

Bombay High Court

Sterling And Wilson Private ... vs Union Of India And 3 Ors on 25 July, 2017

Bench: Anoop V. Mohta

Shridhar Sutar

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 1261 OF 2017  
WITH  
NOTICE OF MOTION (L) NO. 288 OF 2017

1. Sterling and Wilson Private Limited  
Having their registered office at  
9th Floor, Universal Majestic,  
Gautam Nagar, P.L. Lokhande Marg,  
Ghatkopar Mankhurd Link Road,  
Chembur (W), Mumbai-400 043.
2. Zarine Yazdi Daruvala, Indian citizen,  
Shareholder of Petitioner No.1 having her  
Office address at 9th Floor, Universal Majestic  
Gautam nagar, P.L. Lokhande Marg,  
Ghatkopar Mankhurd Link road,  
Chembur (W), Mumbai-400 043. ... PETITIONERS

VERSUS

1. Union of India represented by the  
Ministry of Micro, Small & Medium  
Enterprises
2. Nuclear Power Corporation of India Limited  
Having its registered office at  
16th Floor, Centre-1, World Trade Centre  
Cuffe Parade, Colaba, Mumbai - 400 005.
3. Technico India Private Limited  
Having its registered address at  
3, B.B. Ganguly Street, Kolkata,  
West Bengal - 700 012.
4. Development Commissioner,  
Micro, Small & Medium Enterprises  
Having its office address at  
'A' Wing, 7th Floor, Nirman Bhavan  
New Delhi - 110 108. ... RESPONDENTS

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Mr. J.P. Sen, Senior Advocate, Mr. Mohi Arora, Mr. Akshay Doictor  
i/b. M/s. Desai & Diwanji for Petitioners/Applicants.  
Mr. Aseem Naphade a/w. Mr. Arsh Misra, Mr. Nehal Shetty i/b.  
M.V. Kini & Co. for Respondent No.2.  
Mr. Kumarjit Das a/w. Amit Kumar Muhuri i/b. Vivek V. Phadke,  
Advocate for Respondent No.3.

.....

CORAM : ANOOP V. MOHTA AND  
SMT. ANUJA PRABHUDESSAI, JJ.

RESERVED ON : 17th JULY, 2017

PRONOUNCED ON : 25th JULY, 2017

JUDGMENT (Per Anoop V. Mohta, J)

1. Rule. Rule made returnable forthwith. Heard finally by consent of all the parties in view of the urgency, so expressed.

2. Petitioners being an Engineering Procurement and Construction ("EPC") Contractor for designing, installation and service of fire-fighting and detection systems have challenged the action of Respondent No.2 - a Public Sector Undertakings ("PSU"), Nuclear Power Corporation of India Limited ("NPCIL"), who carries on the business of designing, constructing, commissioning and operating nuclear and atomic power plans and nuclear power 2 of 53 Shridhar Sutar 3 wp(L)-1261.17.doc reactors and who awarded the contract to Respondent No.3 - Technico India Private Limited ("TIPL") which is a company/an enterprise registered under the Micro, Small and Medium Enterprises Development Act, 2006 ("Micro Act"), which carries on the business of manufacturing of parts for manufacturing fire- fighting and fire protection equipment.

3. The basic backgrounds :-

On 26th March, 2012, Public Procurement Policy for Micro and Small Enterprises Order, 2012 (The Policy), published in Official Gazette. Section 6 of the Policy provides that a L-2 MSE bidder will be entitled to match L-1 price bid by a non-MSE bidder and shall be allowed to supply up to 20% of the total tendered value. On 1st April, 2015, the policy issued by Respondent No.4, is brought into force.

4. Respondent No.3 is registered with the National Small Industries Corporation ("NSIC") as a MSE (the enterprise). The NSIC Registration has been issued only in respect of Fabricated Hose Cabinet, Y-Strainer, basket Strainer, MS Tank (air vessel), Fabricated MC Point, Nozzle, Deluge Valve and Fabricated piping 3 of 53 Shridhar Sutar 4 wp(L)-1261.17.doc ring for water spray system, under the Fire Fighting System category.

5. Respondent No.2, on 19th October, 2016, floats Tender bearing number CMM/HMP/23-70-10-087 for fire-fighting and detection system for its two plants.

6. On 17th February, 2017, a letter issued by Respondent No.2 to Petitioner No.1 informing it that the Petitioner was technically complete and qualified for the opening of the price bid of the Tender.

7. Office Memorandum and Frequently Asked Questions ("FAQs") annexed thereto prepared and circulated on 24 th October, 2016 by Respondent No.4 to the Ministries/Departments/PSUs for effecting implementation of the Policy.

8. Price bids in respect of the Tender were opened on 22nd February, 2017 and Petitioner declared as L1 (i.e. the lowest bidder) with a price bid of Rs. 21,81,45,011/- and Respondent No.3 was declared as L2 with a substantially higher price bid of Rs. 23,19,75,000/-.

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9. On 2nd March, 2017 / 25th March, 2017, Petitioner addressed a letter to Respondent No.2, inter alia acknowledging that it had been found to be technically compliant and had also been declared as the lowest bidder (i.e. L-1), and requested Respondent No.2 to issue Letter of intent to the Petitioner.

10. On 18th April, 2017, letter addressed by Respondent No.2 to Petitioner No.1 inter alia conveying to Petitioner No.1 that Respondent No.3, being a purported MSME, had agreed to match Petitioner No.1's L-1 price for the Tender and on account of these facts, Respondent No.3 intended to award the Tender to Respondent No.2.

11. On 29th April, 2017, in response to the aforementioned letter dated 18th April, 2017, the Petitioner, through its advocate addressed a letter informing Respondent No.2 that in the case of M/s.Shree Gee Enterprise Vs. Union of India and Anr. (Writ Petition (C)No.7201 of 2015 filed before the Hon'ble Delhi High Court) the Counsel appearing for Respondent No.1 admitted that the Policy did not apply to tenders that are in the nature of works contracts.

5 of 53 Shridhar Sutar 6 wp(L)-1261.17.doc The nature of work - work contract or sale of goods :

12. The NPCI invited the tender of following nature.

"On or about 19th October 2016, Respondent No.2 floated a Tender bearing number CMM/HMP/23-70-10-087 for Design and Engineering, Manufacture, Procurement, Supply, seismic qualification/testing, Inspection, examination, testing, Erection, Commissioning, performance guarantee (PG), handing over of Fire water spray system including piping, flanges, manual values, NPCIL approved HILTI make anchor fasteners, electrically operated values (EV), deluge valves assemblies (DV) including its control and instrumentation with fire detectors, Jbs, LCP etc and other specialities, supports, mandatory spares and special tools and tackles, if any, for medium velocity water spray system (MVWS) and Multiple Control Zonal Spray system (MCZs) beyond terminal point, for spray system for its two plants i.e. KAPP-3 & 4 and RAPP - 7 & 8 ("Tender")".

