



ment by bringing down the price to L1 price in a situation where L1 bidder is from someone other than a Micro and Small Enterprises and such Micro and Small Enterprise shall be allowed to supply up to 20 percent of total tendered value.

(iii) In case of tender item is non-splitable or non-dividable etc. MSE quoting price within price band L1 +15% may be awarded the full/ complete supply of total tendered value to MSE, considering the spirit of policy for enhancing the Government procurement from MSE, provided they agree to bring down their price to L1 price.

In such cases, the MSE who is lowest within the MSEs and quoting price within the price band of L1 +15% shall be provided the first opportunity to agree to supply the items at the L1 price and on his refusal to accept the L1 price, opportunity shall be provided so on to the other MSEs.

3] The petitioner firm (the respondent No. 4 in WP(c) No. 7912/2016) is a partnership firm having its registration under the Indian Partnership Act, 1932 (hereinafter referred to as the Act of 1932). It carries on business of manufacture and sale of various types of corrugated boxes and sheets in its own factory. The petitioner firm is a small scale enterprise well within the meaning, ambit and scope of the definition under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred as the Act of 2006).

M/s Laxmi Narayan Kraft Industries, the respondent No. 3 (in WP (C) No. 638/2017) and petitioner in (Writ Petition (C) No.7912/2016) is also a partnership firm having its registration under the Act of 1932 and deals with similar business as that of the petitioner firm (in the WP (C) No. 638/2017).

4] Originally the respondent No. 3 in this petition (the petitioner in WP( C) 7912/2016) firm was a Small Scale Enterprise and after expansion, it graduated to a Medium Scale Enterprise within the definition of the Act of 2006 with effect from 27.2.2015. Both the petitioner and the respondent No. 3 participated in the aforesaid tender process alongwith the other bidders.

5] The respondent No.1 after opening the technical bid vide e-mail dated 15.12.2016 informed the respondent No. 3 in this petition (petitioner in WP (C) No. 7912/2016) that as per MSE certificate (attached) the said enterprise was upgraded to Medium Enterprise in the year 2015, so the respondent No. 1 had expressed its inability to consider the offer of the said respondent No. 3. The said e-mail dated 15.12.2016 is reproduced herein below:-

To

M/s. Laxmi Narayan Kraft Industries  
Adams Plaza, 2nd Floor, G.S. Road, Christianbasti, Guwahati e-mail: vivekagarwal@Ingrp.in <mailto:vivekagarwal@Ingrp.in>  
Mobile Nop. 9435042834.

Ref: Our Enquiry: OC05000141/SKD dtd. 11.11.2016 (E-tender) for (FOR MSE BIDDERS ONLY) Supply of Total 20,00,000.00 (Twenty Lakhs) nos of Wax Carton Box (Five and Three Ply) as per specifications, dimensions and drawing.

Dear Sir,

With reference to the subject offer against enquiry ref. OC05000141/SKD dtd. 11.11.2016 (E-tender) for (FOR MSE BIDDERS ONLY) Supply of Total 20,00,000.00 (Twenty Lakhs) nos of Wax Carton Box (Five and Three Ply) as per specifications, dimensions and drawing, please note that as per tender, the current tender is reserved for MSE (Micro & Small Enterprise) bidders only.

However, as per your MSE certificate (attached) your organization have been upgraded to Medium Enterprises in 2016. Considering this we may not be able to consider your offer for this tender.

This is for your kind information and record please.

With regards.  
(S.K. Das)  
Manager (Commercial).

6] Being aggrieved, the respondent No. 3 as the petitioner preferred Writ Petition (C) No. 7912/2016 challenging the aforesaid decision of disqualification by the respondent No. 1. The grounds taken in the said writ petition are that in the NIT there was no reservation for MSE units as the Wax Cartoon Box is not a reserved item under the Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2012 (hereinafter referred to as the Order of 2012). The respondent No. 3 participated in the tender process believing that it was eligible inasmuch as reading of clauses in Annexure-B (referred hereinabove) of the tender document reflects that apart from MSEs unit others could also participate since price preference for MSE bidders was provided as per the terms of Order, 2012. The said writ petition was dismissed at the motion stage vide order dated 10.1.2017 holding that the NIT specifically is meant for MSEs only thereby upholding the order dated 15.12.2016 of the respondent No. 1.

7] After the dismissal of the writ petition of the respondent No. 3, the respondent No. 1 re-scheduled the date of opening of price bid on 17.1.2017. The respondent No. 3 vide e-mail dated 11.1.2017 requested the respondent No. 1 for reconsideration of the decision of the rejection of its technical bid in the light of the Notification dated 1.11.2013 issued by the Additional Secretary and Development Commissioner, Ministry of Micro, Small and Medium Enterprises. The said notification is reproduced herein below:-

NOTIFICATION

In exercise of powers conferred by Section 9 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006) (hereinafter called, 'the Act'), the Central Government hereby makes the following provisions pertaining to extension of the non-tax benefits to Micro, Small and Medium Enterprises, with effect from 1st April, 2013, namely:-

If an enterprise falling under any of the three categories of enterprises as defined in the Act, graduates to a higher category from its original category or beyond the purview of the Act, it shall continue to avail all non-tax benefits of its original category notified by the Ministry of Micro, Small and Medium Enterprises for a period of three years from the date of such graduation to the higher category.

