
(2011) 02 GAU CK 0039
In the Gauhati High Court
Case No : W.A. No. 38 of 2010

Starline Agency

APPELLANT

Vs

Nabajit Das and Others

RESPONDENT

Date of Decision : 28-02-2011

Acts Referred:

Assam Value Added Tax Act, 2003 — Section 2(56), 2(57), 20, 20(2)
Constitution of India, 1950 — Article 226, 3
General Clauses Act, 1897 — Section 8

Citation : (2011) 40 VST 452

Hon'ble Judges : I.A. Ansari, J;A.C. Upadhyay, J

Bench : Division Bench

Advocate : Ashok Saraf, D. Baruah, N. Hawelia, S. Chetia, M.L. Gope and A. Goyal, for the Appellant; B. Goyal Sarma, Government Advocate, Assam and S. Kataki, for the Respondent

Final Decision : Allowed

Judgement

I.A. Ansari, J.—Whether value added tax (in short, "the VAT") is different in nature from sales tax and whether the requirement of furnishing of sales tax clearance certificate in a tender process would, since after enactment of the Value Added Tax Act, mean VAT clearance certificate or not? Whether sales tax clearance certificate is, by its very nature, different from VAT clearance certificate? Whether the requirement of submission of VAT clearance certificate on supply of woollen blankets can be said to be fulfilled on the submission of VAT registration certificate granted under a scheme of composition of the fiscal statute in respect of a works contract? What is the scope of interference in a writ appeal with an order passed in the writ petition dismissing the appeal where a new plea is wholly barred from being raised in a writ appeal if the plea was not taken in the writ petition? What is the scope of judicial review in contractual matters? These are the prominent questions, which have to be answered in this appeal. The material facts, leading to this appeal, may, in brief, be set out as follows:

Pursuant to a tender notice, dated September 30, 2009, issued by respondent No. 2, namely, Inspector General of Prisons, Assam, inviting tenders with samples from intending suppliers/recognized manufacturers/dealers or their agents for supply of woollen blankets/materials for wardens' uniform for the jails of Assam, the writ petitioner (who is respondent No. 1 herein), the appellant (who was respondent No. 4 in the writ petition) and some others submitted their respective tenders for supply of woollen blankets. On October 20, 2009, when the tenders were opened, the lowest bidder's tender was found to be non-responsive inasmuch as he had not submitted separate tenders for different types of supply materials mentioned in the said tender notice. The writ petitioner-respondent No. 1's bid was found to be the second lowest and the appellant was found to be the third lowest bidder. As the lowest bidder's tender was found to be non-responsive, respondent No. 1, who claimed to be the second lowest bidder, filed a writ petition, under article 226 of the Constitution of India, which gave rise to W.P. (C) No. 4858 of 2009, seeking issuance of appropriate writ(s) commanding the State respondents/authorities concerned to allot the work, in question, to the writ petitioner, (i.e., respondent No. 1 herein). This writ application was, however, withdrawn, on November 16, 2009, with liberty to approach this court, in Inline, if any decision was taken by the authority concerned against the will petitioner-respondent No. 1 herein.

2. As the State respondents decided to allot the work of supply of woollen blankets to the present appellant, respondent No. 1 filed another writ petition, under article 226 of the Constitution of India, which gave rise to W.P. (C) No. 5862 of 2009 (Nabajit Das Vs. State of Assam and Others,), the case of respondent No. 1 being, in brief, thus: The writ petitioner, (i.e., respondent No. 1) came to learn that on November 17, 2009, a meeting had been held for taking a decision in the matter of allotment of supply work of woollen blankets and, on request made by respondent No. 1, respondent No. 3 provided respondent No. 1 with a copy of the minutes of the meeting, which, on being examined by respondent No. 1, revealed that a decision had been taken, in the meeting held on November 17, 2009, to award the contract for supply of woollen blankets to the appellant at Rs. 235 per woollen blanket. Respondent No. 1 accordingly filed the second writ petition seeking to get set aside and quashed the decision, which had been taken by the State respondents/authorities concerned to allot the contract to the appellant and, further, for a direction to be issued to the State respondents/authorities concerned to allot the contract, in question, to respondent No. 1.

3. In the meanwhile, however, respondent No. 3, namely, Inspector General of Prisons, Assam, informed the appellant, by the communication, dated November 27, 2009, that the appellant's sample of woollen blanket had been approved as per the rate and requirements mentioned in the list enclosed in the said communication. By the communication, dated November 27, 2009, aforementioned, respondent No. 3 requested the appellant to deposit the security money as per terms and conditions of the tender notice and execute the

deed of contract. Following the communication, dated November 27, 2009, aforementioned, the appellant deposited a sum of Rs. 2,82,000 as security deposit and the deed of contract was accordingly executed on December 8, 2009 and, on the same day, a work order was placed with the appellant asking the appellant to supply 12,000 woollen blankets. By an interim order passed in the second writ petition, the supply of woollen blankets by the appellant was, however, kept suspended.

4. During the progress of the writ proceeding, it surfaced that the bid of respondent No. 1 had been rejected by the State respondents/authorities concerned on, broadly speaking, two grounds, namely, (i) non-submission of the "sales tax clearance certificate" and (ii) the omission of respondent No. 1 to place "earnest money" in favour of the Inspector General of Prisons, Assam, inasmuch as respondent No. 1 was found, according to the State respondents/authorities concerned, to have placed the "earnest money" in favour of the IGP. The contention of respondent No. 1, in the writ petition, was that in its application, made to the postal authorities, respondent No. 1 had applied for pledging of the "earnest money" in favour of the Inspector General of Prisons, Assam, and the said application was accordingly endorsed by the Superintendent of the Office of the Inspector General of Prisons, Assam, and, hence, the description of the pledging authority as IGP, which was shorter version of the term "Inspector General of Prisons", appearing in the relevant NSC/KVP, ought not to have been treated to have disqualified the writ petitioner-respondent No. 1. As regards the non-submission of the "sales tax clearance certificate", the writ petitioner-respondent No. 1 contended, in the writ proceeding, that the Assam General Sales Tax Act, 1993 (in short, "the AGST Act, 1993,") stood repealed and replaced by the Assam Value Added Tax Act, 2003 (in short, "the VAT Act, 2003") and with the coming into force of the VAT Act 2003, the question of furnishing "sales tax clearance certificate" could not have arisen and, hence, the condition, mentioned in the tender notice, requiring the tenderers to submit "sales tax clearance certificate" was a condition, which was impossible to be performed. Consequently, furnishing of "sales tax clearance certificate" ought not have been insisted upon by the State respondents/authorities concerned and the writ petitioner-respondent No. 1's tender ought not to have been treated, on the said ground, non-responsive.