There is no issue that above contract is unsplitable and undividable. It is composite contract.

13. On the petition, this Court, on 7th June, 2017 after hearing the parties ordered Respondent No.2 to postpone issuance of work order till the disposal of this matter. The interim order has been in force till this date.

The legal provision and the contention:

14. The definition of 'enterprise' of the Micro Act is reproduced as under:

6 of 53 Shridhar Sutar 7 wp(L)-1261.17.doc "2 (e) "enterprise" means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951) or engaged in providing or rendering of any service or services".

15. The relevant section 11 is also reproduced as under :

"11. Procurement preference policy - For facilitating promotion and development of micro and small enterprises, the Central Government or the State Government may, by order notify from time to time, preference policies in respect of procurement of goods and services, produced and provided by micro and small enterprises, by its Ministries or departments, as the case may be, or its aided institutions and public sector enterprises".

16. The Counsel appearing for the parties raised and referred the tender conditions (General Conditions of Engineering, Procurement and Construction Contracts ("GCC")). The tender condition also reflects on sales tax, value added tax and other local tax including works contract tax-deduction of sources. The reference is also made to Clause 15.5 in support of their auction that as per new procurement policy, in case tendered items are non splitable or non-divisible, MSE quoting Price within the Price-

7 of 53 Shridhar Sutar 8 wp(L)-1261.17.doc band of "L-1" Price (Other than MSE) + 15% may be awarded for full/complete value of supplies, subject to matching of the L-1 Price.

17. The learned Counsel appearing for the respondents in support of the award tendered to Respondent No.3 has strongly relied upon the policy and the memorandum so issued from time to time by respondent Nos. 1, 2 and 4 and contended that their action is well within the purview of the policy in expect of procurement of goods and services. Specifically Clauses 3, 6, 14 and 16. It is contended in view of Clause 16, the office memorandum and the clarification so issued from time to time including frequently asked questions (FAQs), they have awarded the contract as there was no bar to award such contract, though it was unsplitable and undividable. Subsequent memorandums were also relied upon apart from the Supreme Court judgments on law of tenders. The office memorandum dated 12th February, 2015, 2nd November, 2015, 9th November, 2016 and press

releases from time to time. As we are not dealing with the procurement of goods and recorded services which are incidental and consequential to supply of such goods, such as, transportation, 8 of 53 Shridhar Sutar 9 wp(L)-1261.17.doc insurance, installation, commissioning and maintenance. The concept of goods "service" is well recognised. The "subject matter of procurement firm" means any item of procurement wherein the form of goods, services or works or a combination thereof as referred to in office memorandum dated 9th November, 2016 is also no issue. The judgments so cited by the learned Counsel appearing for respondent Nos. 1, 2 and 4 which are settled law on tender and the scope of judicial review in such matter. We are proceeding further by keeping in mind the settled law :-

(1) (2007)1 SCC 477 - Rajasthan Housing Board and Another Vs. G. S. Investments and Another.

"10. ....

"11. The Principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three Judge Bench in Tata Cellular v. Union of India. It was observed that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. ...."

(2) Supreme Court Civil Appeal No. 10143 of 2016 (SLP(C) No. 29297 of 2016) - Montecarlo Ltd. Vs. NTPC Ltd.

"24. ....But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of 9 of 53 Shridhar Sutar 10 wp(L)-1261.17.doc power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. ...."

(3) Supreme Court Civil Appeal No. 9078 of 2016 - Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd and another.

"13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision."

18. Learned Counsel appearing for Respondent No.3 supported those judgments and contentions, and additionally, admitted that they are manufacturers of limited items, but other items are procured from the market and thereby submitted that their composite tender as per the requirement.

19. Respondent No.2 has strongly relied on the judgment of Delhi High Court in the case of State Bank of India Vs. Airport Authority of India and others in C.W.No. 7538 & C.M. 11614 of 2000 and 214 of 2001 decided on 22nd January, 2002. Specifically in paragraph 19, same is also relied by Respondent No.3, which is reproduced as under.

10 of 53 Shridhar Sutar 11 wp(L)-1261.17.doc "19. Mr. T.R. Andhiyarjuna, Senior Counsel for the respondent No.2, opposed the writ petition on the ground that the party which participates in the tender and take its chance and then fails in the tender, cannot be permitted to challenge the terms and conditions of the tender. He submitted that petitioner could not approbate or reprobate. The challenge to Condition No.4 as being arbitrary was an after thought. The bidder, which participates in the tender was bound by the terms of the tender and the Court should not encourage a subsequent challenge on grounds of hardship in complying with a tender term. He placed reliance of India Thermal Power Ltd. V. State of M.P.(2000) 3 SCC 379".

20. A submission is also made by learned Counsel appearing for Respondent No.2 that the judgment is of concession, cannot be fulfilled as binding procedure referring to the order passed by the Division Bench (supra). The reliance is also placed by learned Counsel appearing for Respondent No.2 that a Division Bench of Punjab and Haryana High Court in Central Institute of Plastics Engineering & Technology Vs. Indian Oil Corporation Limited in Civil Writ Petition No. 8697 of 2015 (2015 SCC OnLine P&H 4276) has also accepted the contention so raised by Respondent No.2 herein by referring to Clause 16 which reads as under.

11 of 53 Shridhar Sutar 12 wp(L)-1261.17.doc "16. Even otherwise, the petitioner had responded to the Notice Inviting Tender dated 30.12.2014 and as such, was bound by the terms and conditions contained therein. The purchase as also the price preference in favour of a Micro and Small Enterprise stood enumerated therein. Having participated in the tender process and having remained unsuccessful, it would not be open for the petitioner to now turn around and raise a challenge to any of the terms and conditions contained in the Notice Inviting Tender".

21. The learned Counsel appearing for the Petitioners has strongly relied upon the provisions of the act and referred the terms and conditions of the contract and clauses of policy including the frequently asked questions. The strong reliance is placed on the judgments dated 25th January, 2017 in Writ-C Nos. 2316 and 42491 of 2016 passed by the Allahabad High Court in the case of Rahul Singh Vs. Union of India and others, specifically in paragraph 7, which is reproduced as under.

