

(2025) 02 SC CK 0747

In the Supreme Court Of India

Case No : Writ Petition (Civil) No. 1301 Of 2021

Lifecare Innovations Pvt. Ltd. & Anr

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 25-02-2025

Acts Referred:

Constitution of India, 1950 — Article 13(3)(a), 14, 19, 32Micro, Small and Medium Enterprises Development Act, 2006 — Section 3, 5, 7, 7(2), 9, 10, 11

Citation : (2025) 02 SC CK 0747

Hon'ble Judges : Pamidighantam Sri Narasimha, J;Sandeep Mehta, J

Bench : Division Bench

Advocate : V Giri, Anil Kaushik, Abhishek Mishra, Shashi Sharma, Rajat Rana, Rahul Narang, Rajinder Singh, K.M Nataraj, Vanshaja Shukla, Apporv Kurup, Amit Kumar B, Mayank Pandey, Amrish Kumar, Vinayak Sharma, Amit Sharma (ii), B.K Satija, Vikrant Narayan Vasudeva, Rohit Lochav, Garima Prasad, Vishnu Shankar Jain, Mani Munjal, Marbiang Khongwir, K.M. Natraj, Mukesh Kumar Maroria, Apoorv Kurup, Mayank Pandey, Vinayak Sharma, Amit Sharma ii, Annirudh Sharma Ii, Vanshaja Shukla, Satyakam, G.M. Kawoosa, Palak Mittal, Pashupathi Nath Razdan, Ketan Paul, Ujala Singh, Vanshika Dubey, Bhavya Pathania,

Final Decision : Disposed Of

Judgement

Pamidighantam Sri Narasimha, J.

1. The petitioner before us, a Micro Enterprise, and its founder Dr. Jitendra Nath Verma, raise two important questions. The first question relates to the 'right' of Micro and Small Enterprises "MSE(s)" to supply 25% of goods and services to be procured by the Government and its instrumentalities under its Procurement Policy. The second issue relates to the legality of 'minimum turnover clauses' prescribed in the Notice Inviting Tenders 'NIT' issued by the Government and its instrumentalities. Determination of these questions required us to consider the 'rights' and duties flowing out of Section 11 of the Micro, Small and Medium Enterprises Development Act, 2006, "MSMED Act/Act" prescribing a Public

Procurement Policy for Micro and Small Enterprises (MSEs) Order 2012 "Procurement Order 2012" and this consideration led us to examine the legal status of the Procurement Order 2012.

1.1 Having examined the legal regime concerning the promotion and development of MSEs, we have come to the conclusion that the Procurement Order 2012 has the force of law and is enforceable. While the Act and the Procurement Order 2012 do not create an 'enforceable right' for an individual MSE, the statutory authorities and administrative bodies created thereunder are impressed with enforceable duties. They are accountable and subject to judicial review. We have also explained how the scope of judicial review in these matters should transcend the standard power of judicial review to issue writs of mandamus to perform the statutory duty and proceed to examine whether the duty bearers, the authorities and bodies are constituted properly and whether they are functioning effectively and efficiently. By ensuring institutional integrity we achieve our institutional objectives.

1.2 Having considered the establishment of the National Board for MSMEs, Advisory Committee, Facilitation Council under the statute, and in particular, the establishment of the Review Committee and the Grievance Cell under the Procurement Order 2012, we have issued specific directions to address the issues arising for consideration and issue necessary guidelines for the effective implementation of the Procurement Order 2012.

2. Brief facts: The brief facts necessary for the disposal of the case are as follows. The first Petitioner is a Micro Enterprise under Section 7 of the MSMED Act, 2006, and operates in the pharmaceuticals and medical biotechnology sector. More specifically, the Enterprise's business involves the manufacturing, development and marketing of healthcare products. The second petitioner, the founder and managing director of the enterprise, is a specialist in the application of 'Liposome Technology' for healthcare, a technology utilised for delivering drugs to the human body. Put simply, this involves enveloping a drug in a bubble made of fats or lipids, which can be dissolved and absorbed directly into the specific site of the body targeted for treatment. Pertinent in the context of this petition is the company's production of a nano-drug called 'Liposomal Amphotericin B Suspension in Saline-Fungisome' ('LAmB'), which is a special form of medication to treat serious fungal infections. The Enterprise claims that LAmB is the only medication in India that treats fungal infection effectively and generates the least amount of toxicity in the kidney compared to other medications formulated and sold by other players in the field. The petitioners state that the Government of India has also recognised LAmB as a critical life-saving drug, and recently, the drug proved instrumental in treating patients suffering from mucormycosis amid the rise of COVID-19.

3. The Enterprise claims that it has attempted to participate in several public procurement processes to supply the drug it manufactures. However, it continuously faces disqualification from participation in the procurement process

evolved by the Central and State Governments and their instrumentalities. The cause for such disqualification is the presence of mandatory minimum turnover clauses, requiring the participants to meet a certain financial threshold in terms of past sales or revenues generated for participation. This requirement disadvantages enterprises such as petitioners since their turnover is bound to be lower than that of their competitors for two reasons. First is obvious, the enterprise would qualify as a Micro Enterprise only when its turnover is lower. Secondly, the turnover of the Enterprise is also bound to be low since it only deals in specialised areas of medical technology and drugs. In contrast, many of its competitors get to factor in their revenue for multiple drugs that they deal in.