5. In order to buttress its above submissions, the writ petitioner-respondent No. 1 herein also contended, in the writ petition, that none of the tenderers had submitted "sales tax clearance certificate" and what the appellant had submitted was also a VAT clearance certificate and not a "sales tax clearance certificate" and, hence, the rejection of the tender of the writ petitioner-respondent No. 1, on the ground of non-furnishing of "sales tax clearance certificate", was illegal and unjustified. The writ petitioner-respondent No. 1 further contended, in the writ proceeding, that a VAT registration certificate had been furnished by the writ petitioner-respondent No. 1 along with a copy of the permission, granted by the Superintendent of Taxes, allowing the writ petitioner-respondent No. 1 to pay

composition amount of the VAT payable by the writ petitioner-respondent No. 1 on civil work, executed by the writ petitioner-respondent No. 1, and this certificate was sufficient compliance of the requirement of furnishing of "sales tax clearance certificate" and, hence, in the light of these facts, the State respondents/authorities concerned ought not to have denied the allotment of the contract to the writ petitioner-respondent No. 1 by contending that the writ petitioner-respondent No. 1 had not furnished the requisite "sales tax clearance certificate" despite the fact that the writ petitioner-respondent No. 1 was the lowest valid tenderer inasmuch as the lowest tenderer's tender had been found, as already indicated above, non-responsive and invalid.

6. The contentions of the writ petitioner-respondent No. 1 found favour with a learned single judge of this court inasmuch as the learned single judge, referring to the decision, in *Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others*, and *Bidhu Bhusan Choudhury v. Union of India*, reported in [2000] 1 GLT 342, observed that the rejection of the writ petitioner's tender as invalid on the ground of omission to give complete description of the pledging authority, in the pledging documents, is not justified and is illegal inasmuch as the postal authority had, later on, clarified that the document, in question, stood pledged in favour of the Inspector General of Prisons, Assam. In so far as the requirement of furnishing of the "sales tax clearance certificate" was concerned, the learned single judge took the view that the tender documents did not require furnishing of VAT clearance certificate and, in the absence of VAT clearance certificate, the writ petitioner's tender could not have been treated as invalid and as far as "sales tax clearance certificate" is concerned, since none of the tenderers had produced "sales tax clearance certificate", the rejection of only of the writ petitioner's tender, on the ground of non-submission of "sales tax clearance certificate", was wholly unjustified. The relevant observations, made by the learned single judge, in arriving at the findings aforementioned, are reproduced below (pages 450 and 451 in 40 VST):

16. The arguments advanced by the rival counsels indicate that the dispute in the present case can be resolved by answering as to whether the tender of the petitioner could be considered invalid because of his failure to supply a sales tax clearance certificate and whether under clause 7(a), a tenderer is required to furnish a VAT clearance certificate. Of course, respondent No. 4 and other tenderers have furnished a VAT clearance certificate instead of a sales tax clearance certificate and on that basis their tenders are accepted for consideration, whereas the petitioner's tender has not been considered, due to non-submission of the sales tax clearance certificate which according to the purchase committee is required to be submitted as per clause 7(a) of the tender notice.

17. Even on a prima facie reading of clause 7(a) it can be gathered that there is no requirement of furnishing a VAT clearance certificate and under such circumstance in my view, the petitioner could not have been considered to be a

invalid tenderer under clause 7(a), for non-furnishing of a VAT clearance certificate as that was not stipulated in any of the clauses of the tender notice. In any case from the proceeding of the Departmental purchase committee held on November 17, 2009 (annexure G), the petitioner's tender was rejected for not furnishing a sales tax clearance certificate.

18. As his tender was considered invalid for non-submission of the sales tax clearance certificate and since none of the tenderers have produced sales tax clearance certificate, their rejection only of the petitioner's tender on this ground has to be declared as unjustified.

19. In this context the reference to section 8 of the General Clauses Act by Mr. Chaliha in my considered view has no application inasmuch as in the case in hand, the court is not scrutinizing a provision of any enactment but is examining the purport of a tender clause only.

....

24. Selection of a party to execute a supply work through tender process would normally require selection of the party who has quoted the lowest price and in this case the petitioner's quotation was lower than respondent No. 4 to whom the work order was issued. Considering the lower quotation of the petitioner, he has a better right in my view to secure the contract in question and under such circumstances the work order granted in favour of respondent No. 4 is declared to be illegal.

7. The learned single judge, thus, held that though the tender of the writ petitioner was considered invalid for non-submission of the "sales tax clearance certificate", the fact remains that when none of the tenderers had produced the "sales tax clearance certificate", rejection of the writ petitioner's tender alone, on the said ground, was unjustified. The learned single judge further held that the work, allotted in favour of the appellant, was illegal inasmuch as the writ petitioner's quoted rate for supply of blanket was lower than that of the appellant and the writ petitioner, therefore, had a better right to secure the contract, in question. Aggrieved by the decision so reached in the writ petition, the unsuccessful tenderer, who stood impleaded as respondent No. 4 in the writ petition, has preferred this appeal.