"7. No provision of the 2006 Act bids us to deconstruct a works contract into elements relating to supply of goods and provision of service. Neither section 11 nor the Public Procurement Policy, 2012 appears to envisage a composite and distinct category of contract such as a work contract actually is. The classification of the tender work under Tenders 45 and 48 were correctly classified by the respondents in terms of the operating manual to be a works contract. There was no challenge to this classification. Consequently we find no error in the decision of the respondents in holding the petitioner to be 12 of 53 Shridhar Sutar 13 wp(L)-1261.17.doc ineligible for the grant of exemptions and benefits under the Public Procurement Policy, 2012.

Their decisions to cancel the tender in the absence of deposit of tender cost and earnest money is upheld. Consequently the writ petitions fail and are accordingly dismissed".

22. Learned counsel for Petitioners therefore submitted referring to the judgment that the issue is clear and on the facts and circumstances as the nature of work so involved within the ambit of works contract as it is not exclusive procurement of work and/or services manufacture or produced by the enterprises "like Respondent No.3" and therefore, in threshold itself, there was no question of awarding the tender/contract to Respondent No.3, in view of the clear position of law of works contract and has settled apart from statutory provisions. The only argument which was made by Respondent Nos. 2 and 3 without opposing the position and meaning of "works contract" that as the work was insplitable and inevitable and as the procurement policy itself permits the policy of such contract, therefore based upon a clarification, so issued from time to time, they have awarded the contract to Respondent No.3.

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23. The concept and its utility of works contract is settled by Supreme Court in the case of Kone Elevator India Private Limited vs. State of Tamil Nadu reported in 2014 (7) SCC 1.

"46. At this juncture, it is condign to state that four concept s have clearly emerged. They are:

(i) the works contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services;

(ii) the concept of "dominant nature test" or, for that matter, the "degree of intention test" or "overwhelming component test" for treating a contract as a works contract is not applicable;

(iii) the term "works contract" as used in clause (29- A) of Article 366 of the Constitution takes in its sweep all genre of works contract and is not to be narrowly construed to cover one species of contract to provide for labour and service alone; and

(iv) once the characteristics of works contract are met with in a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract.

62. ....

"5. .... Therefore, in judging whether the contract is for a "sale" or for 'work and labour', the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The predominant object of the contract, the

circumstances of the case and the custom of the trade provide a guide in deciding whether transaction is a "sale" or a "works contract". Essentially, the question is of interpretation of the 'contract'. It is settled law that the substance and not the form of the contract is material in determining the nature of transaction. No definite rule can be formulated to determine the question as to whether a particular given 14 of 53 Shridhar Sutar 15 wp(L)-1261.17.doc contract is a contract for sale of goods or is a works contract. Ultimately, the terms of a given contract would be determinative of the nature of the transaction, whether it is a "sale" or a "works contract". Therefore, this question has to be ascertained on facts of each case, on proper construction of terms and conditions of the contract between the parties."

69. Considered on the touchstone of the aforesaid two Constitution Bench decisions in Builders' Assn. And Gannon Dunkerley (2), we are of the convinced opinion that the principles stated in Larsen and Toubro as reproduced by us hereinabove, do correctly enunciate the legal position. Therefore, "the dominant nature test" or "overwhelming component test" or "the degree of labour and service test" are really not applicable. If the contract is a composite one which falls under the definition of works contracts as engrafted under clause (29-A)(b) of Article 366 of the Constitution, the incidental parts as regards labour and service pales into total insignificance for the purpose of determining the nature of the contract."

## REASONS

24. The respondents read and referred the policy, and the clarification issued by way of FAQ's submissions recorded from time to time. It is clarified in question No.18 that policy is made for procurement of only goods produces and services rendered by MSEs. However, traders are excluded from the purview of "Public Procurement Policy". This was to the question whether this policy is applicable for work/falling activities also. There is no issue, 15 of 53 Shridhar Sutar 16 wp(L)-1261.17.doc therefore, the benefits of this policy under the Act is required to be given to the procurement of goods produced by the services rendered by enterprises. Therefore, admittedly, not applicable to the traders and even to the works contract and/or trading activities.

25. All the parties are aware of the concept of the "works contract", which is recognised specially "for such contract of engineering, procurement and construction contract" (including lump-sum package). The nature of work/tender invited, itself shows that the contract in question is to design engineering manufacturing, procurement and supply. The scope of the contract definitely falls within the ambit of works contract.

26. Respondent No.3, admittedly submitted the tender, though being an "enterprise" as contemplated under the Act and claimed all the benefits of related policy claiming which, in view of the specific provision not applicable and an expandable to the nature of work so invited.



27. After considering the above admitted position, and the law, the tender work falls within the ambit of "works contract", 16 of 53 Shridhar Sutar 17 wp(L)-1261.17.doc Respondent No.2 could not have awarded the contract to Respondent No.3. Based upon the so called memorandum/clarification issued by Respondent No.4. The position of law including Section 2 and Section 11 of Micro Act, makes it clear that the benefit and/or preference required to be given under the Act and policy only on the nature of works falls within the ambit of goods and services which are manufactured and reproduces by the enterprise. The nature of contract should be for sale of goods and such services. The composite nature of contract falls within the ambit of "works contract". Respondent No.3, therefore, is not entitled to get the benefit of this Act. Respondent No.2 has awarded the contract by giving benefit of this Micro Act, which in our view is impermissible and contrary to the policy so declared under the Micro Act. The memorandum and clarification, even if issued by Respondent No.4, is unacceptable in view of the specific judgment given by the High Court of Allahabad (supra) and Delhi High Court (supra) apart from clear provisions of law of Micro Act and the policy so declared and interpreted in those judgments.

17 of 53 Shridhar Sutar 18 wp(L)-1261.17.doc No total bar of Judicial review and interfere in Commercial Contract tender matter.

28. The memorandum cannot overwrite and/or period over the provisions of act and the judgments so delivered by the High Court, directly on the issue and the provisions in question. The judgment so cited by the learned Counsel appearing for Respondent No.2 Punjab and Haryana High Court (supra) is distinguishable on facts itself, as it was the contract for procurement of goods only and not the case of works contract like the present one. The submissions based upon Delhi High Court (supra) and Punjab and Haryana High Court (supra), that finding once participated in the tender proceedings, the petitioners ought not to have been permitted to challenge the contract so awarded to Respondent No.3 who is successful bidder in the contract is also unacceptable. We are not inclined to accept this, as in the present case, the intention to award of the contract is contrary to the provisions of the Micro Act and the policy so declared. Apart from the judgments and the decisions so announced on the act by Allahabad and Delhi High Courts. The stated concession of law and not of fact, is impermissible. Mere participation is no bar to challenge illegal and arbitral action even in commercial contract 18 of 53 Shridhar Sutar 19 wp(L)-1261.17.doc with the State/authority. The award of such contract to ineligible contractor (Respondent No.3) Their clarification, basically on question No.18 as reproduced above makes it very clear that State policy is not applicable to the "works contract" and/or to the traders This is the case which falls within the ambit of "works contract".

