while quoting the rates, were to clearly indicate the rate of applicable duties and taxes included in the price quoted by them. Let us pause for a moment and analyse its true meaning. Under the said Clause, the bidders were to quote the rate of applicable duties and taxes, which were included in the price quoted by them. This Clause must be read in conjunction with Clause 2.8.6, which provides that the purchaser (appellants) will not be responsible for the payment of taxes and duties paid by the supplier, on the basis of the misclassification or a misapprehension of law. This would mean that the appellants as purchaser was making it clear that it will have no liability to shoulder, in the payment of tax if it is found that, while indicating the rate of applicable duty or tax by the tenderer, it has wrongly quoted a rate which is lower than the rate, which it was liable to pay in law. The quoting of the rate, in other words, by the tenderer, within the meaning of Clause 2.7.6, would bind the tenderer and he would not be heard to say that he had arrived at the rate and made the bid and which stood accepted, on the basis of misapprehension of law or misclassification. On the one hand, Clause 2.7.6 gives the impression that all the bidders/tenderers should clearly indicate the rate of the applicable duty and tax in the price quoted by them. We must however read it in conjunction with Clause 2.9.2. The said Clause provides for a clear duty with the tenderer to acquaint themselves with all the applicable taxes and duties. It further provides that in a case, where the taxes and duties are not indicated explicitly in their offer, the same will be considered, which means, the offer will be considered as inclusive. The meaning of this Clause can only be that while ordinarily the tenderer would and should include in the tender not only the base price but the taxes and the rate of tax and arrive at the global sum at which he is making the bid, Clause 2.9.2 provides for the contingency of the tenderer not indicating about the applicable taxes and duties. In other words, he merely quotes a sum without specifically mentioning about the taxes and duties or the rates. This is pointed out by the learned ASG to contend that the fallacy committed by the High Court lies in it, not giving full meaning to the said Clause.

We would understand that the working of the statutory variation clause would be as follows:

The successful tenderer must clearly indicate the rate of tax/duty in his offer. There must be a variation in the tax and duty, which takes place after the submission of the bid. There cannot be any claim for such statutory variation on account of misclassification by successful tenderer. If these conditions are met, then, the purchaser, under the statutory variation clause, would appear to undertake the liability, to pay to the successful tenderer, the differential tax or duty. A perusal of Clause 2.7.7, which is the result of the first amendment would appear to indicate that for the tenders opening after roll out of GST, all the bidders, tenderers must ensure that they are GST compliant and their quoted tax structure/rates are as per the GST norms. This Clause again must be read in conjunction with Clause 2.9.2, which makes it clear that a tenderer may quote a rate without including any tax component.

38. It is clear that the Clauses read together will yield the following result, bearing in mind also the GST regime. The liability to pay tax under the GST regime is on the supplier. He must make inquires and make an informed decision as to what would be the relevant HSN Code applicable to the items and the rate of tax applicable. Thereafter, when he makes the bid, the issue of competition for winning the bid, would come into clear focus. The goal of the bidder ordinarily is to emerge successful and bag the contract. The extent of profit that he would earn, is a matter, which is essentially a matter to be decided by him. He may, for germane reasons, wish to bag a contract, with situations ranging from one extreme end of the spectrum, viz., even when the prospect of a loss stares at him, or a slightly brighter outcome, viz., the contract working on a break-even basis or moving on to an even more optimistic possibility, namely, of the contract earning him profit, which he is willing to take at a modest rate or a rate which he considers as reasonable in his understanding and circumstances. This is a matter to be left to the commercial expediency of the bidder. Now, when the matter is viewed from the perspective of the purchaser, the purchaser seeks to buy goods and services or both by awarding the contract to the lowest bidder. When the purchaser happens to be the State, it would be not fair or reasonable to not expect it to accept the bid of the lowest bidder unless it decides to not accept the bid of the lowest bidder for reasons which are fair and legal. No doubt, it is not the law that the Government is bound to accept the lowest bid. It is always open to the Government for relevant, valid and fair reasons, to not accept even the lowest bid.

39. The terms of the bid cannot be said to be afflicted with the vice of legal uncertainty. This is not a case where the principle as enunciated in ***Reliance Energy*** (supra) would be apposite. It is elementary that principles enunciated in the facts of a case are not be likened to Euclid's Theorem, having an inexorable operation divorced from the facts which arise for consideration. In this case, the interplay of the three Clauses, which we have referred to, and its conjoint operation, could not have left the bidders or the purchasers (appellants) in any uncertainty.