8. We have heard Dr. A.K. Saraf, learned senior counsel, appearing on behalf of the appellant, and Mr. S. Kataki, learned counsel for the writ petitioner-respondent No. 1. We have also heard Ms. B. Goyal, learned Government Advocate, appearing on behalf of the State-respondents.

9. Assailing the decision reached in the writ petition, Dr. Saraf, learned senior counsel, submits that the learned single judge's finding, that clause 7(a) of the tender notice did not require VAT clearance certificate, is erroneous inasmuch as sales tax is collected by the State by virtue of entry 54 of List II of the Second Schedule to the Constitution of India and both, the AGST Act, 1993, as well as

the VAT Act, 2003, have been enacted by taking recourse to entry 54 of List II as aforementioned. Dr. Saraf contends that any tax, collected by taking recourse to any of the said two enactments, namely, the AGST Act, 1993, as well as the VAT Act, 2003, is nothing, but collection of sales tax and the "sales tax clearance certificate", in the context of the facts of the present case, means a certificate from the competent authority evidencing clearance of tax on sales. Dr. Saraf points out that the writ petitioner-respondent No. 1 had not submitted VAT registration certificate as is warranted in respect of normal sales, but what the writ petitioner-respondent No. 1 had submitted was a VAT registration certificate under the scheme of composition of tax pertaining to works contract executed by the writ petitioner. Such a registration, contends Dr. Saraf, had no relevance whatsoever in the present case, wherein the transaction amounted to sale of woollen blankets by the selected tenderer to the State respondents/authorities concerned and the purchase thereof by the State respondents/authorities concerned.

10. Assailing the finding of the learned single judge to the effect that the writ petitioner's quoted rate for supply of blankets was lower than that of the appellant, Dr. Saraf points out that as per clause 17 of the tender conditions, the tenderers were required to quote their rates inclusive of all taxes and charges. Drawing our attention to the tender documents of the writ petitioner, which formed part of the writ petition, Dr. Saraf points out that these documents clearly reveal that the rate, quoted by the writ petitioner, did not include VAT payable on the woollen blankets offered to be supplied. Dr. Saraf further points out that since the woollen blankets are taxable at four percent and if the element of tax, so payable, is taken into consideration, the rate, quoted by the writ petitioner, would become higher than that of the appellant, but this aspect of the case appears to have completely escaped attention of the learned single judge while taking the view that the writ petitioner-respondent No. 1 herein was the lowest valid tenderer.

11. The learned single judge, thus, according to Dr. Saraf, fell into error in not taking into account the fact that the tender notice required quoting of rate by the tenderer inclusive of VAT and since the writ petitioner had not included, within its quoted rate, the VAT, which was payable on supply of blankets the writ petitioner's quoted rate could not have been taken to be lower than that of the appellant, particularly, when the addition of the tax element of four percent would clearly make the writ petitioner's quoted rate much higher than that of the appellant. Dr. Saraf contends that since the writ petitioner had violated the essential conditions of the tender notice by not submitting the "sales tax clearance certificate" and by quoting a rate, for supply of blankets, without including, within its quoted rate, the taxable element of four percent payable as VAT, the State respondents/authorities concerned were wholly justified in rejecting the tender of the writ petitioner and the learned single judge, in the face of such glaringly noticeable facts and the law relevant thereto, committed manifest error of law in allowing the writ petition and in setting aside the award

of contract, in question, made in favour of the appellant. As far as the learned single judge's finding in respect of pledging of the "earnest money" is concerned, this finding has not been assailed before us.

12. Resisting the above submissions, made on behalf of the appellant, Mr. S. Kataki, learned counsel, appearing on behalf of the writ petitioner-respondent No. 1 herein, submits that no issue, as regards non-furnishing of appropriate VAT registration certificate, had been raised in the writ petition and the appellant may not, therefore, be permitted, now, to raise this issue in the present appeal. So far as the non-submission of the "sales tax clearance certificate" is concerned, Mr. Kataki submits that in the tender notice, since the condition imposed was submission of "sales tax clearance certificate", whereas the AGST Act, 1993, already stood repealed, fulfilment of such a condition was an impossibility and could not have, therefore, been insisted upon or taken as a ground for rejecting the writ petitioner's tender, particularly, when other tenderers too, including the appellant, had not submitted any "sales tax clearance certificate". Mr. Kataki further submits that since the tender notice did not require submission of VAT clearance certificate, the condition of furnishing of VAT clearance certificate and/or the "sales tax clearance certificate" could not have been read, and ought not to be read, into the terms and conditions embodied in the tender notice. Mr. Kataki contends that in a tender process, there cannot be any implied term and a notice inviting tender cannot be interpreted on the basis of what the authorities might have intended and that the requirement of law is that the conditions, incorporated in a notice inviting tender, must be read as they appear in the notice inviting tender. In support of his submissions, Mr. Kataki places reliance on Commissioner of Police, Bombay Vs. Gordhandas Bhanji, .

13. Controverting the submissions made on behalf of the appellant that since the rate, quoted by the writ petitioner, was not inclusive of VAT, the same was not in conformity with the conditions of the tender notice and if the element of VAT payable was taken into account, the rate, quoted by the writ petitioner-respondent No. 1, would become higher than the rate quoted by the appellant, Mr. Kataki submits that there was a declaration by the writ petitioner, in the tender documents, that the writ petitioner would abide by all the terms and conditions of the tender notice and, hence, even though the rate, quoted by the writ petitioner, was exclusive of VAT, the said declaration given by the writ petitioner shall be construed to mean that the rate, which had been quoted by the writ petitioner, was a rate inclusive of VAT and not exclusive of VAT even though the writ petitioner had mentioned, in the tender documents, that its offered rate was exclusive of VAT.