29. The Apex Court in M/s. CRRC Corporation Ltd. Vs. Metro Link Express for Gandhinagar & Ahmedabad (MEGA) Company Ltd.1 has interpreted the tender conditions and the eligibility criteria and set aside the High Court order. The reference was made to Afcons Infrastructure Ltd. (Supra), Montecarlo Ltd.(Supra).

30 Therefore, keeping in mind the Supreme Court Judgments (supra) read and referred by the Counsel appearing for Respondents and as those Supreme Court judgments itself makes the position clear that if the Act and/or award of such contract/tender is based upon illegality and/or

perversity and 12017(6) SCALE 345 19 of 53 Shridhar Sutar 20 wp(L)-1261.17.doc arbitrary, there is no bar for judicial review to interfere in such tender matter even at this stage. Undisputedly, present one is a composite contract for supply and installation. There is no separate contract entered into for installation and/or for labour and service and/or for products/goods. This is not a sale of goods/charter simplicitor.

31 To sum up, the provisions of Micro Act and the policy are not applicable to work order. Hence, Respondent No.2 could not have taken any decision. Therefore, the decision of Respondent No.2 to award the tender to Respondent No.3 is arbitrary and illegal.

Per Justice Anuja Prabhudessai, J.

32 I have perused the judgment authored by Mr. Anoop V. Mohta, J. While agreeing with the view and conclusion arrived at by my learned Brother Judge, I prefer to record my additional reasons as under:-

The petitioner no.1 is a Company registered under the provisions of the Companies Act. The petitioner no.2 is a shareholder of the petitioner no.1 Company. Though the 20 of 53 Shridhar Sutar 21 wp(L)-1261.17.doc petitioners herein had raised several challenges in the writ petition filed under Article 226 of the Constitution, they have restricted their challenge mainly to the validity of clause 15.5 of the tender document and the consequent decision of the respondent no.2 to permit the respondent no.3 to match the petitioners L1 bid and to award the tender contract to the respondent no.3. The petitioners have also sought a direction against the respondent no.2, to award the tender to the petitioner no.1, being declared as L1.

33 The principles to be applied in judicial review of administrative decision, specifically those relating to accepting of tender and award of contract have been considered by the three Judge Bench of the Apex Court in Tata Cellular vs. Union of India<sup>2</sup>. These principles have been reiterated by the Apex Court in Directorate of Education & Ors. vs. Educomp Datamatics Ltd.<sup>3</sup> as :-

9. It is well settled now that the courts can scrutinise the award of the contracts by the government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the 2 1994 (6) SCC 651 3 (2004) 4 SCC 19 21 of 53 Shridhar Sutar 22 wp(L)-1261.17.doc power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular vs. Union of India [1994 (6) SCC 651]. After examining the entire case law the following principles have been deduced. "94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action. (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary

expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts. (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-

administrative sphere. However, the decision must not only be tested by the application of 22 of 53 Shridhar Sutar 23 wp(L)-1261.17.doc Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides. (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

[Emphasis supplied]

10. In *Air India Limited vs. Cochin International Airport Limited* [2000 (2) SCC 617], this Court observed:

"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is 23 of 53 Shridhar Sutar 24 wp(L)-1261.17.doc found vitiated by mala fides, unreasonableness and arbitrariness." [Emphasis supplied]

11. This principle was again re-stated by this Court in *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation & Ors.* [2000 (5) SCC 287]. It was held that the terms and conditions in the tender are prescribed by the government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the one prescribed in the earlier tender invitations.

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free

hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, 24 of 53 Shridhar Sutar 25 wp(L)-1261.17.doc discriminatory or mala fide."

34 In Afcons Infrastructure Ltd. (supra), the Apex Court has held that:-4 "13... a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere . The threshold of mala fides, intention to favour some one arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.

...

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The Constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is malafide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

25 of 53 Shridhar Sutar 26 wp(L)-1261.17.doc 35 While concurring with the aforesaid statement, the Apex court in Montecarlo Ltd, versus NTPC Ltd (supra) has held that:

"24 ...In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and some times third party assistance from those unconnected with the owners organization is taken. This ensures objectivity. Bidders expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessments, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic... There is multiprong complex approach; highly technical in nature. The tenders were public largessee is put to auction stand on a different compartment... Exercise of powers of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the melodies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or sub serves the purpose for which the tender is 26 of 53 Shridhar

Sutar 27 wp(L)-1261.17.doc floated, the court should follow the principle of restraint."

36 The controversy in the present case needs to be considered on the touchstone of these well-settled principles. Reverting to the facts, the respondent no.2 which is a public sector enterprise had issued tender being no. CMM/HMP/23-70-10-087 for the purpose of design and engineering, procurement, manufacture, inspection, testing, supply, erection and commissioning of "fire water spray" system for Reactor Auxillary Building and Control Building, the nuclear plants located at Kakrapar near Surat, Gujrat and Rawatbatta in Kota District, Rajasthan. As per the said tender, the bidders intending to participate in the bid were required to meet the technical criteria, financial criteria and evaluation criteria as detailed in Appendix X of Section A to the said tender document.

37 The Respondent no. 2 being a public sector undertaking extended the benefits under MSMED Act and Public Procurement Policy, 2012 to the MSEs registered under the Act. Clause 15.5 of the tender e Clause of the tender reads thus:-

27 of 53 Shridhar Sutar 28 wp(L)-1261.17.doc "15.5 Purchase Preference for supply of goods or services as per new Public Procurement Policy for Micro & Small Enterprises (MSEs) under Micro, Small and Medium Enterprises Development Act, 2006 (Subject to meeting qualifying requirement pas per clause 2.0) As per the provisions of MSEs Policy, the participating bidder registered under MSEs Act in a tender of supply of goods or services, quoting price within the band of L1+15% would be allowed to supply a portion of the requirement by bringing down their price to the L1 price, in a situation where L1 price is from someone other than an MSE. Such MSEs would be allowed to supply upto 20% of the total tendered value. In case of more than one such eligible MSE, the supply will be shared proportionately. Further, out of 20% allocation allocation, a sub-target of 4% (i.e. 20% out of 20%) will be earmarked for procurement from MSEs to participate in the tender process or meet the tender requirements and the L1 price,the 4% sub-target for procurement ear-marked for MSEs owned by SC/ST entrepreneurs will be met from other MSEs proportionately.