40. The appellants relied on the judgment of this court in ***Sarvesh Refractories (P) Ltd. v. Commissioner of Central Excise and Customs***[7]. In the said case the product in question was classified by the officer having jurisdiction over the manufacturers factory as falling under a particular heading. The case of the appellants therein was that the

[7] (2007) 13 SCC 601

heading should be different. The appellant was the consumer of the goods. It was found by the Tribunal that the appellant as a consumer could not get the classification changed from that of the officer having jurisdiction over the seller. This Court approved the said view. Therefore, the appellants would contend that since the liability to pay the tax is on the successful tenderer (supplier) and Sections 59 and 60 of the GST Act casts the burden on the tenderers to file return, self-assess and pay the tax, it is the jurisdictional officer relevant to the supplier who can make the proper classification. The appellants would stand in the shoes of a purchaser. The appellants cannot therefore be expected to find out the HSN Code and announce it so as to bind the tenderers or fetter the power of jurisdictional officer of the supplier.

41. Learned Additional Solicitor General purportedly drew support from the judgment of this court in ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran***[8]. In the said case, the appellant who was the manufacturer of certain products entered into handling contract with the respondent. A clause in the contract inter alia provided that the respondent was to bear and pay all taxes, duties and other liabilities in connection with the discharge of his obligation. The clause, in question, also permitted the appellant to deduct taxes or duties at source in the matter of payment of bill to the respondent. The appellant deducted 5 per cent towards Service Tax. Thereafter, in accordance with the law, as it stood, there was a retrospective amendment by which the liability to pay the service tax stood shifted to the recipient of service. The Arbitrator, appointed to resolve the dispute raised by the respondent that he was not liable to pay the tax on the goods, rejected the contention. The award was set aside by the High court. What is of relevance are the observations in paragraphs 37 and 39. It reads as under:

"37. As far as the submission of shifting of tax liability is concerned, as observed in para 9 of *Laghu Udyog Bharati* [(1999) 6 SCC 418], service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax."

"39. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between the two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent."

It was further found that the clause properly read could not support the case of the respondent.

42. It is the contention of the appellants herein that even though GST is an indirect tax, it does not mean that the tax should be passed on to the buyer. It is their further case that a contract to the contrary either by way of absorption of taxes or quoting the reduced rate of taxes including zero taxes will not, in any way, interfere with the statutory levy and payment of GST in the hands of the supplier. While the law does not prohibit the passing of the incidence of tax to the buyer, it is the case of the appellants that it is not a pre-condition for either charging the tax or remitting the same by the supplier.

---

[8] (2012) 5 SCC 306

43. The argument of the writ petitioner, which has found favour with the High Court and reiterated before us by Shri Amar Dave, learned Counsel for the writ petitioner is that since the tender conditions contemplate the adding of the tax to the base price for the purpose of arriving at the ranking, which, in turn, will determine, as to who will be the successful bidder, there is the unfair trade practice indulged in by some of the bidders to understate the rate of tax. There is an eminent need for the State (appellants) to indicate the HSN Code. Once it is indicated, it becomes a panacea, as it were, to the evil, which has been perceived and successfully pressed by the writ petitioner. Is that so? The answer to this question, has both legal and factual dimensions. As far as the legal aspects are concerned, the fundamental question, we must pose is, whether there exists any public duty with the appellants to indicate the HSN Code when they float a public tender. Here the learned ASG is correct, when he points out that there is no statutory duty cast on the appellants to indicate the HSN Code in a tender of the kind we are concerned with. Proceeding on the basis that a public duty may emerge, not merely from a Statute but in various other ways, which has been touched upon, in *Andi Mukta* (supra) as also, in *Mansukh Lal* (supra) and even on an expansive exploration, does such a duty flow from any other legitimate source?