14. As regards the appellant's contention that appropriate VAT registration certificate was not submitted by the writ petitioner with the tender documents, Mr. Kataki contends that the requirement, under the tender notice, was submission of VAT registration certificate and it does not really matter whether the VAT registration certificate, in question, which the writ petitioner had

submitted, was under a scheme of composition of tax or in respect of regular sales of goods by the writ petitioner. Mr. Kataki further submits that it is true that the VAT registration certificate, issued to the writ petitioner, was under the scheme of composition of VAT payable and the same relates to a works contract; but even supply of woollen blankets, according to Mr. Kataki, can be classified as a works contract and, hence, the submission of VAT clearance certificate, granted under the scheme of composition of tax payable in respect of works contract, was a sufficient compliance with the conditions of tender notice.

15. Referring to an affidavit filed by the writ petitioner, in the present appeal, taking some additional grounds, Mr. Kataki submits that in terms of clause 6 of the tender notice, an intending tenderer was required to deposit "earnest money" equivalent to two percent of the estimated value of the articles to be supplied. The appellant, however, contends Mr. Kataki, submitted "earnest money" in respect of its quoted price of Rs. 271 only, but did not deposit "earnest money" in respect of its quoted price of Rs. 235 and/or of Rs. 289 and the appellant had, thus, not, according to Mr. Kataki, fulfilled the essential condition of the tender notice, but this aspect, submits Mr. Kataki, could not be agitated in the writ petition by the writ petitioner. On totality of the circumstances, therefore, the writ petition, contends Mr. Kataki, has been justifiably allowed and the decision, reached therein, may not, submits Mr. Kataki, be interfered with.

16. Appearing on behalf of the State respondents/authorities concerned, Ms. Goyal, learned Government Advocate, submits that the essential conditions of the tender notice had not been complied with by the writ petitioner as indicated above and, hence, the rejection of the writ petitioner's bid was wholly correct and justified and the interference, in the writ petition with the decision to award the contract, in question, in favour of the appellant, was not called for and may, therefore, be corrected in this appeal.

17. Repelling the submissions made on behalf of the writ petitioner-respondent No. 1, Dr. Saraf submits that a VAT registration certificate, under the scheme of composition of VAT payable for execution of works contract, cannot be equated to the normal sale and supply of woollen blankets, for, supply of woollen blankets, according to Dr. Saraf, is not a works contract. Dr. Saraf contends that the VAT registration certificate, which the writ petitioner had submitted, suffered from two incurable defects inasmuch as the VAT registration certificate, submitted by the writ petitioner, was not the normal certificate of registration evidencing registration of the appellant as a dealer as envisaged in the VAT Act, 2003, for sale of goods and, secondly, the VAT registration certificate, which the petitioner had submitted, was in respect of works contract, which is different from normal sale and supply of materials, such as, supply of woollen blankets. Thus, according to Dr. Saraf, the VAT registration certificate, granted to the writ petitioner under the provisions of composition, is not a normal VAT registration certificate and, more so, when such registration certificate relates to works contract, the certificate, so produced, cannot cover a work of normal sale and

supply of materials, such as, woollen blankets.

18. As regards the submission of Mr. Kataki that the appellant had quoted three different rates, but had paid "earnest money" of two percent on the place of woollen blanket, which was quoted at Rs. 271 per blanket, Dr. Saraf points out that the appellant had quoted three different rates for three different qualities of woollen blankets and deposited "earnest money" of two percent on the price of woollen blanket, which was Rs. 271. As the respondents/authorities concerned have awarded the contract in favour of the appellant in respect of woollen blankets of Rs. 235 per blanket, the "earnest money", deposited by the appellant, covered the total value of the contract awarded to the appellant and the appellant has, thus, fulfilled the requisite condition of tender notice and the selection of the appellant by the State respondents/authorities concerned, for awarding of the contract, in question, was in accordance with the law.

19. Upon hearing the learned counsel for the parties, the first issue, which attracts our attention, is: Whether a new plea, as has been raised by both the parties, can be allowed to be raised in a writ appeal. A writ appeal is really not a statutory appeal preferred against the judgment and order of an inferior court to the superior court. The appeal inter se in a High Court from one court to another is really an appeal from one co-ordinate Bench to another co-ordinate Bench and it is for this reason that a writ cannot be issued by one Bench of the High Court to another Bench of the High Court. Thus, unlike an appeal, in general, a writ appeal is an appeal on principle and, that is why, unlike an appeal, in an ordinary sense, such as, a criminal appeal, where the whole evidence on record is examined anew by the appellate court, what is really examined, in a writ appeal, is the legality and validity of the judgment and/or order of the single judge and it can be set aside or should be set aside only when there is a patent error on the face of the record, or the judgment is against the established or settled principle of law. If two views are possible and a view, which is reasonable and logical, has been adopted by a single judge, the other view, howsoever appealing such a view may be to the Division Bench, it is the view adopted by the single judge, which should, normally, be allowed to prevail. Though a writ appeal is an appeal in principle, as indicated hereinbefore, the fact remains that a writ appeal too is an appeal and is, therefore, a continuation of the original order passed in exercise of writ jurisdiction by a single judge of this court and, thus, when a writ appeal is continuation of the original proceeding, there is no absolute bar in allowing new pleas to be taken in a writ appeal, particularly, when such a plea is of law and can help the court reach a correct decision in the appeal and also when a new plea relates to such facts, which are not disputed and are already available on record and can help the court in deciding the appeal completely and effectively. This apart, a writ appeal being a continuation of the original order, the decision, in a writ petition, does not operate as an estoppel for either party in raising a question of law or in placing reliance on a document or paper already available on record. A reference may, in this regard, be made to the case of Bongaigaon Refinery and P.C. Ltd. and Others Vs. Girish Chandra Sarmah, ,

wherein the Supreme Court has held that a writ appeal is a continuation of the original order passed in the writ petition by a single judge and the findings, recorded in a writ petition, cannot operate, in a writ appeal, as estoppel against the party concerned. The relevant observations, appearing in this regard, in Bongaigaon Refinery and P.C. Ltd. and Others Vs. Girish Chandra Sarmah, , read as under:

...Since the writ appeal is in continuation of the original order passed in the writ jurisdiction by the learned single judge, it cannot operate as an estoppel against learned counsel for the respondent to press the same. If the finding recorded by the inquiring officer is not sound and it relates to perversity then the appellate court in writ appeal cannot estop the counsel from raising the same. More so, the Division Bench after considering the matter has found that the whole approach was perverse because the respondent alone has been made a scapegoat. When the decision of all the three committees was unanimous, then to take one and put the entire blame on him is definitely perverse approach and the court cannot stand to the technicalities so as to defeat the ends of justice....