In case a tender item is non-splitable or non-divisible, MSE quoting price within the price band of L1-Price (Other than MSE) +15% may be awarded for full/complete value of supplies, subject to matching of L1 price.

The MSEs who are interested in availing 28 of 53 Shridhar Sutar 29 wp(L)-1261.17.doc themselves of these benefits, will enclose with their offer the proof of their being MSE registered with any of the agencies mentioned in notification No.503 dated 26.3.2012, as printed in the Gazette of India indicated below:

- (i) District Industries Centres,
- (ii) Khadi & Village Industries Commission.
- (iii) Khadi & Village Industries Board.
- (iv) Coir Board.

(v) National Small Industries Corporation.

(vi) Director of Handicraft and handloom

(vii) Any other body specified by Ministry of MSME.

The MSEs must also indicate the terminal validity date of their registration. Failing of the above requirements, such offers will not be eligible for consideration of benefits detailed in notification No.503 dated 26.3.2012, as printed in the Gazette of India.

The contractor on whom the contract may be entered into against this tender shall furnish the Purchaser, the details of the sub-contractors meeting any part of contract execution herein and who qualify as MSE's as per the Micro, Small and Medium Enterprises Development Act, 2006 and amendments to the same."

38 The petitioner no.1 as well as the respondent no.3 submitted their respective bids. The price bids were opened on 22nd February, 2017. The petitioner no.1 was declared as L1 (the 29 of 53 Shridhar Sutar 30 wp(L)-1261.17.doc lowest bidder) with a price bid of Rs.21,81,45,011 whereas the Respondent no.3 was declared as L2 with a price bid of Rs.23,19,75,000/. Since the petitioner no.1 is not a MSE, the respondent no.2 called upon the respondent no.3, a registered MSE, to match the price quoted by the petitioner no.1. The Respondent no.3, agreed to meet the price bid of L1. The Respondent no.2 therefore took a decision to award the tender contract to the Respondent no.3. The petitioners have challenged this decision mainly on the ground that the contract being a work contract and not for procurement of goods and services, the provisions of Micro, Medium, Small Enterprises (MSME) Act and the policy framed thereunder are not applicable. The petitioner therefore claims that the decision of Respondent no.2 to extend the benefit under MSME Act and allot the tender contract to the respondent no.3 is arbitrary, irrational and illegal. 39 In order to appreciate the controversy, it would be advantageous to refer to the relevant provisions of the MSMED Act, 2006, which has been enacted with an object to provide for facilitating the promotion and development and enhancing the 30 of 53 Shridhar Sutar 31 wp(L)-1261.17.doc competitiveness of micro, small and medium enterprises. Sections 9 and 11 which are relevant to decide the controversy read thus:

9. Measures for Promotion and Development:. The Central Government may, from time to time, for the purposes of facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises, particularly of the micro and small enterprises, by way of development of skill in the employees, management and entrepreneurs, provisioning for technological upgradation, marketing assistance or infrastructure facilities and cluster development of such enterprises with a view to strengthening backward and forward linkages, specify, by notification, such programmes, guidelines or instructions; as it may deem fit.

....

11. Procurement Preference Policy- For facilitating promotion and development of micro and small enterprises, the Central Government or the State Government may, by order notify from time to time, preference policies in respect of procurement of goods and services, produced and provided by micro and small enterprises, by its Ministries or departments, as the case may be, or its aided institutions and public sector enterprises.

40 A plain reading of these provisions clearly indicate that 31 of 53 Shridhar Sutar 32 wp(L)-1261.17.doc the MSMED Act empowers the Government to notify preference policies for procurement of goods and services produced and provided by MSEs, by its Ministries, Departments and Public Sector Undertakings. In exercise of these powers, the Central Government notified the Public Procurement Policy of 2012 in respect of procurement of goods and services produced and provided by Micro and Small Enterprises. Clauses 3 and 6, of the Public Procurement Policy 2012, read thus:-

"Clause 3. Mandatory procurement from micro Small and Enterprises. - (1) Every Central Ministry or Department or Public Sector Undertaking shall set an annual goal of procurement from Micro and Small Enterprises from the financial year 2012-13 and onwards, with the objective of achieving an overall procurement of minimum of 20 per cent, of total annual purchases of products produced and services rendered by Micro and Small Enterprises in a period of three years.

(2) Annual goal of procurement also include sub- contracts to Micro and Small Enterprises by large enterprises and consortia of Micro and Small Enterprises formed by National Small Industries Corporation.

(3) After a period of three years i.e. from 1st April 2015, overall procurement goal of minimum of 20 per cent shall be made 32 of 53 Shridhar Sutar 33 wp(L)-1261.17.doc mandatory.

(4) The Central Ministries, Departments and Public Sector Undertakings which fail to meet the annual goal shall substantiate with reasons to the Review Committee headed by Secretary (Micro, Small and Medium Enterprises), constituted in ministry of Micro, Small and Medium Enterprises, under this Policy.

Clause 6. Price quotation in tenders. - (1) In tender, participating Micro and Small Enterprises quoting price within price band of L1+15 per cent shall also be allowed to supply a portion of requirement by bringing down their price to L1 price in a situation where L1 price is from someone other than a Micro and Small Enterprise and such Micro and Small Enterprise shall be allowed to supply upto 20 per cent of total tendered value.

(2) In case of more than one such Micro and Small Enterprise, the supply shall be shared proportionately (to tendered quantity).

41 The learned Counsel for the respondent no.3 has placed on record the office memorandum as well as the press release dated 12th February, 2015 issued by the Government of India, Ministry of Micro, Small and Medium Enterprises, wherein the word "upto" in clause 6 of the policy are substituted by phrase "at least". The Central Government has thus clarified that there is 33 of 53 Shridhar Sutar 34 wp(L)-1261.17.doc no embargo on CPSUs to take more than 20% supplies from MSEs as per their previous procurement pattern on case to case basis. 42 A plain reading of these provisions clearly indicate that every Central Ministry, Departmental or Public Sector undertaking is under a mandate to procure goods produced and services rendered by the Micro Medium Enterprises. The Central Government has enlisted total 358 items in Appendix, which have been reserved for exclusive purchase from MSEs. Clause 6 of the policy allows MSEs participating in tender process and qualifying in price band of L1 + 15% to supply at least 20% of the total tender value provided they bring down their price to L1 price. Thus there can be no dispute that the Ministries, its Departments and Public Undertakings are under obligation to implement the provisions under the Act and achieve the objectives of the Act and the policy.

