

(2017) 01 AHC CK 0227

In the Allahabad High Court

Case No : Writ C. Nos. 2316 and 42491 of 2016

Rahul Singh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 25-01-2017

Acts Referred:

Micro, Small and Medium Enterprises Development Act, 2006 — Section 11

Citation : (2017) 3 ADJ 113 : (2017) 2 AllWC 1925 : (2017) 122 ALR 65 :
(2017) 1 BC 737

Hon'ble Judges : Dilip B. Bhosale, CJ. and Yashwant Varma, J.

Bench : Division Bench

Advocate : Sanjeev Kumar Tyagi and Uttara Bahuguna Advocates, for the Petitioner in Writ C No. 2316 of 2016; Manoj Kumar Sharma, Kaushlesh Pratap Singh, S.C. and Tarun Varma, Advocates, for the Respondent in Writ C No. 2316 of 2016; Sanjeev Kumar Tyagi, Advocate, for the Petitioner in WRIT C No. 42491 of 2016; Manoj Kumar Sharma, Advocate, for the Respondent in WRIT C No. 42491 of 2016

Final Decision : Dismissed

Judgement

1. Heard Mr. Shashi Nandan, learned Senior Counsel assisted by Sri S.K. Tyagi, learned counsel for the petitioner, Sri Manoj Kumar Sharma and Mr. Kaushlesh Pratap Singh for the respondents.

2. These two writ petitions question the action of the North Central Railway whereby the tenders submitted by the petitioner have come to be rejected on the ground of a failure on the part of the petitioner to deposit the tender cost as well as earnest money. The claim of the petitioner was that since it was a micro and small enterprise (MSE) covered by the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (2006 Act), it was entitled to the benefits conferred by the Public Procurement Policy, 2012 which exempted MSE's from paying tender cost or depositing the earnest money. The stand taken by the respondents is that the tenders themselves were invited for a works contract which as per the operating manual of the North Central Railway did not qualify as

a contract for supply of goods and services and therefore the petitioner was not entitled to the benefits of the Public Procurement Policy, 2012.

3. The petitioner [and which fact is not disputed by the respondents] is an MSE registered with the National Small Industries Corporation Ltd. (N.S.I.C.) for participation in the Central Government Store Purchase Programme as also for undertaking civil construction. The eligibility limits conferred upon the petitioner by NSIC for the aforementioned two works is set at Rs. 5.79 Crores and Rs. 15 Crores respectively. It is stated to have applied for award of contract by the North Central Railway under Tender Nos. 45 and 48. Its tenders for the aforementioned two contracts have been rejected on the grounds noted above. Sri Shashi Nandan, the learned Senior Counsel appearing in support of these petitions, has contended that both Section 11 of the 2006 Act as well as the Public Procurement Policy, 2012 formulated by the Ministry of Railways and published on 5 July 2012 made no distinction between a supply of goods and services. He, therefore, contended that the rejection of the tender on the ground that it was a works contract was clearly unsustainable. Sri Nandan further contended that the stand taken by the respondents that the supply of goods made only to a particular department of the Railways would qualify for benefits under the Public Procurement Policy, 2012 is also unsustainable in light of the provisions of a Circular dated 23 September 2013. Sri Nandan submitted that since the petitioner was a MSE duly registered with the N.S.I.C. it was clearly covered by the provisions of the Public Procurement Policy, 2012 and consequently the tender of the petitioner could not have been rejected only on the ground of there being a failure on his part to deposit the tender cost and earnest money.

4. Learned counsel appearing for the Railways, on the other hand, firstly drew our attention to the Indian Railway Code to contend that it is this Manual which governs the award of contract by the North Central Railways. According to the learned Counsel, Para 1203 of the said Manual defines the various categories of contracts which are liable to be included in the genre of a works contract and that consequently the Railways was clearly justified in rejecting the tender submitted by the petitioner. In this connection, he referred specifically to clause (iii) of Para 1203 to submit that the supply of ballast is covered under the category of a works contract and such a contract is not covered by the provisions of the Public Procurement Policy, 2012.

5. Having noticed the rival submissions it would at the outset be relevant to notice the scope of work under Tender Nos. 45 and 48. Tender No. 45 defined the nature of work in the following terms:

"Name of Work: Supply stacking and loading into railway wagons/ hoppers/ KC wagons etc. of 60000 cum machine crushed hard granite stone ballast of 65 mm gauge at MANDAH Depot under ADEN/ NCR/ Mirzapur."