4. The petitioners sought exemptions from the said minimum turnover requirement, but the concerned authorities have not granted the same. Consequently, the Enterprise cannot participate as the difference between the required turnovers and the company's turnovers is often huge. In real terms, while the enterprise's average turnover ranges in the band of Rs. 6-7 crores, the NIT issued by Post Graduate Institute of Medical Education & Research, Chandigarh (PGIMER), in 2017 required the bidders to have a minimum turnover of Rs. 20 crores in the three years preceding the NIT and a cumulative turnover of Rs. 200 crores in the same three years.

5. Previously, the Enterprise had filed a writ petition 'CWP No. 2268/2017' before the High Court of Punjab and Haryana, challenging the NIT issued by PGIMER, Chandigarh in 2017. Similar contentions were raised before the High Court, but the writ petition was dismissed by an order dated 05.04.2017. The petitioners filed a Special Leave Petition 'SLP (C) No. 14026/2017' against the dismissal order, and this Court issued notice on 09.05.2017, which is pending disposal.

6. By this petition under Article 32 of the Constitution, the petitioners seek wider directions for all States and their instrumentalities to; a) consider the bids of MSEs irrespective of the minimum turnover clauses in the tenders notification, b) in the alternative, to quash the NITs being contrary to the 2012 Policy 'Notification dated 23.03.2012 as modified by the notification dated 09.11.2018', c) direct the respondents to withdraw or cancel their orders rejecting the Enterprise's bid and, further, d) direct the respondents that any minimum turnover clauses should be confined to revenues received from specific drugs and e) such other orders as deemed necessary.

7. Submissions: Mr. V. Giri, Ld. Senior Counsel for the petitioners submitted that the prescription of such minimum turnover clauses is arbitrary and violative of Articles 14 and 19 of the Constitution because such clauses bear no rational nexus with the object of procuring safe and efficacious medicines. It was submitted that the worth of medicines ultimately procured through the tender is much below the turnovers of many participants. It is also submitted that turnover is not an accurate indicator of the manufacturing capability of the participating bidders, and there is no empirical data to show that turnover has a direct bearing on the manufacturing capability of pharmaceutical companies.

Similarly, the turnover of a pharmaceutical company is no indicator of the efficacy of the pharmaceutical products. Such clauses, therefore, serve no purpose except for unjustly preventing smaller market players with specialised drugs from participating in government tenders. The issue of proportionality of the threshold set by such minimum turnover clauses has been the subject of the circular dated 26.04.2007 issued by the Central Vigilance Commission, where it was stipulated that there should be a nexus between the turnover clause and the value of the product sought. He would submit that this proportionality is totally lacking in the tenders where the petitioners have attempted to participate.

8. It is also submitted that the restriction on the participation of petitioners due to the minimum turnover clause violates the Procurement Order 2012 issued by the Government of India under Section 11 of the Act. While it is mandatory for every government, its ministry, department or instrumentality to procure 25% of their supplies from MSEs, by prescribing minimum turnover clauses, they are circumventing the mandate, thereby defeating the very purpose and object of the policy.

9. Mr. K. M. Natraj, Ld. Additional Solicitor, assisted by Ms. Vanshaja Shukla, Advocate, representing Union of India, submitted that the policy notifications relied upon by the petitioners had been complied with. Year-wise statistics evidencing Government of India procurement from MSMEs is produced evidencing compliance. It is also submitted that the petitioners' claim pertains to specific conditions of a tender, which is purely contractual in nature, and as such invocation of judicial review is impermissible in law. In any case, the learned ASG would submit that there is no arbitrariness in the specification of the mandatory minimum turnover clause in NIT as the government, or its instrumentalities are entitled to assess the capability of the supplier, which is essential, particularly for procurement of drugs. Similar arguments were advanced by other counsels representing other respondent States and Public Sector undertakings.

10. Issues: The following two questions arise for our consideration:

1. Does the MSMED Act, coupled with the Procurement Preference Policy, 2012 mandate procurement of 25 percent of goods and services by the government, and its instrumentalities from the Micro and Small Industrial Enterprises? and

2. Is the prescription of mandatory minimum turnover clause in NITs violative of articles 14 and 19 of the Constitution, provisions of the MSMED Act and the Procurement Preference Policy, 2012?

11. Recognition of MSMEs in India and the enactment of the Micro, Small and Medium Enterprises Development Act, 2006. "Act" From post-modernism to meta-modernism, economies have witnessed a shift from Industries to Enterprises. These enterprises are alluded to as the backbone of emerging economies. Recognising the significant contribution of enterprises, the United Nations observed '2024 Theme: MSMEs and the SDGs' (United Nations) [https://www.un.org/en/observances/micro-small-medium-businesses-day\(2024\)](https://www.un.org/en/observances/micro-small-medium-businesses-day(2024)):

"MSMEs help reduce levels of poverty through job creation and economic growth; they are key drivers of employment, decent jobs and entrepreneurship for women, youth and groups in vulnerable situations. They are the majority of the world's food producers and play critical roles in closing the gender gap as they ensure women's full and effective participation in the economy and in society".