20. In the present case, paragraph 11 of the judgment and order, under appeal, shows that the writ petitioner, by referring to the VAT registration certificate, which had been granted in respect of "works contract" and also the permission, granted to the petitioner by the Superintendent of Taxes to pay composition amount of tax, submitted that the writ petitioner's tender ought not to have been treated as invalid by the State respondents/authorities concerned on the ground that the writ petitioner had not furnished "sales tax clearance certificate".

21. When, as indicated above, the said VAT registration certificate as well as the permission granted by the Superintendent of Taxes enabling the writ petitioner to pay a composition amount of tax, which have been referred to, and relied upon, by the writ petitioner in support of its case, the appellant cannot be really stopped from raising the issue, namely, (i) whether the said registration certificate was an appropriate registration certificate as envisaged by the tender notice and (ii) whether a payment, made under the composition scheme, as indicated hereinbefore, amounts to a "tax clearance certificate"? The objection, raised, in this regard, by Mr. Kotoky, that the appellant has raised a new plea, cannot, therefore, hold water.

22. Since it is necessary for us to examine, in the factual scenario of the present case, the appellant's plea as to whether the VAT registration certificate, furnished by the writ petitioner, was an appropriate VAT registration certificate in the context of the terms and conditions of the tender notice at hand, or not, we would also examine the plea of the writ petitioner-respondent No. 1 herein to the effect that the appellant had not fulfilled the conditions of the tender notice inasmuch as the appellant had not deposited the "earnest money" as required by the tender notice.

23. Before proceeding to examine the rival contentions of the parties, we need to

point out that judicial review means court's power to review the action of other branches or levels of the Government. In the judicial review of a contractual matter, the writ court will not sit as a, appellate court or as an appellate forum over the decision of the authorities concerned to award the contract in favour of any tenderer unless the decision-making process is unfair, non-transparent, arbitrary, motivated, biased, or contrary to the provisions of law and/or public interest. Judicial review, in such a case, is not against the decision, but the decision-making process. So long as it is found that an administrative decision has been reached by taking into consideration all such factors, which were relevant, and by keeping excluded from the purview of consideration all such factors, which were irrelevant, the decision cannot, ordinarily, be interfered with by taking recourse to article 226 of the Constitution of India unless the decision suffers from infraction of law. Judicial review is aimed at preventing arbitrariness and favouritism and is required to be exercised in larger public interest, or, when a decision, brought to the notice of the court, reveals that the power has been exercised for a collateral purpose.

24. It is also well-settled that essential conditions of a notice inviting tender must be adhered to by all the tenderers and if there is no power of general relaxation, no relaxation shall be granted. It can also not be in dispute that the principle of strict compliance would be insisted, where it is possible for all the parties to a tender process to comply, fully and completely, with a given condition, particularly, when the condition is mandatory in nature. Whether any condition, or part thereof, embodied in a notice inviting tender, is an essential condition or not, shall have to be examined bearing in mind the object, which is sought to be achieved by the condition so imposed. There can also be no doubt that an authority would, ordinarily, be fully justified in rejecting a tender if the tenderer does not fulfil the conditions required for submission of a valid tender. Insistence upon fulfilment of the conditions, embodied in a tender notice, ensures quality in the tenderers and the deletion of any condition(s) or relaxation of any condition(s), in favour of any tenderer, would, ordinarily, result in discrimination not merely amongst the tenderers, but also amongst the persons, who would have applied and/or participated in the tender process, had they known that such a relaxation would be permitted (See *Tata Cellular Vs. Union of India*, and *Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others*,).

25. In the above backdrop of the ambit and scope of judicial review in contractual matters, we, now, turn to the question as to whether the requirement of furnishing of a "sales tax clearance certificate", in the tender process, in question, would mean VAT clearance certificate, because the Assam General Sales Tax Act, 1993, stood repealed and replaced by enactment of the Assam VAT Act, 2003, on the date of the floating of the present tender notice. For the purpose of reaching a correct decision on this aspect of the appeal, it is, to our mind, necessary to clearly understand as to what VAT means and what difference, if any, lies there between VAT, on the one hand, and sales tax, on the

other.

26. VAT is a tax on every sale with a facility of set-off on tax paid on purchases. Value added tax (VAT) is the tax levied by a State Government on sale or purchase of goods within the State and by its very nature, VAT is an indirect tax on sale of goods, which is recovered from the buyer by the seller, and the tax, so collected by the seller, is deposited in the account of the State Government. The globalization of trade, investment and services necessitated reforms in the economic structure of the State. VAT is the modern system of indirect tax, which has been adopted by a large number of countries to avoid cascading effect of the earlier existing system of sales tax. Thus, VAT is nothing, but a modern and transparent tax system that has replaced the earlier system of payment of sales tax in order to eliminate the cascading effect of sales tax. VAT is a multi-stage tax, which is levied every time the commodity changes hands, but only on the incremental value added at each stage unlike the turnover tax, which is levied on the gross turnover of a dealer. VAT produces a yield equivalent to that of a single stage retail sales tax. Since the sum of the value added, at each successive stage, is equal to the final value or price of a commodity or service, the sum of tax collected, at the successive stages, will be equivalent to the tax, which would be payable if it were to be charged once on the final value or price of the produce. Section 2(56) of the Assam VAT Act, 2003, defines VAT to mean a tax on sale of any goods, at every point, in the series of sale made by the registered dealer, with the provisions of credit of input tax paid at the points of previous purchase thereof. In short, VAT is nothing, but a modern system of sales tax.