[Vide S.O. 3322 (E), dated 1st November, 2013, published in the Gazette of India Extra., Pt.II, Sec. 3(ii), No. 2550, dated 4th November, 2013.]

8] On receipt of the said e-mail from the respondent No. 3, the respondent No. 1 forwarded the same to the Competent Authority for review of the earlier rejection order. The Competent Authority thereafter confirmed that on the basis of the said Notification, the respondent No. 3 has to be considered for price bid opening. Thereafter it was proposed to consider the price bid of respondent No. 3 alongwith other 4 numbers of techno-commercially acceptable bidders which includes the present petitioner.

9] The price bid was opened on 24.1.2017 and the respondent No. 3 was the L-1 bidder and the petitioner was L-2 bidder. The respondent No. 1 gave an option to the present petitioner vide e-mail dated 24.1.2017, which is reproduced below:-

M Gmail Jumbo Packaging - jpi.ghy@gmail.com <mailto:jpi.ghy@gmail.com>.

Request for matching the L1 price against Tender No. OC05000141/SKD [E-TENDER]-Supply of Wax Carton Box (Five & Three Ply] as per specifications, dimensions & drawing.

24, 2017 at 4.30 PM

To: jpi.ghy@gmail.com <mailto:.ghy@gmail.com> jpi ghy@gmail.com <mailto:ghy@gmail.com>

Cc: Debashish Choudhury Debashish Choudhury@nrl.co.in <mailto:Choudhury@nrl.co.in>, Ghanashyam Gogoi Ghanashyam Gogoi@nrl.co.in <mailto:Gogoi@nrl.co.in>, Kajal Saikia Kajal Saikia@nrl.co.in <mailto:Saikia@nrl.co.in> Tapas Mukherjee tapas.mukherjee@nrl.co.in <mailto:tapas.mukherjee@nrl.co.in>

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Dear Sir,

With reference to the subject tender, please note that price bids have been opened today. The comparative statement has been attached for your reference. You became the L2. As such, if you match the L1 price, then 30% of the total tender quantity i.e. 60,000 for item 10 & 5, 40,000 for item no 20 shall be awarded to you as per tender. Therefore, you are requested to match the L1 price basis & as well as landed price [highlighted yellow] considering the L1 bidder terms & conditions & confirm by return mail by tomorrow (12:00noon). Otherwise 100% shall be awarded to L1 bidder.

With Regards

Susen Kumar Das

Manager (Commercial)

Numaligarh Refinery Limited

Golaghat, Assam-785699

Tel No. 03776-265409.

The petitioner vide its return mail confirmed that the petitioner would be able to supply materials at L-1 rate.

10] The petitioner after having consented to supply at the rate quoted by the respondent No. 3 preferred the Writ Petition (C) No. 638/2017 challenging the action of the respondent 1 in reconsidering the technical bid of the respondent No. 3 and subsequent consideration of the price bid of the said respondent No. 3 terming the said action of the respondent No. 1 to be arbitrary and violative of fundamental rights of the petitioner.

11] The respondent No. 3 after filing of the present writ petition by the petitioner, preferred Review Petition No. 6/2017 in WP' No. 7192/2016 (disposed of) for review of the order dated 10.1.2017 whereby the said petition was dismissed at the motion stage. Bringing into the reference the Notification dated 1.11.2013 issued by the Ministry of Micro, Small and Medium Enterprises (referred hereinabove), the respondent No. 3 sought for review of the dismissal order wherein it was held that the respondent No. 3 was not entitled for consideration as the prospective bidder as the tender process was meant for participation of the bidders under the category of Micro and Small Enterprises under the Act, 2006.

12] The said review petition was allowed vide order dated 28.2.2017 thereby recalling the order of dismissal dated 10.1.2017 of WP ' No. 7912/2016 with an observation which is reproduced herein below.

28.2.2017.

How far and to what extent, on the strength of the aforesaid notification dated 01.11.2013, it will be permissible for a small industry which has graduated to a medium enterprises, to participate in the tendering process in terms of the tender issued by the NRL, will have to be looked into. In view of this notification, the case of the review petitioner will require closure scrutiny, particularly in view of clause (ii) of the note under heading For Procurement Tender which provides that In tender, participating Micro and Small Enterprises quoting price within price band of L1+15% percent shall also be allowed to supply a portion of requirement by bringing down the price to L1 price in a situation where L1 bidder is from someone other than a Micro and Small Enterprises and such

Micro and Small Enterprises shall be allowed to supply up to 20 percent of the tendered value.

Taking that view, the review application is allowed. The order dated 10.01.2017, passed in WP(c) No. 7912/2016 is recalled.

