

Court No. - 34

Case :- WRIT - C No. - 17620 of 2019

Petitioner :- Bharat Forge Limited

Respondent :- The Principal Chief Materials Manager Diesel Locomotive Works And 7 Others

Counsel for Petitioner :- Prashant Shukla, Anurag Khanna (Senior Advocate)

Counsel for Respondent :- Rishi Kumar, Rajnish Kumar Rai, Udayan Nandan

Hon'ble Mrs. Sunita Agarwal, J.

Hon'ble Jayant Banerji, J.

Heard Shri Kavin Gulati, learned Senior Advocate assisted by Shri Prashant Shukla and Ankur Sehgal, learned Advocates for the petitioner; Shri Shashi Nandan, learned Senior Advocate assisted by Shri Udayan Nandan and Shri Ajay Sondhi, learned Advocates for the respondent no. 6 and Shri Rajnish Kumar Rai, learned Advocate for the respondent nos. 1 to 5 (Railways).

The petitioner herein is a company registered under the provisions of the Indian Companies Act having its registered office at Pune Cantonment, Mundhwa, Pune, Maharashtra.

The respondent no.1, Diesel Locomotive Works, Varanasi published a notice dated 11.4.2019 inviting e-tender for procurement of Turbo Wheel Impeller Balance Assembly to D.L.W Part no.16080385. The Turbo Wheel Impeller Balance Assembly (in short referred to as the “procurement product”) is an assembly critical to the 710G HHP locomotive run by the Railway. This product consists of a turbine and a compressor, coupled on a common shaft, and balanced to enable its rotation at speeds as high as 22,000 RPM(rounds per min). This assembly is an essential moving part of the 710-G turbocharger. With the drop in higher temperature exhaust gases, there is rotational energy delivered to the turbine which in turn delivers its input to the compressor, enabling pumping of high density air into engine cylinders, for combustion.

A reading of the tender document shows that the validity period of offer was 120 days. The commercial compliance conditions of the tender, relevant for our purpose, are as under:-

“1. In case the successful tenderer is not liable to be registered under CGST/IGST/UTGST/SGST Act. The Railway shall deduct the applicable GST from his/their bills under reverse charge mechanism [RCM] and deposit the same to the concerned tax authority.”

“9. Please enter the percentage of local content in the material being offered. Please enter 0 for fully imported items, and 100 for fully indigenous items. The definition and calculation of local content shall be in accordance with the Make in India policy as incorporated in the tender conditions.”

10. Please enter the percentage of local content in the material being offered. Please enter 0 for fully imported items, and 100 for fully indigenous items. The definition and calculation of local content shall be in accordance with the Make in India policy as incorporated in the tender conditions.”

The Special Condition no.2 relevant to the case reads as under:-

“2. Instructions issued by Railway Board vide letter no.2015/RS G/779/5 No dated 03.08.2017 [uploaded with tender] on Preference to Make of India will also be applicable for this tender. In case, conditions given in this letter contradict with Para 1.24 of GT Bid Document, conditions of this letter will prevail.”

It is contended by the petitioner that in order to promote local manufacturer and production of Goods and Services in India with a view to enhance employment opportunities, the Government of India had issued “Public Procurement” (Preference to Make in India) Order' 2017 (in short as the “Public Procurement Order, 2017),” pursuant to Rule 153(iii) of the General Financial Rules 2017 issued by the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, Government of India.

The relevant provisions of the Public Procurement Order, 2017 are as under:-

“2. Definitions:- For the purpose of this Order:

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

'Local supplier' means a supplier or service provider whose product or service offered for procurement meets the minimum local content as prescribed under this Order or by the competent Ministries/Departments in pursuance of this order.

'L1' means the lowest tender or lowest bid or the lowest quotation in a tender, bidding process or other procurement solicitation as adjudged in the evaluation process as per the tender or other procurement solicitation.

'margin of purchase preference' means the maximum extent to which the price quoted by a local supplier may be above the L1 for the purpose of purchase preference.