27. What now, needs to be noted is that both, the Assam General Sales Tax Act, 1993, and the Assam Value Added Tax Act, 2003, are fiscal legislations made by taking recourse to entry 54, List II of the Seventh Schedule to the Constitution of India, which deals with taxes on sale or purchases of goods. Not only that the AGST Act, 1993, was enacted by taking recourse to entry 54, List II of the Seventh Schedule to the Constitution of India, but even the Assam VAT Act, 2003, has been enacted by taking recourse to entry 54, List II of the Seventh Schedule to the Constitution of India. Thus, the VAT Act aims at levying tax on sale or purchase of goods inside the State. Whatever may be the nomenclature of the Act, whether the Assam General Sales Tax Act, 1993, or the Assam Value Added Tax Act, 2003, the fact remains that it is a tax on a sale or purchase of the goods and the same, therefore, is nothing, but a sales tax. Even the preamble to the Assam Value Added Tax Act, 2003, states that it is an Act to provide for imposition and collection of tax on the sale of goods in the State of Assam and for matter connected therewith and incidental thereto. Hence, the finding of the learned single judge to the effect that there was no requirement of furnishing of VAT clearance certificate and though the other tenderers had furnished VAT clearance certificate instead of "sales tax clearance certificate", yet none of the tenderers having furnished "sales tax clearance certificate", the rejection of the writ petitioner's tender on the ground of non-submission of "sales tax clearance certificate" was unjustified, is, we regret, erroneous. The

learned single judge has proceeded on the basis that a "sales tax clearance certificate" was something different from a VAT clearance certificate thereby failing to take note of the fact that VAT is also a sales tax and it is only the system of levy that has undergone change and not the nature of tax.

28. Coupled with the above, we may turn to clause 7(a) of the tender notice, which had set out the requirement of submission of "tax clearance certificate". Clause 7(a) of the tender notice reads as under:

7(a) All tender must be accompanied by up to date income tax/VAT registration certificate/sales tax clearance certificate including PAN card.

29. From a bare reading of clause 7(a) of the tender notice, it becomes clear that the conditions, embodied therein, nowhere, speaks of "sales tax clearance certificate" under the Assam General Sales Tax Act, 1993, alone. It simply speaks of a condition of furnishing of "sales tax clearance certificate". The requirement of furnishing of "sales tax clearance certificate", in the context of the law, in force, means that there is no outstanding amount of sales tax due to the State from the person holding the certificate. The requirement of furnishing of "sales tax clearance certificate" cannot, in the present case, be construed to mean a "sales tax clearance certificate" issued only under the Assam General Sales Tax Act, 1993. The object and purport of the condition, embodied in clause 7(a), requiring a tenderer to furnish "sales tax clearance certificate" ought to be kept in mind, while interpreting the term "sales tax clearance certificate", which appears in clause 7(a). In short, thus, the requirement, under clause 7(a), was to furnish a certificate evidencing that no tax, arising out of sale or purchase of goods, has remained due and payable by the tenderer, as a dealer, under a statute made by taking recourse to entry 54, List II of the Seventh Schedule to the Constitution of India.

30. Turning to the finding of the learned single judge that the writ petitioner had quoted a rate, which was lower than that of the appellant herein and the writ petitioner had, therefore, a better right to secure the contract, in question, it is imperative that we closely examine clause 17 of the tender notice. This clause (clause 17) reads as under:

17. The rate quoted in the tenders shall be inclusive of all other taxes and charges leviable by Government and the tendered rates must conform to the units of measurement and other specification indicated in the tender notice, which shall be in terms of prevailing units of measurement, etc.

31. From a bare reading of what clause 17 embodies, it becomes transparent that clause 17 imposes the condition on the intending tenderers to quote their rates inclusive of taxes as well as charges leviable by the Government. As discernible from the writ petitioner's own letter, dated October 20, 2009, annexed to the writ petition, the writ petitioner's quoted rate was Rs. 234, per woollen blanket, with a note, which read, "all rates are excluding VAT." This shows that the writ petitioner's quoted rate of Rs. 234, per blanket, did not

include the VAT payable. On the other hand, the rate, quoted by the appellant and on the basis whereof, the contract has been awarded to the appellant, was Rs. 235, which was inclusive of VAT. Admittedly, woollen blankets are taxable at four paise in a rupee under the Assam Value Added Tax Act, 2003. On the price of Rs. 234 per blanket, the VAT payable, if added to the offered rate of the writ petitioner, would raise the offer of the petitioner to the tune of Rs. 243.36 per blanket. The fact that the writ petitioner's quoted rate of Rs. 234, per blanket, would rise to Rs. 243.36, if VAT is added thereto, has not been disputed, before us, on behalf of the writ petitioner-respondent herein. Viewed in this light, it becomes crystal clear that the rate, quoted by the writ petitioner-respondent No. 1, of Rs. 234, per blanket, which was exclusive of VAT, cannot be said to be lower than the rate quoted by the appellant or the rate at which the appellant had offered to make supply of blankets. The submissions made, in this regard, by Mr. Kataki, to the effect that notwithstanding the rate, quoted by the writ petitioner to be exclusive of VAT, the same should be considered to be inclusive of VAT, because, there is a declaration, in terms of the tender notice, that the writ petitioner would abide by all the terms and conditions of the NIT, cannot but be rejected inasmuch as a tender process would become arbitrary if mere declaration, given by a tenderer, that he would comply with all the terms and conditions of a notice inviting tender, is treated as sufficient compliance of all the terms and conditions incorporated in a notice inviting tender. Such a declaration, if relied upon, would frustrate the very purpose of calling of tenders by imposing certain essential conditions. By quoting a rate "exclusive of VAT", the writ petitioner had not only failed to fulfil the terms of the tender notice, but it also goes without saying that since the writ petitioner had itself mentioned its rate as "exclusive of VAT", the rate, quoted by the writ petitioner, shall have to be calculated by taking into account the element of VAT. On taking into account the element of VAT, when the rate, quoted by the writ petitioner, becomes higher than the rate quoted by the appellant, the finding of the learned single judge, that the rate quoted by the writ petitioner was lower than that of the appellant, cannot, but be termed as erroneous and calls for interference therewith.