12. In the recent judgement of this court in NBCC (India) Ltd. v. State of West Bengal, 2025 SCC Online 73 this Court noted the historical importance of cottage and small industries for our country and also their real-time contribution as under:

"1. The old value of 'Small is beautiful' ' E.F. Schumacher, 'Small Is Beautiful: A Study of Economics as if People Mattered' (1973)' has not lost its relevance. Recognising the contribution of micro, small and medium enterprises towards economic development, the United Nations declared June 27th as MSME day. MSMEs are said to be the backbone of many economies, including India. This resonates with the statement of the father of our nation, Mahatma Gandhi, declaring that the 'salvation of India lies in cottage and small scale industries'. The Parliament enacted the Micro, Small and Medium Enterprises Development Act, 2006² for facilitating the promotion and development of the enterprises by creating certain rights and duties and establishing a Board, Advisory Committee, and Facilitation Council. Importantly, the Act provided a mechanism for dispute resolution.

[...]

8.2...Statistics indicate that MSMEs provide employment to 62% of the country's workforce, contribute 30% to India's GDP, Contribution Of MSMEs to the GDP' (Press Information Bureau) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2035073> (July 22, 2024) and account for around 45% of India's total exports 'The MSME Revolution: Transforming India's Economic Landscape' (Press Information Bureau) <https://pib.gov.in/PressReleasePage.aspx?PRID=2087361> (Dec 23, 2024). The Indian MSME sector is projected to grow to \$1 trillion by 2028 'MSMEs: The Backbone of India's Economic Future' (Invest India) <https://www.investindia.gov.in/team-india-blogs/msmes-backbone-indias-economic-future> (June 28, 2024). Moreover, MSMEs play a crucial role in promoting rural development, women's employment, and inclusive growth. 19.5% of total MSMEs 'Women-led Enterprises' (Lok Sabha Digital Library) <https://eparlib.nic.in/bitstream/123456789/2502792/1/AU3648.pdf> (Aug 10, 2023) and 70% of informal micro-enterprises are owned by women "Participation of Females in MSMEs' (Lok Sabha Digital Library) <https://eparlib.nic.in/bitstream/123456789/2974207/1/AU1128.pdf> (Feb 8, 2024)". There is undoubtedly a global consensus regarding the indispensable importance of MSMEs".

13. The first statutory recognition of MSMEs, measures for their protection, promotion and grant of special benefits was through the Interest on Delayed

Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993. 'Repealed by MSMED Act, 2006 Act' The 1993 Act was repealed by the comprehensive and promising regime under the present Micro, Small and Medium Enterprises Development Act in 2006, which not only created different classes of enterprises under Section 7, but also established an Advisory Committee to advise the Central government regarding the classification of enterprises, a National Board for MSMEs under Section 3, the functions of which are provided in Sections 5 and 6, inter alia to deal with, "factors affecting the promotion and development of micro, small and medium enterprises and review the policies and programmes of the Central Government" and to "make recommendations on matters referred to it by the Central Government which are necessary or expedient for facilitating the promotion and development and enhancing the competitiveness of the micro, small and medium enterprises". Section 9 of the Act enables the Central Government to adopt measures that may be necessary for the promotion, development, and enhancement of the competitiveness of MSMEs. Section 10 speaks of progressive credit facilities for these MSMEs. Section 11 is the provision for procurement preference policy. Section 11 is important for our consideration. Under this provision, the Central or State governments notify the preference policies with respect to the procurement of goods and services produced and provided by micro and small enterprises by its ministries, departments, aided institutions, or public sector enterprises. Section 11 is reproduced hereinbelow for ready reference:

"Section 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."

14. Section 11 is the executive power vested in the Central and State Governments to formulate policies for achieving the purpose and object of the Act. In fact, the statement of objects and reasons of the Act declares that:

"Added to this, a growing need is being felt to extend policy support for the small enterprises so that they are enabled to grow into medium ones, adopt better and higher levels of technology and achieve higher productivity to remain competitive in a fast globalisation area. Thus, as in most developed and many developing countries, it is necessary that in India too, the concerns of the entire small and medium enterprises sector are addressed and the sector is provided with a single legal framework. As of now, the medium industry or enterprise is not even defined in any law.

2. In view of the above-mentioned circumstances, the Bill aims at facilitating the promotion and development and enhancing the competitiveness of small and

medium enterprises and seeks to-

(a) provide for statutory definitions of "small enterprise" and "medium enterprise".

...

(g) empower the Central and State Governments to notify preference policies in respect of procurement of goods and services, produced and provided by small enterprises, by the Ministries, departments and public sector enterprises;

..."

15. In exercise of power under Section 11, the Central Government, through its Ministry of Micro, Small and Medium Enterprises, notified the Public Procurement Policy for Micro and Small Enterprises (MSE's) Order 2012.

16. Clauses 2, 3, 5, 8, 11, 12 and 13 of the Procurement Order 2012 are relevant for our purpose, and they are extracted hereinbelow for ready reference:

"Cl. 2. Short title and commencement. -

(1) This Order is titled as 'Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2012'.

(2) It shall come into force with effect from 1st April 2012.

Cl. 3. Mandatory procurement from Micro and Small 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 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.

Cl. 5. Reporting of targets in Annual Report. ?

(1) The data on Government procurements from Micro and Small Enterprises is vital for strengthening the Policy and for this purpose, every Central Ministry or

Department or Public Sector Undertaking shall report goals set with respect to procurement to be met from Micro and Small Enterprises and achievement made thereto in their respective Annual Reports.