THE CIRCULAR OF THE RAILWAY BOARD DATED 05.09.2017

44. The writ petitioner, no doubt, lays store by the Communication dated 05.09.2017. It is, undoubtedly, issued by the Railway Board. We may advert to the same:

"BHARAT SARKAR
MINISTRY OF RAILWAYS
RAILWAY BOARD
New Delhi

No: 2008/RS(G)/777/l

Date:05.09.2017

The General Manager,
All Indian Railways/PUs,
NF(C), CORE
The DG/RDSO/ Lucknow &
NAIR/Vadodara
CAOs, DMW/Ratiala', WPO/Patna,
COFMOW/N. Delhi, RWP/Bela

Sub: Evaluation of offers under GST Regime

1. After implementation of GST Act, various representations have been received from the field units and vendors, regarding evaluation of offers under GST regime mentioning that different vendors are quoting different GST rates for same item in same tender. The representations have been examined and the following instructions are issued.

2. Purchaser may Incorporate HSN number in the tender document However, it shall be the responsibility of the bidders to quote correct HSN number and corresponding GST rate.

3. Where however, bidders quote different GST-rates in offers, during transition phase, following conditions may be incorporated as part of tender conditions:

I. The offers shall be evaluated based on the GST rate as quoted by each bidder and same will be used for determining the inter se ranking. While submitting offer, it shall be the responsibility of the bidder to ensure that they quote correct GST rate and HSN number.

II. Purchaser shall not be responsible for any misclassification, of HSN number or incorrect GST rate If quoted by the bidder.

III. Wherever the successful bidder invoices the goods at GST rate or HSM number which is different from that incorporated in the purchase order; payment shall be made as per GST rate which is lower of the GST rate incorporated in the purchase order or billed.

IV. Vendor is informed that she/he would be required to adjust her/his basic price to the extent required by higher tax billed as per Invoice to match the all inclusive price as mentioned in the purchase order.

V. Any amendment to GST rate or HSN number in the contract shall be as per the contractual conditions and statutory amendments in the quoted GST rate and HSN number, under SVC.

4. Determination of transition period may be arrived at by the Zonal

Railway/Production Unit.

5. Tender cases already finalized need not be reopened.

6. This is issued with the concurrence of Finance Directorate of the Railway Board.

Sd/-
(Santosh Mittal)
Dy. Director Railway Stores (G),
Railway Board"

45. The Communication, no doubt, indicates that the purchaser may incorporate HSN Number in the tender document. While the use of the word 'may' in a statute is capable of being interpreted as mandatory and assuming that we can apply such a principle to a circular we would hold that having regard to the context, the consequences that follow, the tax regime and the public interest, a mandatory duty cannot be spelt out. On the one hand, the writ petitioner would draw support from the same to contend that all that the High Court has done is to direct the appellants to implement the communication issued by the Railway Board itself. On the other hand, learned ASG would lay emphasis on the word 'may'. He would also draw attention to the next following sentence and emphasised that it is responsibility of the bidder to quote the correct HSN number and corresponding GST rate.

46. We are of the view that when read in a holistic manner, the purport of the Railway Board is that it is the responsibility of the bidder to quote the correct HSN Number and the corresponding GST rate. We have already unravelled the true scope of the relevant Clauses and wide range of results that would follow on its true construction. It may be true that the circular permits the purchaser to indicate the HSN Number. The purchaser may indicate it. That is a far cry from holding that the communication enshrines a public duty which can be enforced by way of Mandamus. While it is true that in a given case, when a Public Authority is vested with a discretionary power under a Statute, it can be directed to exercise a discretion, it may not be legal to direct even a statutory functionary to exercise the discretion in a particular manner. The very idea of a discretionary power would suffer annihilation, if it ceases to be discretionary in the hands of a Court ordering a Mandamus. No doubt, there may be cases where the facts are such that the court is not powerless to direct the Authority to do a thing which it considers absolutely necessary and just and legal to perform the act even when the Authority seeks shelter on the basis that what is conferred on it, is a mere discretion. The other terms of the circular clearly

appear to indicate that the rate even if indicated by the appellants will not detract from the tenderers quoting the rate which is up to them. It is the rate quoted by the tenderers which governs. It is the same which will be used to carry out the ranking. The other terms also militate against a public duty with the appellants as directed. The appellant seeks to protect its best interest as a player in the commercial field. The clauses are self-evident.