32. Let us, now, examine the question as to whether the VAT registration certificate, granted under a composition scheme, which the writ petitioner had submitted, an appropriate VAT registration certificate as envisaged by the tender notice. The copy of the VAT registration certificate, annexed to the writ petition, reveals that the same is a certificate of registration in form 5 of the Value Added Tax Rules, 2005, and the commodity dealt in has been specified to be "civil works" for the purpose of works contract. The writ petitioner has also annexed to the writ petition a copy of the order, dated June 5, 2009, passed by the Superintendent of Taxes, Guwahati, whereby the writ petitioner was allowed to pay composition amount in respect of the works contract. As per section 20(2) of the Assam VAT Act, 2003, the Government may, by notification published in the Official Gazette and subject to such conditions and restrictions, as may be specified therein, permit any dealer liable to pay tax on sales effected by way of

transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, to pay, at his option, in lieu of the amount of tax payable by him under this Act, an amount by way of composition at the rate specified in the notification, but not exceeding five percentum of the total contract value of the works contract. Rule 13(13) of the Assam VAT Rules, 2005, provides that every dealer, who opts for composition scheme u/s 20 of the Assam VAT Act, 2003, or a casual dealer shall apply for registration in form 4 and shall be granted a registration certificate in form 5 and shall be assigned a general registration number, which shall be written in the registration certificate. Other dealers have to apply for registration in form 2 and certificate shall be supplied in form 3.

33. From the certificate of registration annexed to the writ petition, it is clear that the same is in respect of the composition scheme and the item/commodity mentioned therein civil work. The registration has been granted in form 5, wherein the general registration number is mentioned. In the present case, the items are woollen blankets, which can, by no stretch of imagination, be said to be civil work. Thus, the certificate of registration, which the writ petitioner submitted with its tender, was not at all in compliance with the requirements of clause 7(a).

34. What, now, needs to be noted is that Mr. Kataki, learned counsel, has submitted that the certificate of registration, which the writ petitioner has submitted, was in respect of "works contract" and the supply of woollen blanket too is nothing but a "works contract" and it was, therefore, not necessary to submit a certificate of registration other than the one, which the writ petitioner had already submitted. The submission, so made on behalf of the writ petitioner-respondent No. 1, leaves us with no option but to examine as to what a "works contract" means.

35. The term, "works contract", is defined in section 2(57) of the Assam Value Added Tax Act, which reads as under:

section 2(57) "works contract" includes any agreement for carrying out for cash, deferred payment or other payment or other valuable consideration, the building, construction, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;

36. From the definition of "works contract", as contained in section 2(57), it becomes clear that a "works contract" means any agreement for carrying out, for cash, deferred payment, or other payment, or other valuable consideration, the building, construction, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property, etc. Thus, a "works contract" is an act, distinct and different from supply of woollen blanket. By no rational analysis, supply of woollen blankets can be defined to be, or be treated as, a "works contract". The distinction between a "contract for sale" and a "contract for work" and "labour" has been succinctly

described in Halsbury's Laws of England, Third Volume, article 3, page 6 in the following words:

A contract of sale is a contract whose main object is the transfer of property in, and delivery of the possession of, a chattel as a chattel to the buyer. When the main object of work undertaken by the payee of the price is not transfer of chattel qua chattel, the contract is one for work and labour. The test is whether or not the work and labour bestowed, and in anything that can properly become the subject of sale; neither the ownership of the materials, nor the value of the skill and labour as compared with the value of the materials is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for sale of the chattel. The primary test is whether the contract is one whose main object is transfer of property in a chattel as a chattel to the buyer, though some work may be required to be done under the contract as ancillary or incidental to the sale or it is carrying out of work by bestowal of labour and services and materials are used on execution of such work.

37. Coupled with the above, "Benjamin on Sale" (Eighth Edition, Volume 34, page 6), has observed that, where the employer delivers to a workman either all or the principal materials of a chattel on which the workman agrees to do works, there is a bailment by the employer, and a "contract for work" and labour, or for work, labour and materials (as the case may be) by the workman. Materials added by the workman, on being affixed to or blended with the employers materials, thereupon vests in the employer by accession and not under any contract of sale. Whether the workman supplies either or the principal materials, the contract is a "contract for sale" of the completed chattel, and any material supplied by the employer, when added to the workman's material, vests in the workman by accession. The fact that the value of the materials, supplied by one of the parties, exceeds the value of the materials supplied by the other, does not conclusively prove that the more valuable are the principal material.

38. From what have been described as the distinction between a "contract for work" and a "contract for sale" of goods, what becomes clear is that if the intention is to transfer, for a price, a chattel in which the transferor had no previous property, then, the contract is a contract for sale. In a contract for sale, the main object is the transfer of property and delivery of possession of the property; whereas the main object in a "contract for work" is not the transfer of the property, but it is one for work and labour.

39. One of the tests to determine whether a contract is a "contract for work" or for sale was formulated by the Supreme Court, in Commissioner of Sales Tax M.P. Vs. Purshottam Premji, , and the question, so posed, was answered as under (page 41 in 26 STC):

The primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing work or

rendering service no property in the thing produced as a whole notwithstanding that a part or even the whole of the materials used by him may have been his property. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it, at some time before delivery, and the property therein passes only under the contract relating thereto to the other party for price....