(2) The annual reporting shall facilitate in better understanding of support being provided by different Ministries or Departments or Public Sector Undertakings to Micro and Small Enterprises.

Cl. 8. Annual Plan for Procurement from Micro and Small Enterprises on websites:-

The Ministries or Departments or Public Sector Undertakings shall also prepare Annual Procurement Plan for purchase and upload the same on their official website so that Micro and Small Enterprises may get advance information about requirement of procurement agencies.

Cl. 11. Reservation of specific items for procurement. ?

To enable wider dispersal of enterprises in the country, particularly in rural areas, the Central Government Ministries or Departments or Public Sector Undertakings shall continue to procure 358 items (Appendix) from Micro and Small Enterprises, which have been reserved for exclusive purchase from them. This will help in promotion and growth of Micro and Small Enterprises, including Khadi and village industries, which play a critical role in fostering inclusive growth in the country.

Cl. 12. Review Committee. -

(1) A Review Committee has been constituted under the Chairmanship of Secretary, Ministry of Micro, Small and Medium Enterprises, for monitoring and review of Public Procurement Policy for Micro and Small Enterprises vide Order No. 21(1)/2007-MA dated the 21st June 2010 (Annexure).

(2) This Committee shall, inter alia, review list of 358 items reserved for exclusive purchase from Micro and Small Enterprises on a continuous basis, consider requests of the Central Ministries or Departments or Public Sector Undertakings for exemption from 20 per cent target on a case to case basis and monitor achievements under the Policy.

Cl. 13. Setting up of Grievance Cell. -

In addition, a 'Grievance Cell' will be set up in Ministry of Micro, Small and Medium Enterprises for redressing grievances of Micro and Small Enterprises in Government procurement. This cell shall take up issues related to Government procurement raised by Micro and Small Enterprises with Departments or agencies concerned, including imposition of unreasonable conditions in tenders floated by Government Departments or agencies that put Micro and Small Enterprises at a disadvantage."

17. Clause 3 of the policy sets annual goals of procurement from MSEs from the financial year 2012-13 itself. The object of the said clause is to achieve an overall

procurement of a minimum of 25 percent of total annual purchases of products and services from MSEs within a period of 3 years 'The 20 percent requirement as per 2012 policy was subsequently amended by notification dated 09.11.2018 increasing the minimum procurement to 25 percent'. Sub-clause (3) clarifies that after a period of 3 years, commencing from 2015, the overall procurement goal "shall be made mandatory". The consequence of non-compliance with the mandate is contemplated under sub-clause (4), where the ministries, departments and public sector undertakings that fail to meet the annual goal are obligated to justify with reasons and are made answerable to the Review Committee.

18. The Review Committee. We have already extracted hereinabove clause 12(2) under which the Procurement Order 2012 establishing a Review Committee to; i) review the list of 358 items reserved for micro and small enterprises, ii) consider exemptions and iii) monitor achievements. Clause 12(1) also recognises a committee constituted vide Order No. 21(1)/2007-MA dated 21.06.2010 as the Review Committee, and this notification is a part of the Procurement Order 2012; it is an Annexure to the Policy document. The relevant portion of the notification indicating the composition and functions of the Review Committee is as under:

"ORDER

Subject: Constitution of a Committee for monitoring and review of the Public Procurement Policy for Micro and Small Enterprises

Pending approval of the new Public Procurement Policy for Micro and Small Enterprises (MSEs), a Committee is hereby constituted for looking into the applicability of some of the provisions of the proposed Policy in respect of select Central Ministries/Departments. The Committee will be chaired by the Secretary, Ministry of Micro, Small and Medium Enterprises.

2. The composition of the Committee will be as follows:

- | | |
|---|--------------------|
| (i) Secretary, Ministry of MSME | : Chairman |
| (ii) Secretary, Planning Commission | : Member |
| (iii) Secretary, Department of Public Enterprises | : Member |
| (iv) Director General (Supplies and Disposals), Department of Commerce, Ministry of Commerce and Industry | : Member |
| (v) Additional Secretary and Development Commissioner (MSME) | : Member Secretary |

The Committee will undertake the following functions:

- (i) Consider the requests of the Central Ministries/Departments/PSUs for exemption, on a case to case basis, from the 20% target;
- (ii) Review the list of 358 items (as per Appendix) reserved for exclusive purchase from the MSEs based on the feedback received from the Central Ministries/Departments/PSUs;
- (iii) Review the grievances received from MSEs regarding Government procurement, including imposition of unreasonable conditions in the tenders floated by the Government Departments/PSUs: and
- (iv) Suggest special measures to be taken by the Central Ministries/Departments for enhancing their procurements from MSEs."

19. Following the enactment, the constitution of the National Board for MSMEs (Section 3), the Advisory Committee (Section 7(2)) and the Facilitation Council (Sections 20 & 21) on the one hand and notification of the Procurement Preference Policy (under Section 11), followed by the constitutions of the Review Committee (Clause 12) and the Grievance Cell (Clause 13) are statutory and executive bodies established to realise the purpose and object of the Act. The planning, promotion and development (Section 9) of the MSEs and the procurement preference policy (Section 11) are to be declared and notified by the Central or State Governments. Procurement Order 2012 also prescribes that Annual Plans (Clause 7) and Annual Reports (Clause 4) are to be prepared and uploaded for transparency and public information.