43 The provisions of Section 11 of the Act and clause 3 of the Policy envisage procurement of "goods and services" produced and provided by MSEs. The provisions of the Act and the Policy 34 of 53 Shridhar Sutar 35 wp(L)-1261.17.doc are therefore applicable to procurement of "goods and services" produced and provided by MSEs. Answer to FAQ No.18 also makes it abundantly clear that the policy is meant for procurement of only goods produced and services rendered by MSEs. However, traders are excluded from purview of Public Procurement Policy.

44 The provisions of the Act would therefore not be applicable to work contracts, which are essentially contracts of composite nature involving supply of goods as well as labour/services etc. Similar view has been taken by Delhi High Court in M/s. Shree Gee Enterprises (supra) wherein it has been held that the policy is not applicable to work contracts simplicitor and that it is only meant for goods produced and services rendered by MSEs.

45 In Rahul Singh (supra), the Allahabad High Court has held that provisions of Section 11 of the 2006 Act relate to the procurement of goods and services produced and provided by MSEs. It was further held that:

35 of 53 Shridhar Sutar 36 wp(L)-1261.17.doc " 6. A reconstruction of Section 11 bears out that it empowers the Central Govt. to formulate preference policies in respect of

(a) procurement of goods produced by MSE and (b) services provided by a MSE. The words "Services Provided" as used in the said provision must necessarily be read as disjunctive to the expression "Goods Produced". It cannot possibly be disputed that a "Work Contract" forms completely different and distinct genre then a contract for supply of goods, or for that matter a contract for providing services. A works contract is essentially a indivisible contract which may involve not just the supply of goods but also the provision of labour and service. ... In our considered opinion, the provisions of 2006 Act and more particularly Section 11 thereof , only contemplates and brings within its hold contracts for supply of goods and provision of service simplicitor. ... -



"7. No provision of the 2006 Act bids us to deconstruct a works contract into elements relating to supply of goods and provision of service. Neither section 11 nor the Public Procurement Policy, 2012 appears to envisage a composite and distinct category of contract such as a work contract actually is."

46 Considering the scope and object of the Act and the relevant provisions under the Act and the Public Procurement Policy, we are of the considered view that the purchase preference 36 of 53 Shridhar Sutar 37 wp(L)-1261.17.doc is restricted only to "goods and services" provided by MSEs. 47 The next question, which falls for consideration is whether the tender contract issued by the Respondent no.2 pertains to procurement of Goods and Services within the meaning of the Act or whether it is a work contract and is excluded from the purview of Public Procurement Policy. 48 The term "Goods" has been defined under section 2(f) of the MSMED Act as under:

"Goods" means every kind of movable property other than actionable claims and money"

49 The Respondent No.2 has placed on record an Office Memorandum dated 9th November, 2016, issued by the Government of India. A perusal of the said Office Memorandum indicates that in view of the number of clarifications sought by the procuring agencies, relating to providing of benefits of "Goods" & "Services", the matter was placed before the Review Committee. The Committee has decided that the definition of Goods and Services as provided in the Public Procurement Bill, 2012 37 of 53 Shridhar Sutar 38 wp(L)-1261.17.doc prepared by Ministry of Finance Department of Expenditure should be accepted for PP Policy. The said definition reads thus:

"Goods" includes all articles, material, commodity, livestock, furniture, fixtures, raw material, spare parts, instruments, machinery, equipment, industrial plant, vehicles, aircrafts, ships, railway rolling stock assemblies, sub-assemblies, accessories, a group of machines comprising an integrated production process of such other categories of goods or intangible, products like technology, transfer, licenses, patents or other intellectual or intangible, products like technology transfer, licenses patents or other intellectual properties (but excludes, books, publications, periodicals etc for a library) procured or otherwise acquired by a procuring entity.

Procurement of goods may include certain small work or some services, which are incidental or consequential to the supply of such goods, such as transportation, insurance, installation, commissioning, training and maintenance.

"Service" means any subject matter of procurement other than goods or works, except those incidental or consequential to the service, and includes physical, maintenance, professional, intellectual, training, consultancy and advisory services or any other service classified or declared as such by a procuring entity but does not include appointment of an individual made under any law, rules, regulations or order issued in this behalf. "Subject matter of procurement" means any item of procurement whether in the form or 38 of 53 Shridhar Sutar 39 wp(L)-1261.17.doc goods, services or works or a combination thereof.

50 In the instant case, the question whether the nature of work envisaged by the tender is in the nature of procurement of goods or whether it is a work contract would largely depend on the terms of the contract and the nature of the obligation to be discharged thereunder. It is therefore not necessary to delve into the powers of the Review Committee to accept the definition Goods and Services as provided in the Public Procurement Bill, 2012 for PP Policy. or to consider whether the definition accepted by the Review Committee is in conformity with the specific provision and the object and scope of the parent Act. 51 Now coming to the terms of the tender, from a plain reading of the tender it is evident that the tender was not invited for installing fire extinguishers (wall type), as specified under item no. 117 of the Appendix to the MSMED Act. The tender was invited for- 'Design & Engineering,' Manufacture, Procurement, Supply, seismic qualification/testing, inspection, examination, testing, erection, commissioning, performance guarantee (PG), 39 of 53 Shridhar Sutar 40 wp(L)-1261.17.doc handing over of Fire water spray system including piping, flanges, manual valves, NPCIL approved HILTI make anchor fasteners, electrically operated valves (EV), Deluge valves assemblies (DV) including its Control and Instrumentation with fire detectors, JBs, LCP etc and other specialties, supports, Mandatory spares and special tools & tackles, if any for Medium Velocity Water Spray System (MVWS) and Multiple Control Zonal Spray System (MCZS) beyond terminal point indicated in the tender specification in RAB and CB for KAPP- 3 & 4 and RAPP-7 & 8 (Tender).

52 It will be advantageous to reproduce some of the relevant clauses of the tender to understand the nature and scope of the contract. Detailed scope of facilities and work for fire water spray system ss spelt out in clause 4.1. of general conditions of Engineering Procurement and Construction Contracts (GCC) and clause 6.1 of General Technical Requirements read as under:-

#### 4.1. Scope of Facilities :

4.1.1. Unless otherwise expressly limited in the Technical Specifications, the Contractor's obligations cover the detailed design and engineering of the facilities, 40 of 53 Shridhar Sutar 41 wp(L)-1261.17.doc supply of all Plant and Equipment (covering design, engineering, procurement, manufacture, Quality Assurance, testing, packing and forwarding transportation and delivery at site and the performance of all Installation services required for unloading and storage at site, erection/ installation, associated civil works, per-

commissioning / commissioning and Performance Testing of the Facilities) in accordance with the plans procedures, specifications, drawings, codes and any other documents as specified in the Technical Specifications, as lump-sum Engineering, Procurement and Constructions (EPC) package contract. Such specifications include, but are not limited to, the provisions of Supervision and Engineering services, Supply of Labour, Transportation (Including without limitation, unloading and hauling to, from and at the Site), storage Contractor's Equipment, Constructions Utilities and Supplies, Structures and Facilities, Erection and Commissioning, Consumables, equipment required for inspection and testing and Commission, Spare and Accessories."