47. In this regard, we must not overlook the consequences of reading the word may in the letter dated 05.09.2017 as casting a mandatory duty. This would bring us to frontally face the question of how the purchaser would go about implementing such a direction. Sections 96 to 103 of the Central Act, as also of the State GST Act do provide for the mechanism of advance ruling. If the purchaser is to include the HSN Code, there must be a mechanism to give effect to what is directed by the High Court, viz., "to clarify the issue with the GST Authorities relating to the applicability of the correct HSN Code of the product and thereafter mention in the NIT". To describe this as impractical and the direction given being without bearing in mind the conspectus of the statutory provisions of the GST Acts, cannot but be correct. Under the provisions relating to advance ruling, while it is true that the question which can become the subject matter of advance ruling includes questions relating to classification of goods and services, there is a detailed procedure provided in the matter. The matter does not rest with the decision of the original Authority. A right of appeal is provided. The matter may travel to the Supreme Court. The provisions contemplate powers of a civil court in the matter of discovery, adducing of evidence etc. In other words, it is long drawn and elaborate procedure and the direction to 'clarify' with the GST Authorities, as directed by the High Court, can hardly square with the cumbersome and elaborate process detailed in the Chapter relating to the advance ruling. The advance ruling, we notice, is binding on the applicant ordinarily. No doubt, it has a wider impact in circumstances detailed in Section 103(1A). We are at a loss to further understand how in the name of producing a level playing field, the State, when it decides to award a contract, would be obliged to undertake the ordeal of finding out the correct HSN Code and the tax applicable for the product, which they wish to procure. This is, particularly so when the State is not burdened with the liability to pay the tax. The liability to pay tax, in the case before us, is squarely on the supplier. There are adequate safeguards and Authorities under the GST Regime must best secure the interests of the Revenue.

48. Shri Amar Dave, learned Counsel for the writ petitioner would contend that the Section 168 of the Central Act can be understood as the fountainhead of statutory power, using which, the appellants can comply with the impugned direction. The power is vested with the Board, it is pointed out. The appellants have floated a global tender. It means that the bidders can be located at any place. The Officers, who would be the Jurisdictional Officers of the bidders, may not even be known to the appellant. It is difficult to accept the case of the writ petitioner that appellants must seek the 'clarification' contemplated in the impugned Judgment by resorting to Section 168 of the Central Act or the State Act. Section 168 does not expressly provide for right to any person to seek a direction as contemplated therein. Further, we may notice that there is an express power provided in the provisions relating to advance ruling. There is an elaborate procedure to be followed and even right of appeal. At any rate, power under Section 168 is essentially meant for

officers to seek orders, instructions or directions besides the Board itself on its own passing orders, in the interest of maintaining uniformity in the implementation of the Act.

49. We cannot ignore the case of the appellant that the Circular cannot bind the supplier and the Circular can be challenged in an appropriate proceeding. Appellants contend that it does not represent a final view, and does not bind the court and a circular which is in the teeth of the statute can have no existence in law. In this regard our attention is drawn to the judgment of this Court in (2008) 13 SCC 1. It is further contended that the circular cannot bind the appellants who are only purchasers of the product. There is no duty cast on the Board under the Central Act or on the Commissioner under the State Act to issue any clarification, as directed in the impugned Judgment. There is no duty cast on the appellants to seek such direction. Therefore, the appellants are right in contending that there is no statutory duty, which could have been enforced in the manner done in the impugned Judgment. There is no public duty which is enforceable.

THE CUSTOMS INVOICE DATED 21.03.2017

50. As far as the reliance placed on a customs invoice dated 21.03.2017, it is pointed out on behalf of the appellants that the importer on its understanding, entered the rate (18%). Proceeding on the basis that it was a unit of the railways, this by itself cannot bind the appellants to comply with the impugned judgment. The nature of the clauses and the liability to pay tax detract from the appellants being bound, particularly in the absence of any public duty. We agree with the appellants.

THE CASE OF THE SECOND RESPONDENT (L1)

51. The second respondent (L1) has filed a short Counter Affidavit in this Court. Therein, reliance is being placed on Sections 59 and 60 of the CGST. While, Section 59 provides for self-assessment by a registered dealer, Section 60, contemplates a dealer making a request to the proper Officer, in writing, giving reasons for payment of tax on a provisional basis, thus, leading to the tax being permitted to be paid on such rate as is specified by the Officer. According to L1, the Officer can determine the rate of tax. Thus, any bidder who would be the supplier of goods or services, is provided with a mechanism to enter the correct rate of tax in the bid. L1 has a case that the product in question falls squarely under Chapter 86 of the GST Tariffs and, therefore, the rate quoted by L1 was correct. It is further contended that the Writ Petition was filed with delay. Second respondent even alleges collusion between the appellants and the writ petitioner and contends that the case is meant only to defeat the right of L1. The second respondent (L1) would contend that the appeal deserves to be allowed.