20. The existing legal regime of public procurement from micro and small enterprises can now be identified as mandating;

- (a) Initially setting annual goals of procurement for a period of 3 years (Clause 3) and thereafter mandating yearly procurement of a minimum of 25 percent of procurement by the ministries, departments, and public sector undertakings (Clause 3(3)).
- (b) 358 items appended to the Procurement Preference Policy 2012 are reserved for exclusive procurement from MSEs.
- (c) Requiring the ministries, departments and public sector undertakings to prepare an Annual Procurement Plan (Clause 8) for purchase and to upload the same on their official website. This is to subserve the purpose of the MSEs to get advanced information about the requirements of procuring agencies.
- (d) The requirement of Annual Reporting (Clause 5) of government procurement is necessary for the collection of data, necessary for assessment and strengthening the policy. For this purpose, ministries, departments and public sector undertakings are mandated to report achievement of goals set with respect to procurement prescribed in their respective annual plans.
- (e) The policy recognises a pre-existing committee constituted by Order No. 21(1)/2007-MA dated 21.06.2010 as the Review Committee under Clause 12.

This Review Committee is mandated to consider the requests of the ministries, departments or public sector undertakings for exemption from the 25 per cent target on a case-to-case basis. The Review Committee is also tasked with the duty of monitoring achievements under the policy.

(f) Yet another important feature of the policy is the constitution of the Grievance Cell under clause 13. The grievance cell, inter alia, will take up the issues raised by the MSEs with respect to government procurement. Clause 13 specifically provides that the mandate of the grievance cell shall include redressal of "imposition of unreasonable conditions in tenders floated by the Government Departments or agencies that put Micro and Small Enterprises at a disadvantage".

21. Having considered the provisions of the Act and the MSE Procurement Preference Policy, 2012, we are of the opinion that there is no mandatory minimum procurement 'right' of an individual MSE. However, there is certainly a statutory foundation for the Procurement Preference Policy, 2012, having force of law as it 'encapsulates a mandate and discloses a specific purpose'. [Gulf Goans Hotels Co. Ltd v. Union of India, (2014) 10 SCC 673 "...a government policy may acquire the 'force of law' if it conforms to a certain form possessed by other laws in force and encapsulates a mandate and discloses a specific purpose"; Bennett Coleman & Co. v. Union of India (1972) 2 SCC 788 "What is termed 'policy' can become justiciable when it exhibits itself in the shape of even purported 'law'. According to Article 13(3)(a) of the Constitution, 'law' includes 'any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law'. So long as policy remains in the realm of even rules framed for the guidance of executive and administrative authorities it may bind those authorities as declarations of what they are expected to do under it] Clause 3 of the policy mandating procurement of 25 per cent of supply from MSEs is simply the statutory duty of the bodies constituted under the Act and the Policy. The significance of creation and establishment of these statutory and administrative bodies is not difficult to conceive. If these institutions and bodies work effectively and efficiently, it is but natural that the purpose and object of the legislation will be achieved in a substantial measure. It is, therefore, necessary to ensure that in the functioning of these bodies, there is efficiency in administration, expertise through composition, integrity through human resources, transparency and accountability, and response-ability through regular review, audits and assessments.

22. While exercising judicial review of administrative action in the context of Statutes, laws, rules or policies establishing statutory or administrative bodies to implement the provisions of the Act or its policy, the first duty of constitutional courts is to ensure that these bodies are in a position to effectively and efficiently perform their obligations. This approach towards judicial review has multiple advantages. In the first place, while continually operating in the field with domain experts, these bodies acquire domain expertise, the consequence of which would also be informed decision-making and consistency. Further, the

critical mass of institutional memory acquired by these bodies will have a direct bearing on the systematic development of the sector and this will also help handling polycentric issues. Thirdly, while continuously being on the field, and having acquired the capability of making real-time assessments about the working of the policies, these bodies will be in a position to visualize course correction for future policymaking.

23. Shifting the focus of judicial review to functional capability of these bodies is not to be understood as an argument for alternative remedy, much less as a suggestion for judicial restraint. In fact, this shift is in recognition of an important feature of judicial review, which performs the vital role of institutionalizing authorities and bodies impressed with statutory duties, ensuring they function effectively and efficiently. The power of judicial review in matters concerning implementation of policy objectives should transcend the standard power of judicial review to issue writs to perform statutory duty and proceed to examine whether the duty bearers, the authorities and bodies constituted properly and also whether they are functioning effectively and efficiently. By ensuring institutional integrity we achieve our institutional objectives. Further, effective and efficient performance of the institutes can reduce unnecessary litigation.

24. Having had the experience of having micro-managed issues concerning our forest wealth, this court in *In Re: T.N. Godavarman Thirumulpad v. Union of India* 2024 INSC 78 recognised the importance of environmental rule of law and the need to strengthen the statutory and administrative bodies concerning forest. The relevant portion of the order is extracted below:

"27. The above referred bodies, authorities, regulators, and officers are constituted with persons having expertise in the field. They have the requisite knowledge to take appropriate decisions about contentious issues of the environment, forests, and wildlife, and also to ensure effective implementation of environmental laws. These bodies constitute the backbone of environmental governance in our country. They need to function with efficiency, integrity, and independence. As duty-bearers, they are also subject to accountability.