#### 6.1. Detailed Scope of Work for Fire Water Spray System:-

6.1.1.a) Design & Engineering- The scope of design & engineering covers from conceptual design to detailed engineering including seismic analysis and preparation of drawing and documents covering but not limited to development of design 41 of 53 Shridhar Sutar 42 wp(L)-1261.17.doc basis, piping design, philosophy, design / sizing criteria, design calculation, design parameters finalization, preparation of Process and Instrumentation Diagrams (PIDs), valve list, development and finalization of control and logic requirements, redundancy & design margins requirements and material selection of fire water spray system piping, manual valves, power operated valves, deluge valves, flanges, nozzles, strainers, specialities , sizing and selection of pipe supports.

...

b) Minor Engineering- Scope of minor Engineering covers engineering modification of piping near interface piping, at terminal points, modification or re-routing in piping layout its associated piping supports including EP location due to interference with other system components & structures. Routing of small diameter auxiliary piping (less than and including 50 NB) I tubing including supports. It is expected that 10 % of the piping supports may need modifications post stress analysis.

c) Supply- Scope of supply includes design & manufacture of nozzles, pipes & fittings, valves, flanges, specialties, control panels, Instruments, tubing, structural steel, fasteners, anchor bolts, consumables required for execution of this contract covering all activities from material induction, manufacturing process, quality surveillance, inspection and testing, carrying out and witnessing 42 of 53 Shridhar Sutar 43 wp(L)-1261.17.doc non-destructive testing and performance testing of nozzles and deluge valve & motorised valves at manufacturer's works, packing, ocean shipment and marine insurance and clearance through Indian port of entry in case of imported equipment, inland transportation, Inland transit insurance, delivery to site, unloading, taking delivery, site storage, receiving all the drawings and documents from vendors, preservation during transit & storage at site till erection. All associated instruments, installation, control panel engineering and testing including seismic testing, documents like test procedure, test reports, drawings are also a part of supply..

d) Erection/ Construction- Scope of erection and construction covers material handling during erection/ construction, transportation from Contractor's storage area to erection site, Inspection, examination, testing before and during erection, complete erection, site testing after erection, flushing of piping after completing erection, with provision of required temporary piping, supports, instruments and system normalisation after testing & flushing, installation of panel and its functional test, identification and establishing QA program for site works in line with PURCHASER's QA Program, preparation of CA documents, CA Plans, work procedures for erection & construction procedures for all structures and systems as specified herein. Erection and construction of all fire -water spray systems and structures in such a manner so as to render the system complete for 43 of 53 Shridhar Sutar 44 wp(L)-1261.17.doc safe & efficient operation of the plant. Preparation of as-built drawings for all fire water spray systems, including field routed piping. Preparation of construction completion reports. Collection and documentation of all testing and inspection data.

Piping Erection- Scope of piping erection covers handling, transportation, shifting, installation, alignment, fixing of pipe and pipe elements, valves, specialties with supports.

Fixing of U-damps along with bolts, nuts, locknuts, plain washers, taper washers etc.

...

e) Estimation of Bill of Quantity (BOQ) for piping supports - Purchaser will be providing the typical support configurations to successful bidder. Estimation of Bill of Quantity (BOQ) for piping supports in terms of numbers and size & lengths of support members, U- Clamps, nuts, bolts, washers is in the scope of Contractor.

f) Quality Assurance & Testing-Tenderer shall prepare and submit QA Plan for Purchasers approval. Tenderer shall carry out all Quality Surveillance activities as per approved QA plans, which will be prepared by vendor based on sample OAP, drawings, data sheets and technical specifications enclosed with the tender.

g) Painting- Painting including supply, handling, surface preparation, application 44 of 53 Shridhar Sutar 45 wp(L)-1261.17.doc of primer and final paint.

h) Commissioning of vendor specific systems and equipment- Scope of commissioning & testing include preparation of detailed logical and sequential programme of commissioning activities, commissioning procedures. Commissioning of all the system, structure and equipment to verify the design Intent, preparation of commissioning reports. Carryout any modification required in the system, structure and equipment based on commissioning feedback.

....

k) Seismic qualification- Seismic qualification is required for piping.

including supports, panels, power operated valves of fire water spray system for the area identified in RAB & CB as per PIO, Power operated valves (Deluge valves assembly & Electrically operated valves with actuator) , instruments and panels as specified shall be qualified for seismic loads under SSE and OBE, as per NPCIL specification no PP-P-1819 titled "Technical Specification for Methods & Procedures for seismic qualification of valves, panels, devices, rotating equipments, tanks, vessels, piping and supports. ...

The contractor shall submit design, analysis and test procedure to Purchaser for approval. For the systems engineered by the contractor, the piping stress I seismic analysis shall be carried out by the contractor.

53 A perusal of these clauses reveal that the contract 45 of 53 Shridhar Sutar 46 wp(L)-1261.17.doc under tender is a composite contract, which involves supply of goods, as well as erection, installation and commissioning in accordance with the plans/ drawings, procedures, and specific

specifications. The nature of work requires expertise, special skill in designing, engineering and various other technical aspects in erecting, installing, commissioning and making the firewater spray system operational and functional. The tender contract of this nature is not for sale of goods simplicitor, but is a composite contract, which has to be treated as work contract. 54 In this regard it would be advantageous to refer to the decision of the Apex Court in *Larsen & Toubro Ltd. vs. State of Karnataka*<sup>5</sup> wherein it was observed as under:

"60. Whether the contract involved a dominant intention to transfer the property in goods, in our view, is not at all material.

It is not necessary to ascertain what is the dominant intention of the contract. Even if, the dominant intention of the contract is not to transfer the property in goods and rather it is rendering in service, or the ultimate transaction is transfer of immovable property, then also it is open to the State to levy Sales Tax on the materials used in such contract if it otherwise has 5 (2014) 1 SCC 708 46 of 53 Shridhar Sutar 47 wp(L)-1261.17.doc elements of work contract....