52. In this case, the second respondent has been found to be L1 for 593 pieces of turbo wheel impeller balance assembly. We see from the Counter Affidavit, filed in the High Court, by the appellants, that it was, *inter alia*, contended that the tendered product is Turbo Wheel Impeller Assembly and not Turbo Super Charger. In the Rejoinder Affidavit, filed by the writ petitioner, we noticed at page-764 onwards of the SLP Paper Book that the writ petitioner has joined issue and contended that the stand of the appellants in the Counter Affidavit was without appreciating that the product is the most integral part of Turbo Charger, without which, the Turbo Charger is rendered commercially redundant. The end item is a Turbo Charger, which houses the Impeller Wheel Assembly and is not an associated product but rather a component of Turbo

Charger itself. We further notice the specific stand of the writ petitioner that in the light of the fact that the functionality and commercial purpose of both these products are the same, they have to be classified under the same Head and taxed at 18 per cent. A Chartered Engineers' Certificate was produced. So was the diagram. In fact, having regard to the nature of the dispute about the product, it brings into sharp focus, the complex nature of the problem, which appears to have been oversimplified in the matter of issuing the impugned direction. We have already noticed that the second respondent (L1) projected this dispute, even in this Court as well.

MAKE IN INDIA; ORDER DATED 15.06.2017

53. As far as the 'Make in India' Policy is concerned, relied upon by the writ petitioner, which is dated 15.06.2017, it is, no doubt, true that it is a very significant move by the Government to promote the manufacture of goods and services in India, thereby effectively dealing with the problem of unemployment and increasing the income of its people. There is no dispute also that the writ petitioner is an approved local supplier within the meaning of the Order. It is equally true that a preference is contemplated for local suppliers as defined in the Order. The margin of difference between L1 and the local supplier cannot exceed 20 per cent. It is also not in dispute that on the basis of the total price quoted, the margin of purchase preference is much more than 20 per cent. The contention of the writ petitioner is that the rights of the writ petitioner under the Government Order stand frustrated on account of L1 to L3 quoting the tax rate at 5 per cent. Emphasis was placed on the definition of the word 'local content'. The words 'local content' is defined as follows:

"'Local content' means the amount of value added in India which shall, unless otherwise prescribed by the Nodal Ministry, be the total value of the item procured (excluding net domestic indirect taxes) minus the value of Imported content in the item (including all customs duties) as a proportion of the total value, in percent."

54. The contention of the writ petitioner is that unless the appellant found out the correct HSN Code and also the tax rate applicable for the product, the local content, as defined in the Order, could not be determined. This was countered by the learned ASG by pointing out that the definition of the word 'local content' excludes the 'domestic indirect taxes'. In this connection, we may also notice the definition of 'L1'. 'L1' has been defined as meaning the lowest tender or the lowest quotation, *inter alia*, as adjudged in the valuation process as per the tender or other procurement solicitation. Thus, L1 is, undoubtedly, to be determined, based on the terms of the tender.

55. In the definition of the word 'local content', it may be true that, when the value of the imported content in the item is calculated, all the customs duties must be included. The claim of the writ petitioner is that, when the HSN Code, for the purpose of calculating the custom duty, is to be found out for determining the local content, then, there can be no reason to not include the HSN Code for the item for the purpose of GST. We are unable to agree. Proceeding on the basis, that for determining the local content, the HSN Code of the item, for the purpose of custom duty, is to be found, that may not justify the writ petitioner from contending that the HSN Code for the GST must be included in the tender conditions. This is for the reason that, apart from the absence of any duty with the appellants to indicate compulsorily the HSN Code, we would have to overlook the operation of the terms of the tender. Under Clause 2.9.2, we have noticed that a tenderer