28. We may ask a simple question - how effectively are these environmental bodies functioning today? This question has a direct bearing on the protection and restoration of ecological balance.

29. As environmental governance through these bodies emerges, the obligation of the constitutional courts is even greater. Hitherto, the constitutional courts focused on decisions and actions taken by the executive or private persons impacting the environment and ecology because the scrutiny by regulators was felt to be insufficient. Their judgment, review, and consideration did not inspire confidence and therefore, the Court took up the issue and would decide the case. In this process, a large number of decisions rendered by this Court on sensitive environmental, forest, and ecological matters constitute the critical mass of our

environmental jurisprudence. This Court would continue to exercise judicial review, particularly in environmental matters, whenever necessary.

30. We, however, seek to emphasise and reiterate the importance of ensuring the effective functioning of these environmental bodies, as this is imperative for the protection, restitution, and development of the ecology. The role of the constitutional courts is therefore to monitor the proper institutionalisation of environmental regulatory bodies and authorities."

25. Returning to the MSMED Act and the Procurement Order 2012, we must focus on the functioning of the bodies created and established thereunder. We hold that these bodies are accountable, and their function is subject to judicial review. For disposal of this case, we are equally considered with the effective functioning of these bodies.

26. Ms. Vanshaja Shukla, representing the Union of India, has brought to our notice the statistics indicating the percentage of public procurement from micro and small enterprises to demonstrate that the mandate clause 3 of the 2012 policy is fully complied with. The extract of the relevant data is as follows Response to Starred Question No. 44, Rajya Sabha (06 Feb, 2023); Counter Affidavit filed by Union of India (latest figures as of 04.02.2025):

Financial Years

Total Procurement (Rs. in crores)

Procurement from MSEs (Rs. in crores)

2019-20

(152 CPSEs)

1,31,460.68

29.69% Rs. 39,037.13

(No. of MSEs Benefitted- 1,57,770)

2020-2021

(161 CPSEs)

1,39,419.81

29.21% Rs. 40,717.67

(No. of MSEs Benefitted-1,77,594)

2021-2022

(162 CPSEs)

1,65,383.04

32.52% Rs. 53,778.58

(No. of MSEs Benefited-2,27,049)

2022-2023

(166 CPSEs

and 2 Departments)

1,74,316.30

37.13% Rs. 64,721.65

(No. of MSEs Benefited-2,36,433)

2023-2024

(151 CPSEs

and 1 Department)

1,70,930.01

43.71% Rs. 74,717.24

(No. of MSEs Benefitted- 2,58,413)

27. While the above data makes it clear that the Central Government and its instrumentalities seem to have complied with the policy requirement of procuring 29.69% from MSEs in the year 2019-2020, 29.21% for the year 2020-2021, 32.52% for the year 2021-2022, 37.13% for the year 2022-2023, and 43.71% for the year 2023-2024, it is not clear as to whether the said procurement includes procurement of some of the 358 items that have been reserved exclusively for MSEs under clause 11 of the Procurement Policy. A holistic reading of the procurement policy, incorporating clauses 3, mandating 25 percent from MSEs and clause 11 reserving 358 items for procurement from MSEs, gives us an impression that these mandates are independent of one another. The specific grievance of the petitioner is that the data supplied by the Union includes even the items contemplated under clause 11. We have before us the performance and audit report conducted on the working of the Review Committee. Report No. 18 of 2018, 'Compliance with Provisions of Public Procurement Policy, 2012 For Micro and Small Enterprises', (CAG, 2018) <https://cag.gov.in/uploads/download_audit_report/2018/Chapter_7_Impact_of_IND-AS_of_Report_No_18_of_2018_-_Compliance_Audit_on_General_Purpose_Financial_Reports_of_Central_Public_Sector_Enterprises_of_Union_Government.pdf>, hereinafter referred to as the 'CAG' In the report of the Comptroller and Auditor General of India, 'Ibid' it was thus observed:

"d) Clause 3(4) of the Policy envisaged that the CPSEs which fail to meet the annual procurement target from MSEs shall substantiate with reasons to the Review Committee headed by Secretary, Ministry of MSME. A scrutiny of the

minutes of the Review Committee meetings revealed that none of the CPSEs which had failed to achieve the procurement targets had furnished reasons to the Review Committee".

28. We are of the opinion that the Review Committee, specifically entrusted with this duty, should resolve this issue. Under sub-clause (2) of clause 12, the Review Committee is specifically entrusted with the twin duties of (i) reviewing the 358 items exclusively reserved for MSEs and (ii) considering the request of the ministries, departments and public sector undertakings for exemption from 25% on a case-to-case basis. The Review Committee also has the obligation to "monitor the achievements of the policy". As the Review Committee is entrusted with reviewing and monitoring the performance of the sector, we are of the opinion that this body, comprising domain experts, must examine this issue, take an appropriate decision and ensure its implementation.