3.Requirement of Purchase Preference:- Subject to the provisions of this Order and to any specific instructions issued by the Nodal Ministry or in pursuance of this Order, purchase preference shall be given to local suppliers in all procurements undertaken by procuring entities in the manner specified hereunder:-

b. In the procurements of goods which are not covered by paragraph 3a and which are divisible in nature, the following procedure shall be followed:

- i. Among all qualified bids, the lowest bid will be termed as L1. If L1 is from a local supplier, the contract for full quantity will be awarded to L1.*
- ii. If L1 bid is not from a local supplier, 50% of the order quantity shall be awarded to L1. Thereafter, the lowest bidder among the local suppliers will be invited to match the L1 price for the remaining 50% quantity subject to the local supplier's quoted price falling within the margin of purchase preference, and contract for that quantity shall be awarded to such local supplier subject to matching the L1 price. In case such lowest eligible local supplier fails to match the L1 price or accepts less than the offered quantity, the next higher local supplier within the margin of purchase preference shall be invited to match the L1 price for remaining quantity and so on, and contract shall be awarded accordingly. In case some quantity is still left uncovered on local suppliers, then such balance quantity may also be ordered on the L1 bidder.*

5.Minimum local content: The minimum local content shall ordinarily be 50%. The Nodal Ministry may prescribe a higher or lower percentage in respect of any particular item and may also prescribe the manner of calculation of local content.

6.Margin of Purchase Preference: The margin of purchase preference shall be 20%.”

The Make in India Policy/Public Procurement Order, 2017 is applicable to all Ministries, Departments, CPSUs. The Railway Board, Ministry of Railways, Government of India New Delhi had adopted the Make in India policy and conveyed its decision by the circular dated 3.8.2017, relevant contents of which are noted hereunder:-

- 2. The order contemplates for decisions on certain issues to be taken by Nodal Ministry. Accordingly the decisions of Ministry of Railways (as nodal Ministry) on such issues are as under:*

(a) Local content: *The minimum local content shall ordinarily be 50% PHOD/CHOD of procuring department (Stores/Engineering), in consultation with*

indenting department shall however be competent to vary the minimum local content below the prescribed level on case to case basis. Requisite action as per para 14 of the subject order, shall be ensured. Such power should not be further delegated.

(b) Margin of Purchase Preference: The margin of purchase preference shall be 20%.

The contention of the learned senior counsel for the petitioner is that a comprehensive reading of the Make in India policy; circular issued by the Railway Board and the tender document indicates that the bidders, including the petitioner herein were required to specify the percentage of local content in the material being offered in accordance with the Make in India Policy noted above. The special conditions, inserted in the tender document, further provides that preference to 'Make of India' will also be applicable to the subject tender.

The Union of India had issued directions to all ministries, Departments & C.P.S.Us that in all procurements, preference shall be given to those products which have atleast 50% local content, ordinarily, with such purchase preference existing in the margin of 20%. Margin of purchase preference would refer to the extent to which the price of a local supplier/local product may be above the price quoted by the supplier/product that would otherwise be the L-1, for the purpose of getting purchase preference. These directions were adopted by the circular dated 3.8.2017 issued by the Railway Board.

In the instance case, the tabulation statement of the financial bids of all bidders was published on 13.5.2019. The petitioner herein had been categorised as L-4 whereas respondent nos.6, 7 and 8 had been placed in the category as L1, L2 and L3; respectively.

As per the writ averments, the L-1, respondent no.6 (Krishna Bearings) is a trader importing procurement product from Walbar Corporation, Mexico, whereas L-2 and L-3 are local sources yet not approved by D.L.W (Diesel Locomotive Works), thus, only respondent no.6 (Krishna Bearing) could have outbid the petitioner herein. However, the respondent no.3 had included GST at the rate of 5% in the basic rate whereas the

petitioner, and other bidders (L-5 and L-6) had quoted payment of GST at the specified rate of 18% on the basic rate of the procurement product. A table giving comparative figures in INR of the contesting bidders (L-1, respondent no.6) and (L-4, the petitioner herein) is as under:-

Sl no.	Bidder	Rank	Base Price	GST Rate	GST value	Total price
1	Krishna Bearing	L1	6,00,000	5%	30000	6,30,000
2	Bharat Forge	L4	7,03,000	18%	1,26,540	8,29,540

Placing the above figures, it is contended by the learned senior counsel for the petitioner that though there is difference of about 17.1% in the base price offered by L-1 and L-4 (respondent no.6 and the petitioner herein), but because of difference in the GST rates, the difference in the total price quoted by the L-1 and the petitioner became about 31.6%. The petitioner has quoted the correct GST rate as 18% whereas the respondent no.6 (L-1) incorporated wrong rate of 5% for payment towards GST which has resulted in placement of the petitioner as L-4. It is further contended that the GST rates of the products and services have been duly clarified/fixed by the Goods and Services Tax Council, using the Harmonized System of Nomenclature (HSN) Codes for each product/service, to specify the rates at which GST would be applicable. The contention is that the procurement product would fall under Chapter 84 of the GST Tariff of India declared by the GST Council and HSN Code 84148030 is relevant for "Turbo charger", or the Procurement Product, which is chargeable at 18% GST. The relevant extract of Chapter 84 of the GST Tariff on Goods, as released by the GST Council, is appended as Annexure-'7' to the writ petition.