can make his bid without adding any tax component. It is open to the bidder, wholly or partly, to absorb the tax effect. In other words, being an indirect tax, while it is open to a bidder to pass it on to the buyer (the appellant), nothing stands in the way of the bidder, partly or wholly, absorbing the tax. The liability to pay the tax under the GST regime is with the supplier unless it falls under Section 9(3) of the GST Act. Further, the appellants cannot declare a GST rate and make it binding on the bidder. The correctness of the Code/rate can, at best, be the appellants understanding of the same. This is why, in the Circular dated 05.09.2017, issued by the Railway Board, it conferred a discretion on the purchaser, to incorporate the HSN Number in the tender document. This is carefully conditioned by the caveat that, the responsibility to quote the correct HSN Number and corresponding GST rate, is to be on the bidder. Still further, the Railway Board has contemplated that during the transition phase, it was to be provided that offers will be evaluated, based on the GST rates quoted by each bidder and the same will be used for determining the *inter se* ranking. When a successful bidder invoices the goods with the GST rate or HSN Number different from that incorporated in the purchase order, payment is to be made at the rate, which is lower of the GST rate, as between what is incorporated in the purchase order or the invoice. It is further made clear in the Circular dated 05.09.2017 that if a higher tax rate is billed and an all-inclusive price is mentioned in the purchase order, then, the basic price would have to be accordingly adjusted to make it in conformity with allinclusive price.

56. We cannot therefore hold that in view of the Make in India policy as contained in the order dated 15.06.2017, there is duty to declare the HSN code in the tender and what is more, make the tenderers quote the rate accordingly.

57. Unless Clause 2.9.2 is done away with (it must be remembered that there is no challenge to Clause 2.9.2), the tenderers would be free to quote a lumpsum rate without including the tax rate. The further and more important obstacle is the mechanism or rather the absence of the same by which the purchaser of goods and services (the appellants) can be compelled to ascertain the correct HSN Code. The direction by the High Court is to clarify with the Tax Authorities. We have noticed that there is no provision for clarification, as such. The only provision which clearly deals with classification is provision for advance ruling. We have noticed the nature of the procedure in the Chapter dealing with advance ruling. We would have to assume that the appellants will be compelled to go through the said cumbersome procedure and, at the end of it, proclaim the HSN Code. The appellants purchase several goods and services. Each time, the appellants purchase goods and services or both, if the impugned Order is to be sustained, the appellants would have to resort to the prolonged proceedings in a matter where the appellant had no liability to pay the tax. All of this is premised on the writ petitioner's quest for the perfect level playing field. That apart, we have also noticed, how the interests of the appellant, which it pursues as an actor in the commercial world, but wearing the mantle of State obliging it to act fairly, would not empower the Court in judicial review to mandate for a duty, not supported by any Statute, the terms of the bidding document and any other binding instrument. We have already found that Circular dated 05.09.2017, issued by the Board, does not provide for the mandatory duty to specify the HSN Code.

OTHER TENDERS BROUGHT OUT BY OTHER UNITS OF THE RAILWAYS CONTAINING THE HSN CODE

58. In this regard it is contended by the appellants that as far as the tenders relied upon by the writ petitioner produced in the counter affidavit as having been brought out wherein the HSN code is indicated, they are tenders issued by the other units of the Indian Railways. Since the first appellant is the Union of India, we would expect that if it is otherwise permissible to sustain the impugned judgment, it may not be fair to not have a uniform policy in the matter of award of largesse by the various units under it. However, the appellants do point out that even in the tenders which have been brought out, the HSN Code mentioned in the tender is shown as indicative only. It has been provided in the tenders relied upon by the writ petitioner that it will be the responsibility of the bidder to quote the correct HSN Code and the corresponding GST rate while submitting the offer. We may notice the relevant clause:

"A. 1. HSN number mentioned in tender 8504 is indicative only. It will be responsibility of the bidders to quote correct HSN number and corresponding GST rate while submitting offer. 2. Even if bidders quote different GST rates in offers, the offers shall be evaluated by IREP3 system based on the GST rate as quoted by each bidder and same will be used for determining the inter se ranking. Bidders may note that I. It shall be the responsibility of the bidder to ensure that they quote correct GST code and HSN number. II. Purchaser shall not be responsible for any misclassification of HSN number or incorrect GST rate if quoted by the bidder. III. Wherever the successful bidder invoices the goods GST rate of HSN number which is different from that incorporated in the purchase order, payment shall be made as per GST rate which is lower of the GST rate incorporated in the purchase order or billed. IV. Any amendment to GST rate or HSN number in the contract shall be as per the contractual conditions and statutory amendments in the quoted GST rate and HSN number, under SVC. B. Are you eligible for availing benefits and preferential treatment extended to Micro and Small Enterprises (MSEs). If so, the necessary documents as per special conditions for MSEs for claiming benefits and preferential treatment extended to MSEs to be attached. C. In case the successful tenderer is not liable to be registered under CGST/ IGST/ UTGST/ SGST Act, the railway shall deduct the applicable GST from his/their bills under Reverse Charge Mechanism (RCM) and deposit the same to the concerned tax authority. D. Performance statement of orders received and supplies made for last three years for subject item is must for all tenderers including approved sources."