29. In view of the above, we direct the respondents, in particular the Review Committee constituted under clause 12 of the Procurement Preference Policy 2012, to examine this issue of mandatory procurement of 25 per cent of goods and services by the Government, its departments and instrumentalities from the MSEs under clause 3 of the Policy and notify whether the said procurement would be independent of the 358 items reserved for procuring from MSEs and take such action as is necessary for compliance of the Procurement Order 2012 and upload its decisions for the purpose of clause 5 of the Policy. The necessary action shall be taken within 60 days from our order.

RE: 2. Is the prescription of mandatory minimum turnover clause in NITs violative of articles 14 and 19 of the Constitution, provisions of the MSMED Act and the Procurement Preference Policy, 2012?

30. The second issue concerns the grievance of the petitioner that the decisions of the ministries, departments or their instrumentalities in prescribing "minimum turnover clauses" undermine implementation of the Procurement Order 2012, thereby defeating the very purpose and object of the Act.

31. On the broader issue as to whether 'minimum turnover clauses' could be violative of Articles 14 and 19 of the Constitution, it is to be seen that the two most relevant criteria for framing suitable conditions in NIT relate to the 'capacity' and 'capability' of the bidder. In *Association of Registration Plates v. Union of India*, (2005) 1 SCC 679; *Krishnan Kakkanth v. Govt. of Kerala*, (1997) 9 SCC 495, *Ugar Sugar Works Ltd. v. Delhi Administration* (2001) 3 SCC 635; *M.R.F. Ltd. v. Inspector Kerala Govt.*, (1998) 8 SCC 227 this Court had an occasion to examine a tender clause which read, "The tenderers/bidders of the joint-venture partners together must have had a minimum annual turnover equivalent to INR 30 crores in the immediately preceding last year. At least 25% of this turnover must be from the licence plate business. Certificate confirming and the certification of this minimum 25% turnover being from licence plate business will have to be provided duly attested by a chartered accountant/any

bank to be attached in support of fulfilment of this condition". Rejecting the submission that the said clause violated articles 14 and 19 of the Constitution, the Court thus observed:

"35...The insistence of the State to search for an experienced manufacturer with sound financial and technical capacity cannot be misunderstood. The relevant terms and conditions quoted above are so formulated to enable the State to adjudge the capability of a particular tenderer who can provide a fail-safe and sustainable delivery capacity.

38...Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers under Article 19 of the Constitution.

43. ...Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest." (emphasis supplied)

32. Courts approach is also based on the idea that the executive should have greater latitude in selecting contractors and prescribing eligibility requirements. (See, generally, *Tata Cellular v. Union of India*, (1994) 6 SCC 651; *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation*, (2000) 5 SCC 287)

33. However, the law as applicable for procurement through MSEs stands on a different footing. This is for the reason that there is a statutory prescription for notifying a procurement preference policy (Section 11), and in furtherance of such a statutory prescription, the Preference Policy 2012 has been notified mandating procurement of a minimum of 25 per cent from the Micro and Small enterprises. Although it is generally permissible for the government, and its instrumentalities to provide minimum turnover criteria wherever "public safety, health, critical security equipment, etc.", Relaxation of Norms for Start-ups in Public Procurement regarding Prior Experience - Prior Turnover criteria', <relaxsation_of_nhttps://dpe.gov.in/sites/default/files/relaxsation_of_norms.pdf> (Sept 20, 2016) are involved, it must be ensured that such prescriptions do not defeat the Procurement Order 2012. It is necessary to lay down clear guidelines for ministries, departments, and instrumentalities. In fact, it has not been the stand of the Government that the commercial freedom to prescribe minimum turnover clauses on the one hand and the policy to promote MSEs on the other are competing interests or that they have to balance these values. The Procurement Order 2012 declares the procurement preference obligations of the State and therefore statutory and executive authorities are

bound to implement the same. Minimum turnover clauses cannot undermine or override the Procurement Preference Policy 2012.

34. While referring to the Procurement Order 2012, we have already indicated that under Clause 13, the Ministry is to set upon the 'Grievance Cell'. By order dated 18.11.2013, the central government constituted the Grievance Cell, the composition as well as the function of the Grievance Cell are evident from the office order extracted herein below;

"OFFICE ORDER

18.11.2013

Subject: Constitution of Grievance Cell for redressing difficulties of MSEs under Public Procurement Policy for Micro and Small Enterprises.

Under the provision of Section-13 of new Public Procurement Policy for Micro and Small Enterprises (MSEs), a Grievance Cell is hereby constituted for redressing difficulties of MSEs under Public Procurement Policy for Micro and ' Small enterprises.

2. A Grievance Cell will be functional under the supervision of Director (MA), O/o DC(MSME), looking after (MA) with following contact details:

i) Name of Grievance Cell In-charge	Shri U.C. Shukla
ii) Telephone No.	+91-11-23063363
iii) Fax No.	+91-11-23060536
iv)	E-mail
umeshshukla.msme@gmail.com	

3. The Grievance Cell will be for redressing grievances of MSEs in Government procurement. This cell shall take up issues related to Government procurement raised by Micro and Small Enterprises with Department or Agencies concerned, including imposition of unreasonable conditions in tenders floated by Government Departments or Agencies that put Micro and Small Enterprises at a disadvantage."