It is pointed out that neither the NIT (Notice inviting tender) nor the tender document published by respondent no.1 mentioned the relevant HSN code applicable to the procurement product. It appears that the respondent no.6 has quoted the HSN Code of the products to be supplied

to the Railways under Chapter 86, instead of Chapter 84, attracting HSN Code of 8602 series, for which GST is levied at 5% of the base price instead of 18%. The said issue was brought to the notice of the respondents and upon discussion with the GST Council, it was clarified that only those goods specifically classified under Chapter 86 would attract GST at the rate of 5% of the base price. Whereas other products/goods specifically classified under other chapters would attract the GST applicable as per the chapter, regardless of whether they are being supplied to the Railways. However, on a clarification sought by the petitioner under the Right to Information Act, the respondent no.1 has responded that the duty of relying on mentioning the correct HSN Code as per the GST Tariff was on the supplier/bidder and not on the tendering authority.

The submission is that the petitioner had previously also raised the issue regarding non-incorporation of the relevant HSN Code in the tender document before the tendering authority. The purchase product manufactured by the petitioner falls under the Make in India Policy as the said product is 97.68% indigenously manufactured. In reponse to compliance condition no.1 (noted above), none of the bidders, except the petitioner herein had attached the Local Content Certificate to avail of the purchase preference for locally manufactured goods under the Make in India policy.

Having failed to get a proper response from the respondents, the petitioner has approached this Court in the present writ petition with the following prayers:-

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

and directing the respondents stay the effect of the opening of the Subject Tender No. 10191001 by the Respondent no.1, and subsequent awarding of the category/rank from L1 to L6 to the various parties to the Tender;

(iii) a writ order or direction in the nature of mandamus commanding and directing the respondents in light of the incorrect GST Rate/ HSN Codes, as ought to have been correctly specified by the Bidders/Suppliers to the Subject Tender, this Hon'ble Court may also be pleased to declare the opening of the Tender a nullity, and issue a Writ of Mandamus, directing the Tendering Authority, i.e. Respondent no.1, to invite fresh bids with the HSN Code duly specified;

(iv) a writ order or direction in the nature of mandamus commanding and directing the respondents disqualify those suppliers/bidders who are not entering the correct HSN Code/GST Rate specification and are, thus, paying a GST of only 5% as against the applicable rate of 18%.”

It is, thus, vehemently contended by the learned senior counsel for the petitioner that the petitioner who is the only local manufacturer of the procurement product has been unfairly and unjustly prevented from availing the benefit and the preference under the Make in India policy. The product offered by the petitioner in the subject tender being 97.68% indigenously developed has been recognized by the respondent nos.1 and 2, which has led to inclusion of the petitioner herein to the 'approved vendor list' prepared by the respondent nos.1 and 3. It is submitted that the respondent no.1, the tendering authority, has the responsibility to provide a level-playing field of all bidders/tenderers by mentioning the HSN Code for the procurement product so that all tenderers/bidders would have quoted a uniform GST rate. The denial to discharge the said responsibility by respondent no.1 has led to unfair trade practices, in as much as, the tenderers took unfair advantage by quoting a GST rate which is substantially lower than the applicable GST rate. Accepting bids of those who do not quote the correct GST price is contrary to the public interest, in as much as, it gives licence to the tendering authority to act in favour of a particular bidder.

Learned senior counsel appearing for the petitioner, thus, submits that a writ of mandamus be issued directing the tendering authority to indicate the HSN Code of the procurement product, i.e 'Turbo Wheel Impeller Balance Assembly' in the tender document itself as per GST Tariff in Chapter 84 as HSN Code no.84148030, to ensure a uniform bid from the tenderers and balance to provide a level-playing field to all bidders/tenderers, by including uniform GST rates in the base price.

As far as the subject tender is concerned, learned counsel for the petitioner submits that the lis does not survive as the procurement product has been supplied subsequently to the respondent nos.1 and 2 under a fresh tender which has been secured by the petitioner herein. The life of the offer in question was 120 days and had expired during the pendency of the present writ petition in view of the interim order passed by this Court, whereunder the tender Committee had been restrained from issuing the purchase order under the subject tender. Even otherwise, the petitioner herein was entitled to be awarded 50% of the order quantity being the local supplier in view of Clause 3(b) (ii) of the Public Procurement Order' 2017/Make in India Policy, in as much as, if the correct GST rate was quoted by the respondent no.6, L-1, margin of purchase preference would be less than 20%.