Tender No. 48 describes the nature of work in the following terms:

"Name of Work: Rehabilitation of cess between Galpura Berchi station in MGSALD section under ADEN/MZP "

6. The expression "rehabilitation of cess" was explained to include the work of excavation and dressing of the earth surface including removal of vegetation of all kinds. It was also explained to include the carrying out of earth work, under filling of embankments, guides and bunds. Insofar as the Tender No. 45 is concerned, as is evident from the nature of the work it involved the supply, stacking and loading into railway wagons, machine grinded stone ballast. As we notice the provisions of the Public Procurement Policy it sought to confer certain benefits and concessions to MSEs registered with the NSIC. The benefits and exemptions were available in respect of "procurement of goods and services, produced and provided by Micro and Small Enterprise ...". As is evident from the Code referred to by the learned counsel for the respondents, the supply of building material including ballast is covered under the specie of a works contract. The respondents based their decision to deny the petitioner of the benefits under the Public Procurement Policy. Para 1203 which was referred to us is in the following terms:

"1203. Works Contracts All works and supplies relating to the Engineering Department executed through the agency of contractors may be broadly classed as follows :

(i) Zone Works Such as works of ordinary repairs and maintenance and others of petty nature in a particular zone, or area;

(ii) Special Works Such as the construction of bridge, the formation of an embankment etc. other than zone works;

(iii) Supplies of building materials Such as bricks, tiles, lime, bamboos, ballies, matting, doors, windows, ballast, boulders, moorum, stone chips, fire bricks, shingle, pitching stone etc. which are not usually stocked or purchased by the Stores Department.

Contracts relating to these three classes will for the purpose of this Code be termed as "Work Contracts" as distinguished from "Stores Contracts" which pertain to the supply of stores arranged by the Store Department."

7. We note that there is no challenge to the provisions of this Code and the classification made by the North Central Railways in this regard.

8. Be that as it may, we proceeded to deal with the contentions advanced on behalf of the petitioner on merits. The provisions of Section 11 of the 2006 Act relate to the "procurement of goods and services produced and provided by MSE"s. As is evident from the name and nature of the two works comprised in Tender Nos. 45 and 48, the contracts were not for supply of goods alone. Both the contracts on their terms appear to envisage contracts of a composite nature involving both the supply of goods as well as labour. The respondents therefore appear to be correct in proceeding on the premise that both tenders were works

contracts. We may also note here that the learned Senior Counsel appearing for the petitioner did not seriously dispute the classification of these contracts as work contracts. The submission essentially was that even if it be a works contract, neither under the provisions of 2006 Act nor under the terms of the Public Procurement Policy was such a contract excluded. We find ourselves unable to accept the said submission for more than one reason.

9. A reconstruction of section 11 bears out that it empowers the Central Government 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 "works contract" forms a completely different and distinct genre than a contract for supply of goods or for that matter a contract for providing services. A works contract is essentially an indivisible contract which may involve not just the supply of goods but also the provision of labour and service. This particular specie of contract has rightly been understood by the Railways as to not fall within the ambit of the 2006 Act. In our considered opinion, the provisions of the 2006 Act and more particularly section 11 thereof, only contemplates and brings within its fold contracts for supply of goods and provision of service simpliciter. Answering a similar contention with respect to the provisions of the Finance Act, 1994 which used the word "service" alone, the Supreme Court in *CCE & Customs v. Larsen & Toubro*, (2016) 1 SCC 170, observed as under:"

16. We find that the assesseees are correct in their submission that a works contract is a separate species of contract distinct from contracts for services simpliciter recognised by the world of commerce and law as such, and has to be taxed separately as such. In *Gannon Dunkerley* [1959 SCR 379 : AIR 1958 SC 560] , this Court recognised works contracts as a separate species of contract as follows: (SCR p. 427 : AIR p. 578, para 48)

"48. To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the court below to be. The several forms which such kinds of contracts can assume are set out in *Hudson on Building Contracts*, at p. 165. It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment."

23. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the

very language of Section 65(105) which defines "taxable service" as "any service provided". All the services referred to in the said subclauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the nonservice elements from the composite works contracts has been made by any of the aforesaid sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.

24. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner."

10. 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 works 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 ineligible for the grant of exemptions and benefits under the Public Procurement Policy, 2012. Their decision 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.