59. Having regard to the terms, we cannot cull out a public duty to provide for the correct HSN code. Therefore, we cannot support the impugned judgment based on the issuance of tenders as contended.

REVERSE CHARGE MECHANISM

60. We have noticed that the appellants have contended that the liability to pay the GST, an indirect tax, lies with supplier of goods and services. The exception which is admitted by the appellants is in cases covered under Section 9(3) of the GST Act which provides for reverse charge mechanism. Under the reverse charge mechanism, the liability to pay tax is on the recipient of the goods or services or both. This would indeed mean that if the appellants are in the shoes of persons who become liable as recipients of goods and services or both under Section 9(3), then it will be the liability of the appellants to pay such tax. Strictly speaking this question does not appear to arise on the facts. At any rate, we do not see how the writ petitioner can advance its case on the basis of this aspect as it is essentially the look out of the appellants. We must not be oblivious to the fact that the complaint of the appellant is the denial of a level playing field

among the tenderers. It is obvious that the appellants as purchasers of the goods and services are obliged to purchase the goods and services which are otherwise compliant with the tender conditions at the cheapest rate. In a case where it is liable under revere charge mechanism, it would be the look out of the appellant in public interest to ensure that it will end up purchasing goods at the cheapest rate possible. It is elementary that even the lowest bidder would not have right to have his bid accepted and is always open to the appellants in public interest and in accordance with the tender condition to reject even the lowest bid. No doubt if the tax rate in such a case is separately insisted upon, then on the rate acceptable to the appellants, the gross outflow can be calculated consisting the amount to be paid to the successful tenderer and the amount to be remitted to the revenue. In this regard, we notice from the tender condition relied upon by the writ petitioner which we have extracted at paragraph 58, what is contemplated is that the amount would be deducted at the applicable GST rate from the bill under the Reverse Charge Mechanism and deposited with the concerned tax authority. If under the terms of the tender, what is contemplated is that, in a case where the tax component is not included or it is included at a lower rate, the appellants are entitled to deduct the actual rate of tax as payable by it under the Reverse Charge Mechanism and the tender of such a person is accepted being the lowest tender, then there can be no question of public interest being prejudiced. If on the other hand, the tax rate is included and the clause provides for deduction of the actual rate from the bill, then also public interest may not be affected. This is all the more reason for the tenderer specifically including the tax component indicating the correct rate of tax. This is a matter where the first appellant can consider giving appropriate instructions.

61. The upshot of the above discussion is that, we find that the appellants have made out a clear case for our interference with the impugned Judgment. There remains, however, one aspect. It is the case of the appellants that the supplier of the goods and services, i.e., the successful tenderer is, indeed, liable to pay the GST by filing returns and carrying out self-assessment. There is also no dispute that it is the Officer, dealing with the supplier, who would have jurisdiction in the matter. In the said circumstances, in order to also ensure that the successful tenderer pays the tax due and to further ensure that, by not correctly quoting the GST rate, there is no tax evasion, we would think it is necessary to direct that, in all cases, where a contract is awarded by the appellants, a copy of the document, by which, the contract is awarded containing all material details shall be immediately forwarded to the concerned jurisdictional Officer. It is accordingly ordered. Towards this end, the appellants shall indicate that the tenderers will, in their bids, indicate the details of their Assessing Officers so that the appellants can effectively comply with this direction. The Union of India and the Railway Board shall ensure that this direction shall be complied with by all units.

62. The appeal is allowed, impugned judgment is set aside and we further direct that the appellants will comply with the directions given in paragraph-61 of this Judgment. There is no order as to costs.