Sri Shashi Nandan, learned Senior Advocate appearing for respondent no.6, however, submits that as per the notification of GST rates on Goods and Services dated 20.6.2017 indicated by the Central Board of Central Excise on their website, the 'Turbo Wheel Impeller Balance Assembly' which is a part of Railway locomotives, would fall in Chapter 86 of GST Tariff declared by the GST council.

The contention is that the procurements product, i.e the 'Turbo Wheel Impeller Balance Assembly' is an integral part of 'Turbo super charger' and not "Turbo charger" as stated by the petitioner. The "Turbo super charger" being a Railway locomotive part falls under Chapter 86 of GST

handbook of Tarrif issued by the GST Council and as such the applicable rate of GST on the aforesaid product is only 5% and not 18%. The contention of the petitioner that GST @ 18% is applicable on the procurement product is, thus, false. The petitioner itself has quoted GST @ 5% for the same procurement product in the tender bearing no. 101710860 which was opened on 24.7.2019. Even otherwise, the rate quoted by the petitioner does not fall within 20% margin of the purchase price and as such it is not entitled to be given the benefit of being the local supplier under the Make in India Policy, in the subject tender.

Sri Rajnish Kumar Rai learned Advocate for respondent nos.1 to 5, on the other hand, insists that the tabulated statement of financial bids prepared by the tendering authority/respondent no.1 is based on GST rates and basic rates of procurement product, as quoted by the tenderers. It is the responsibility of the tenderers to quote correct rates and statutory duties/taxes following Rules and Guidelines of the Government of India in their tender documents.

Clause 2.7.6 of Amendment no.1 of the bid document has been placed before us which reads that:-

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

It is further clarified in Clause 2.8.6.2 that:-

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

Clause 2.9.2 of the tendered document says:-

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

It is then submitted that the Railway Board had also issued a circular dated 5.9.2017 after implementation of GST Act that it shall be the

responsibility of the tenderers/bidders to quote correct HSN number and its corresponding GST rate. The purchaser/tendering authority shall not be responsible for the misclassification of HSN number or incorrect GST rate, if quoted by the bidder/tenderer. All the tenderers/bidders have to ensure that they are GST compliant and quote tax structure/rates as per GST law and for this reason HSN code was not mentioned in the NIT (Notice Inviting Tender) and bid document.

It is vehemently contended that even otherwise, it is the responsibility of the concerned authority to realise GST, if it is not paid by the tenderer/bidder. In case of non- payment of GST by misclassification or mentioning of incorrect HSN Code, the GST enforcing authorities are equipped to deal with it and penalise the erring person(s).

Beside the above, as per the terms and conditions of the tender, bidders have to keep a valid offer for 120 days from the date of opening of the tender. In this case, all bidders have quoted 120 days of the validity period of their offer in the tender. The tender was opened on 13.5.2019 and hence all offers were valid upto 9.9.2019 for decision. During the pendency of the present writ petition, the offer period had expired and, therefore, the petitioner has left with no enforceable right. Moreover, a subsequent tender no.101810202 for procurement of 'Turbo Wheel Impeller' floated on 22.2.2019, which was subject matter of challenge in writ petition no.8225 of 2019 (M/s New Tech UOI & ors), was opened on 25.10.2019 after final decision in the said writ petition on 1.10.2019. It was secured by the petitioner company being L-1, lowest approved source bidder. In the subsequent tender also, HSN code and SGT rates were not mentioned and no objection was raised by the petitioner. In fact, the tenderers/bidders have to adjust their base price according to the GST rates to match all inclusive price as mentioned in the purchase order. All the prayers in the present writ petition, therefore, have become infructuous. The writ petition is liable to be dismissed as such.