40. From the above observations, made in Commissioner of Sales Tax M.P. Vs. Purshottam Premji, , it is clear that the primary difference between a contract for "work and service" and a contract for "sale of goods" is that in the case of the contract for "sale of goods", the goods produced, as a whole, has individual existence as the sole property of the party producing it, at some time before delivery of the same, and the property therein passes only under the contract relating thereto to the other party for a price; whereas in a "contract for work", the person, performing work or rendering service, has no property in the goods produced as a whole.

41. From the observations, made above, in Commissioner of Sales Tax M.P. Vs. Purshottam Premji, , it is clear that the primary difference between a "contract for work and service" and a "contract for sale of goods" is that in the case of the latter, the goods produced, as a whole, has individual existence as the sole property of the party producing it, at some time before delivery of the same, and the property therein passes only under the contract relating thereto to the other party for a price; whereas in a "contract for work", the person, performing work or rendering service, has no property in the goods produced as a whole.

42. We may, at this stage, refer to the case of State of Andhra Pradesh Vs. Kone Elevators (India) Ltd., , wherein the distinction between a "contract for sale" and a "contract for work" has been succinctly described. Speaking for the court, S.H. Kapadia, J., (as his Lordship, then, was) drawing the distinction between the two, observed and held as under (pages 26 and 27 of 140 STC):

5. It can be treated as well-settled that there is no standard formula by which one can distinguish a "contract for sale" from a "works contract". The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged thereunder and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a "contract of sale", the main object is the transfer of property and delivery of possession of the property, whereas the main object in a "contract for work" is not the transfer of the property but it is one for work and labour. Another test often to be applied is: when and how the property of the dealer in such a transaction passes to the customer: is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a "sale";

if it is the latter, it is a "works contract". 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 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.

43. From the above observations, made in *State of Andhra Pradesh Vs. Kone Elevators (India) Ltd.*, , what clearly surfaces is that the question as to whether a contract is a "contract for sale" or a "contract for work", depend upon the nature of obligations to be discharged under the contract and the surrounding circumstances, If the intention is to transfer for a price a chattel in which the transferee had no previous property, then, the contract is a "contract for sale". Thus, the main object, in a "contract for sale" is the transfer of property and delivery of possession of the property, whereas the main object in a "contract for work" is not the transfer of the property, but it is one for work and labour. The test, which is often applied, is when and how the property of the dealer in such a transaction passes to the customer. Is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a "sale", if it is the latter, it is a works contract. In judging, therefore, 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".

44. In the light of the law as discussed above, when the present contract is carefully analysed, it becomes clear that the intention of the tenderer is to transfer for a price the chattel (blanket, in the present case, to the State respondents), wherein the State respondents had no previous property. In such circumstances, the supply of woollen blankets, covered by the tender notice, is nothing, but a "contract for sale". Hence, the contention of Mr. Kataki that the contract for supply of woollen blankets is a "works contract" is, in the facts and attending circumstances of the present case, wholly untenable and is, therefore, rejected.

45. In the case at hand, considering the fact that the tender notice specifically

provided for submission of VAT registration certificate, the same must be treated to be with regard to the item sought to be purchased. The object of asking for the certificate of registration is that the tenderer must be a registered dealer so that the tax, which will become due to the State for the supply of the items, pursuant to the tender notice, is duly paid and this object cannot be, obviously, achieved by submission of a certificate of registration in respect of civil works and, that too, under a composition scheme. We have, therefore, no hesitation in holding that the writ petitioner-respondent No. 1 herein had not fulfilled the condition of submission of VAT registration certificate as was required to be done under the tender notice and, hence, the writ petitioner's tender was not a valid tender.

46. We may, now, examine Mr. Kataki's contention that the tender of the appellant was not a valid tender inasmuch as the appellant had deposited the earnest money in respect of only one category of woollen blanket costing Rs. 271, whereas the contract for supply was awarded for woollen blanket costing Rs. 235 only. It needs to be noted, in this regard, that clause 6 of the tender notice states that the intending tenderer shall deposit earnest money at two percent of the estimated value of the articles tendered for. In the present case, the quantity of woollen blankets to be supplied was fixed and the appellant had offered three different qualities of woollen blankets priced differently. The appellant, however, deposited the earnest money taking into consideration the price of woollen blanket, which Rs. 271. However, the State respondents/authorities concerned accepted the appellant's offer to supply woollen blanket at Rs. 235 per blanket. The earnest money, required to be deposited for the supply of blanket at Rs. 235, per blanket, was much less than the earnest money, which the appellant had already deposited. It also needs to be noted that the appellant submitted only one tender and the appellant, therefore, was not required to deposit earnest money for different types of woollen blankets, which the appellant had offered, when it was clear (and it is not in dispute) that only one type of woollen blanket would be accepted and ordered for. Situated thus, we find no force in the submission of Mr. Kataki that the appellant had not fulfilled the conditions of the notice inviting tender in respect of deposit of earnest money.

47. Because of what have been discussed and pointed out above, we are clearly of the view that as petitioner-respondent No. 1 had not fulfilled the essential conditions of the tender notice, the writ petitioner's tender was not a valid tender and was rightly rejected by the State respondents/authorities concerned. Extended logically, it would mean, and we hold, that the learned single judge erred in law in treating the writ petitioner's tender as a valid tender and also in treating the writ petitioner as a tenderer, who had quoted, for supply of blanket, a rate lower than that of the appellant. The writ petition was, thus, incorrectly and wrongly allowed.

48. In the result and for the reasons discussed above, this appeal succeeds. The judgment and order, under appeal, shall accordingly stand set aside and the writ

petition shall stand dismissed.

49. This appeal stands disposed of in terms of the above observations and directions. No order as to costs.