72. ... even in a contract, besides the obligation of supply of goods and material and performance of labour and services, some additional obligations are imposed, such contract does not cease to be work contract, (for) the additional obligations in the contract would not alter the nature of the contract so long as the contract provides for a contract of work and satisfies the primary description of work contract.... Once the characteristics or elements of work contract are satisfied in a contract, then irrespective of additional obligations, such contract would be covered by the term "works contract" to contract for labour and service only."

55 In *Kone Elevators Pvt. Ltd. vs. State of Tamil Nadu*<sup>6</sup> the issue before the larger Bench of the Apex Court was whether a contract for manufacture, supply and installation of lifts in a building is a contract for sale of goods or a work contract. The Apex Court upon considering the principles laid down in *Larsen & Toubro* has held that :

"46. At this juncture, it is condign to state that four concepts have clearly emerged.  
They are:

(i) the works contract is an indivisible contract but, by legal fiction, is divided into 6 (2014) 7 SCC 1.

47 of 53 Shridhar Sutar 48 wp(L)-1261.17.doc two parts, one for sale of goods, and the other for supply of labour and services;

(ii) the concept of "dominant nature test" or, for that after, the "degree of intention test" or overwhelming component test" for treating a contract as a works contract is not applicable;

(iii) the term "works contract" as used in clause (29-A) of Article 366 of the Constitution takes in its sweep all genre of works contract and is not to be narrowly construed to cover one species of contract to provide for labour and service alone; and

(iv) once the characteristics of works contract are met with in a contract entered into between the parties, any additional obligations incorporated in the contract would not change the nature of the contract.

56 The Apex Court whilst holding that the principle stated in Larsen & Toubro Ltd. correctly enunciate the legal position, held that:

"69..... therefore, "the dominant nature test" or "overwhelming component test" or "the degree of labour and service test" are really not applicable. If the contract is a composite one, which falls under the definition of works contract as engrafted under clause (29-A) (b) of Article 366 of the Constitution, the incidental part as regards labour and service pales into total insignificance for the purpose of determining the nature of the contract."

48 of 53 Shridhar Sutar 49 wp(L)-1261.17.doc ....

"70. ...We may hasten to add that this position is stated in respect of a composite contract which requires the contractor to install a lift in a building. It is necessary to state here that if there are two contracts, namely, purchase of the components of the lift from a dealer, it would be a contract for sale and similarly, if a separate contract is entered into for installation, that would be a composite contract, for it is not a sale of goods/chattel simpliciter. It is not chattel sold as chattel or, for that matter, a chattel being attached to another chattel. Therefore, it would not be appropriate to term it as a contract for sale on the bedrock that the components are brought to the site i.e. building, and prepared for delivery"....

57 In the instant case, as stated earlier, the contract under tender is a composite contract for supply of goods as well as installation of fire water spray system, which is a permanent fixture. The goods supplied under the contract are eventually assembled and installed at site and become part of the permanent fixture. The said contract satisfies fundamental characteristics of work contract and hence cannot be considered as a contract simplicitor for sale of goods and services.

49 of 53 Shridhar Sutar 50 wp(L)-1261.17.doc 58 As stated earlier, the MSMED Act and the Public Procurement Policy is applicable only to procurement of goods and services. The contract under tender not being a contract for sale of goods and predominantly a work contract, the benefits of the Act and the Policy could not be extended to the MSEs registered under the Act. Clause 15.5 of the tender is therefore not in consonance with the provisions of the MSMED Act and the Policy framed thereunder and does not sub-serve the purpose of the Act and the policy. The said clause is therefore illegal, arbitrary and contrary to the provisions of the policy and the Act. In the light of above, the fact that the petitioner no.1 had not challenged the said clause pales into insignificance, as it is well settled that there is no estoppel against law. Hence, the fact that the petitioner no.1 had not challenged the condition in the tender would not per se entitle the respondent no.2 to extend the benefits under MSMED Act and Public Procurement Policy to the respondent no.3, when the policy itself does not apply to the work contract. 59 It is also pertinent to note that the Petitioner no.1 was

the lowest bidder (L1). He was neither disqualified nor held to be 50 of 53 Shridhar Sutar 51 wp(L)-1261.17.doc ineligible for any other reason. The Petitioner no.1 was not awarded the contract mainly because it was not a MSE. The Respondent no. 3 (L2) was allowed to match the price bid of the petitioner no.1 (L1) solely on the basis of the provisions of MSMED Act and Public Procurement Policy and clause 15.5 of the tender. As stated earlier, the Policy was not applicable to the contract under tender, despite which the respondent no.2 has sought to legislate a benefit to the respondent no.3 which has not been contemplated either by the policy or the Act. The decision of the respondent no.2 to award the tender to the respondent no.3, by taking refuge to clause no.15.5 of the tender is illegal, arbitrary and based upon incorrect reading and interpretation of the Public Procurement Policy. Therefore, awarding the tender to the respondent no.3 would be arbitrary, discriminatory and contrary to the provisions of the Act and the policy.

60 The petitioners have also sought a direction against the respondent no.2 to award contract to petitioner no.1. It is not in dispute that the petitioner no.1 is the lowest bidder. Nevertheless, in terms of clause 16.1 of the tender the purchaser 51 of 53 Shridhar Sutar 52 wp(L)-1261.17.doc i.e. the respondent no.2 herein has right to accept or reject lowest bid in whole or in part without assigning any reasons whatsoever. Even otherwise, merely by the fact of being a lowest bidder he does not acquire any indefeasible right for issuance of contract. Under the circumstances, and particularly considering the nature of work involved, we are of the considered view that it would be appropriate to allow the respondent no.2, who in the circumstances is the best judge, to take the decision as regards the eligibility of the bidder, and to award of the contract to the eligible and suitable bidder.

61 Under the circumstances, and in view of the discussion supra, and taking into consideration the principles laid down by the Apex Court in Tata Cellular (supra), in my considered view this is fit case which warrants judicial interference to the extent of quashing the decision taken by the respondent no.2 to award the tender to the respondent no.3. Hence, the Order:-

- i) The petition is partly allowed.
- ii) The decision of the respondent no.2 to award

the tender to the respondent no.3 is hereby quashed 52 of 53 Shridhar Sutar 53 wp(L)-1261.17.doc and set aside;

iii) We make it clear that we have not quashed the entire tender process and that the respondent no.2 can take appropriate decision as regards award of contract to any eligible bidder;

iv) Rule is made absolute in above terms. No costs.

v) In view of disposal of the writ petition, Notice of Motion (I) No. 288 of 2017 stands disposed of. (ANUJA PRABHUDESSAI, J.) (ANOOP V. MOHTA, J.) 53 of 53