On behalf of the petitioner, in rejoinder, it is submitted that the denial on the part of the respondent no.1 to mention correct GST Code in the tender document not only lead to payment of lesser tax (GST) to the concerned department but also resulted in refusal to provide a 'level playing field' to the tenderers/bidders. As per the condition in the tender document, the successful tenderer is liable to be registered under CGST/IGST/UTGST/SGST/Act, the Railway has to deduct the applicable GST from the bills under reverse charge mechanism (RCM) and deposit the same to the concerned tax authority. The duty of Railways/respondent no.1 was, thus, to seek ratification/clarification from the GST authority as to the GST rates payable. Failure on the part of the respondent no.1 to do so has resulted in incorrect selection/ranking of bidders. The tabulation statement of financial bids (extracted above) clearly shows that the petitioner had lost the bid, though being entitled to Make in India policy, on account of incorrect mention of GST rate by L-1, L-2, and L.3, 5% in place of 18%. Even otherwise, the subsequent tender no.101810202 finalised on 16.11.2019 for procurement of "Turbo Wheel Impeller" in favour of the petitioner herein, is inclusive of GST @ 18% .

It is reiterated that the respondent no.1 is under obligation to provide uniform treatment to all bidders by mentioning HSN Code in the tender document so as to insist that they mention correct GST rates for selection in the tender process.

Heard learned counsel for the parties and perused the record.

There is no dispute about the fact that the petitioner is a local manufacturer recognized and included in the list of approved vendors maintained by the respondent nos.1 and 3. The petitioner has annexed a certificate of the product being indigenously developed along with the tender documents. The opening of the subject tender, in the instant case, may not be possible as the offer period has expired due to the interim order passed by this Court. Further with the subsequent tender for

procurement of the product, namely 'Turbo Wheel Impeller Balance Assembly' having been granted to the petitioner, the prayer nos.2 and 3 of the writ petition have been rendered infructuous.

Only dispute remains is about the flaw, if any, in the procedure adopted by the Railways in the tendering process. The petitioner is aggrieved by the fact that after opening of the financial bids, the ranking of bidders was done on the total price (all inclusive price), which was arrived at by adding base price and GST rate (GST value). The bidders selected as L-1 , L-2 and L-3 had quoted GST @ 5%, whereas the petitioner quoted 18% GST rate, which has resulted in increase in the margin of purchase preference for more than 20%. The petitioner could get benefit of Make in India Policy being the local manufacturer, only if the margin of purchase preference was less than or upto 20%. The Make in India policy/Public Procurement Order' 2017 was framed to promote manufacturing and production of goods and services in India with a view to generate employment and enhance income.

The respondent Railways had arranged ranking of the tenderers/bidders on the total offered price which figure was arrived by adding GST value in the base price. The explanation/stand of respondent no.1 that they are not concerned with GST rates as it is the area of concern of GST authorities and it was the responsibility of the bidders to quote HSN number and corresponding GST rates, is not sound, in as much as, GST value (GST rate) is integral to the tendering process.

At this stage, we may note that in the matter of award of contract, scope of judicial review is limited. The parameters for interference would be arbitrariness, irrationality, unreasonableness, bias and malafide. The purpose is to check whether choice or decision is made lawfully and not to check whether choice or decision is "sound". The reason being a contract is a commercial transaction; evaluating tenders and awarding contracts are essentially commercial functions. If the decision relating to

award of contract is bonafide, the Court in exercise of the powers of judicial review will not interfere, even if a procedural aberration or error in assesment or prejudice to a tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damage in the Civil Court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical or procedural violation or some prejudice to self and persuade Courts to interfere by exercising power of judicial review should be resisted. The reason being that such interferences may be interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.

The Court cannot examine the details of the terms of the contract which has been entered into by the public bodies or the State. The Courts have inherent limitations on the scope of any such enquiry. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the Court, cannot act as an appellate Court by substituting its opinion in respect of selection made for entering into such contract.

See: *Sterling Computers Limited Etc vs. M & N Publications Limited and others* reported in (1993) 1 SCC 445; *Tata Cellular vs Union of India* reported in (1994) 6 SCC 651; *Meerut Development Authority vs Association of Management Studies and others* reported in (2009) 6 SCC 171.

But, at the same time, the Courts can certainly examine whether "decision making process" was reasonable, rational, not arbitrary and violative of Article 14.

In *Reliance Engery ltd and another vs Maharashtra State Road*

Development Corporation Ltd and others reported in **(2007) 8 SCC 1**, it is held that standards applied by the Courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". 'Level playing field' is an important concept while construing Article 19(1)(g) of the Constitution of India. When Article 19(1)(g) confers financial right to carry on business to a company, it is entitled to invoke the doctrine of 'level playing field'. It is clarified therein that this doctrine, however, be subject to the public interest. It is said therein as under:-

“In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in [Article 19\(1\)\(g\)](#) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in [Article 19\(1\)\(g\)](#). Time has come, therefore, to say that [Article 14](#) which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with [Article 21](#) which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. [Article 14](#) applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.”