35. The Grievance Cell is specifically mandated to take up issues relating to the imposition of unreasonable conditions in tenders floated by Government departments or agencies that put MSEs at a disadvantage. This will certainly include the prescription of minimum turnover clauses. The functioning of the Grievance Cell has come under the scrutiny of the Comptroller and Auditor General of India Report No. 18 of 2018, 'Compliance with Provisions of Public Procurement Policy, 2012 For Micro and Small Enterprises', (CAG, 2018)<https://cag.gov.in/uploads/download_audit_report/2018/Chapter_7_Impact_of_IND-AS_of_Report_No_18_of_2018_-_Compliance_Audit_on_General_Purpose_Financial_Reports_of_Central_Public_Sector_Enterprises_of_Union_Government_.pdf>, hereinafter referred to as the 'CAG', which has suggested improvement in the

functioning of this body in the following terms:

"Clause 13 of the Public Procurement Policy Order, 2012 envisages setting up of a Grievance Cell in Ministry of MSME for redressing grievances of MSE in Government Procurement. The function of the Cell was to take up issues related to Government Procurement raised by MSE with Departments or agencies concerned.

Scrutiny of records revealed that the total of 2253 grievances had been received in DC (MSME) during the last five years (250: Internet Grievance Monitoring System (IGMS), 193: Centralised Public Grievance Redress and Monitoring System (CPGRAM) and 1810: letters). However, only three of these grievances were routed through Grievance Cell.

Moreover, the DC (MSME) had not maintained the details of grievances received from Office of Prime Minister of India and by e-mail. In respect of redressal of grievances received through IGMS portal, it was noticed that in cases of complaints which were forwarded to the concerned CPSEs, the action taken by concerned CPSEs on the said complaints could not be ascertained as the same were not uploaded on the portal.

DC (MSME) stated (October 2017) in reply that the complaints which were required to be dealt by the Grievance Cell were placed before it for taking a decision. All the complaints could not be dealt by Grievance Cell since some of the complaints were routine in nature. The reply is not acceptable as audit observed that some of the grievances that were not routed through the Grievance Cell though serious in nature.

Recommendation: DC (MSME) should maintain information on final outcome of complaints/grievances".

(emphasis supplied)

36. Mr. Giri also brought to our notice circular No. 14/4/07 dated 26.04.2007 issued by the CVC referring to certain irregularities or lapses. This circular may not be in the context of the difficulties faced by MSEs but is indicative of the general practices adopted by procuring agencies, which militate against a healthy procurement policy. The relevant portion of the circular issued by CVC is as follows: -

"3. i) For a work with an estimated cost of Rs.15 crores to be completed in two years, the criteria for average turnover in the last 5 years was kept as Rs. 15 crores although the amount of work to be executed in one year was only Rs.7.5 crores. The above resulted in prequalification of a single firm.

ii) One organization for purchase of Computer hardware kept the criteria for financial annual turnover of Rs. 100 crores although the value of purchase was less than Rs. 10 crores, resulting in disqualification of reputed computer firms.

iii) In one case of purchase of Computer hardware, the prequalification criteria

stipulated was that the firms should have made profit in the last two years and should possess ISO Certification. It resulted in disqualification of reputed vendors including a PSU.

iv) In a work for supply and installation of A.C. Plant, retendering was resorted to with diluted prequalification criteria without adequate justification, to favour selection of a particular firm."

37. We had indicated to Mr. Giri, that the purpose and object of entertaining this Writ Petition under Article 32 of the Constitution is not so much to enquire into the individual grievance of the petitioner than to examine the nature of the rights created by the Procurement Order 2012 and the remedies available to the stakeholders, and to declare with clarity, certainty the scope of judicial review for effective implementation of the Policy.

38. In this view of the matter, apart from the earlier direction relating to mandatory procurement, we also direct the authorities under the Act, including the Review Committee and in particular the Grievance Cell, which is specifically entrusted with the obligation to redress "imposition of unreasonable conditions in tenders floated by Government Departments or agencies that put Micro and Small Enterprises at a disadvantage" to examine limits of minimum turnover clauses and issue necessary and appropriate policy guidelines.

39. Having considered the matter in detail, this writ petition is disposed of directing:

(a) the Public Procurement Policy for Micro and Small Enterprises (MSEs) Order 2012 has force of law as it is formulated in exercise of power under Section 11 of the Act and also encapsulates the purpose and object of the Act;

(b) though there is no mandatory minimum procurement 'right' for an individual MSE there is certainly a statutorily recognized obligation on the authorities and the bodies under the Act and the Procurement Order 2012 to implement the mandate which is subject to judicial review;

(c) the judicial review will primarily ensure proper constitution and effective functioning of the authorities the National Board for MSMEs, the Advisory Committee, the Facilitation Council, the Review Committee and the Grievance Cell and leave the policy and decision making to them.

(d) the respondents, and in particular, the Review Committee constituted under clause 12 of the Procurement Preference Policy 2012 to examine the issue of mandatory procurement of 25 per cent of goods and services by the Government, and its instrumentalities from MSEs under clause 3 of the Policy in the context of clause 11 providing for reservation of specific items for procurement and take such action as is necessary for effective implementation of the Policy within a period of 60 days from the date of our order; and

(e) the respondents, including the Review Committee and in particular the

Grievance Cell, shall examine and declare limits of the minimum turnover clauses with respect to MSEs and issue appropriate policy guidelines within a period of 60 days from the date of our order.

40. With these directions the writ petition is disposed of. There shall be no order as to costs.