Paragraph '38' of the said report further reads as under:-

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

In light of the above legal position, on analysis of the facts and circumstances of the instant case, one of the points which arises for consideration is whether the classification of HSN Code is integral to the tendering process, i.e., whether it has an impact on the selection of

tenderers or the choice of tenderers while ranking them after opening the financial bids. It is admitted to the respondent no.1 and it was clarified in the bid document that the applicable GST has to be deducted from the bills of the successful tenderer under reverse charge mechanism and the deposit of the same is to be made to the concerned tax authority. The 'Statutory Variation clause' as a 'disclaimer clause' has been mentioned in the tender document with the obligation on every tenderer to mention the correct rate of tax in the tender document. Further, it is argued on behalf of the respondent no.1 that the Railways is not concerned with the misclassification of HSN Code or GST rate if quoted by the tenderer. The contention of respondent no.1 is that the tenderer would be required to adjust the basic price to the extent required by higher tax billed as per invoices to match the all inclusive price as mentioned in the purchase order. The said stand will not change the position at the stage of selection, in as much as, there will be disparity in the total price offered on account of difference in the GST rates quoted by each bidder. The fair competition or 'level playing field', would, therefore, be denied to each bidder as someone may bag the tender by quoting lesser rate of GST (lesser GST value), which may result in substantial difference in the total price offered by bidders/tenderers.

The HSN code (Harmonized System of Nomenclature) is provided for each product/service by GST Council to specify the rate at which GST would be applicable. The suppliers have to quote HSN Code of the product to be supplied by them in the tender document, itself. The mentioning of correct HSN Code is necessary to determine the GST rate (GST value) which is to be added in the base price to arrive at the final price offered by the bidder/tenderer.

In the case at hand, though the respondent no.6 was ranked as L-1 and the petitioner herein as L-4, but the margin of purchase preference between respondent no.6 (L-1) and petitioner (L-4) became more than 20% on account of mentioning of GST rate at 5% by the respondent no.6 (L-1),

which is according to HSN Code of the product in Chapter 86 of GST Tariff. The petitioner herein claims that the correct GST rate should be 18% and the HSN Code which falls under Chapter 84 of GST Tariff would be applicable. Whereas the respondent no.1, Railways in the counter affidavit filed by them did not clarify the correct HSN Code or GST rate of the product and is trying to shift its responsibility by saying that the levy of tax and imposition of penalty for mis-classification of HSN Code is an area of concern of the tax authorities.

Considering the above, we find that the above explanation of railways is not satisfactory, in as much as, selection of bidder is made by inclusion of GST value in the base price. In the situation of any confusion regarding the applicability of correct HSN Code, the Railways ought to have sought clarification from the GST authorities about the correct HSN Code applicable to the procurement product. The respondent no.6 has also stated in its counter affidavit that the respondent no.2 should be instructed by this Court to come on record to state the GST rate and correct HSN Code in order to resolve all the controversies raised in the writ petition. The doubt arises, as respondent no.2 namely the General Manager, Diesel Locomotive Works, Varanasi has not given clear response. It is categorically stated in the counter affidavit of respondent no.6 that it is imperative for the respondent no.2 to come on record to confirm the HSN Code and GST rates which would clear all doubts once and for all with respect to the goods in question.

In our considered opinion, if the GST value is to be added in the base price to arrive at the total price of offer for the procurement product in a tender, and is used to determine the interse ranking in the selection process, it is incumbent on the part of the respondent nos.1 and 2 to clarify the HSN Code, i.e. to clear their stand with regard to the applicable GST rate and HSN Code of the “procurement product”.

Thus, the mentioning of HSN Code in the tender document itself shall

resolve all disputes relating to fairness and transparency in the process of selection of bidder, by providing 'level playing field' to all bidders/tenderers in the true spirit of Article 19(1)(g) of the Constitution of India. For any issue relating to the applicability of correct HSN Code or GST rate, it would then be the duty of respondent nos.1 and 2 to seek clarification from the GST authorities. The respondent nos.1 and 2 cannot get away by saying that they are not required to mention the GST rate or HSN Code in the tender document, as it is integral to the process of selection of tenderer, moreso, in view of the admission of the respondent no.1 in the counter affidavit that the offers have to be evaluated based on the GST rates as quoted by each bidder and same will be used to determine the interse ranking.

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

With the above observations and directions, the writ petition is **disposed of**.

Order Date :-18.12.2020/Harshita