Behind the said backdrop, both the Writ Petition (C) No. 638/2017 and Writ Petition (C) No. 7912/2016 are taken up together for disposal vide this common judgment and order.

13] Ms Kejriwal, learned counsel for the petitioner referring to the Notification dated 1.11.2013 submits that the benefit given to the Medium Enterprises for a period of 3 years from the date of graduation from Small Enterprises is silent whether the same could be considered in a tender process as the case in the hand, wherein it is specifically stipulated that the tender is exclusively meant for Micro and Small Enterprises only and not beyond that. Having so spelled out with regard to the intent of the respondent No. 1 in the NIT so far the status of prospective participating bidders are concerned, subsequently it cannot change its stand and converts the tender to a general one and /or allowing the respondent No. 3 to participate, that too after its graduation to the status of Medium Enterprises until and unless, the tender is specific to that effect.

14] Referring to Section 11 of the Act of 2006 and the Order 2012, Ms. Kejriwal submits that the said policy is to protect the Micro and Small Enterprises but not Medium Enterprises. Citing clause 2 of the Order 2012, the learned counsel for the petitioner submits that the Public Procurement Policy is meant for Micro and Small Enterprises and it is mandatory on the part of every Central Ministry or Department or Public Sector Undertakings to set an annual goal of procurement from Micro and Small Enterprises from financial year 2012-2013 onwards with the objective of achieving an overall procurement of minimum 20% of the total annual purchase of products produced by the Micro and Small Enterprises in a period of 3 years.

15] Ms. Kejriwal further referring to clause 11 of the said Order, 2012 submits strenuously that the Public Sector undertaking shall continue to procure 358 items Appendix to the Order, 2012 from Micro and Small Enterprises which are reserved for the exclusive purchase from the said category of enterprises and in Serial No. 72 of the Appendix, the present items covered by the NIT are mentioned. Further with reference to the Note (ii) under heading For Procurement of Tender as mentioned in the commercial terms and conditions of the NIT in hand, Ms Kejriwal submits that the said clause under no circumstances can be invoked by the respondent No. 1 favouring respondent No. 3 as the NIT itself stipulates that the tender is meant for Micro and Small enterprises and not for Medium Enterprises graduated within the period of three years prior to the date of the NIT.

16] Pointing to the mandate of the Act, 2006 and Order, 2012, Ms. Kejriwal referring to the Section 20 of the General Clauses Act, 1897 submits that the orders etc. issued under the enactment after the commencement of the Act, shall unless there is anything repugnant in the subject or context have the said respective meanings as in the Act or Regulation conferring the power. There is no mention in the Notification dated 1.11.2013 that the person similarly situated as the respondent No. 3 would be entitled for participation in the tender process specifically meant for purchase from Micro and Small enterprises and as such there is no point in allowing the respondent No. 3 to take into consideration as the qualified participant in the tender process more so on the face of the rigid clause stipulated in the NIT which is meant for bidders who are Micro and Small Enterprises. Thus, the learned counsel submits that the subsequent acts and deeds of respondent No. 1 allowing the respondent No. 3 to participate in the tender process is arbitrary and have no logical basis, rather the same is violative of Article 14 of the Constitution of India so far the petitioner is concerned

17] Mr. Dubey, learned counsel, appearing for the respondent No.3 objects to the submissions made by the learned counsel for the petitioner. It is submitted that a legal fiction has been created by way of notification dated 1.11.2013 and on the basis of the said fiction the respondent No. 3 is entitled as the Medium Enterprise to enjoy all the benefits under the Act of 2006 meant for MSEs by considering the said graduated enterprise to be a Small Enterprise. Mr. Dubey, referring to the policy of the Government and also referring to the intent and purpose of the Notification dated 1.11.2013 took this court to the statement made by the Finance Minister while presenting the budget 2013-2014 (Fiscal) in the Lok Sabha.

18] It is further submitted that Chapter 4 of the Act, 2006 speaks for measures for promotion and development and enhancement of the competitiveness of Micro, Small and Medium Enterprises. A harmonious reading of various provisions of Chapter 4 would lead to correct interpretation of the Notification dated 1.11.2013. He also further submits that it is the duty of the court to interpret the law, which includes any Act, Rule or Notification and as such this court should interpret the law for the real and correct intent of the Notification dated 1.11.2013.

19] Mr. Dubey further submits that the respondent No. 3 is entitled to preferential procurement under Order 2012 and the same is a non-tax benefit in a tender process and for that purpose, the learned counsel took this court to the tender issued by M/s. Bharat Heavy Electrical Limited (in short the BHEL). Mr. Dubey further referring to the clause (ii) of the aforesaid NIT under heading For Procurement Tender in the instruction of the NIT submits that by introduction of the said clause itself indicates that the respondent No. 3 is eligible for participation in the tender process.

20] Mr. J. Roy, learned counsel for the respondent No. 1 submits that after the dismissal of the Writ Petition No. 7912/2016 on 10.1.2017 the respondent No. 3 in the present writ petition forwarded the Notification dated 1.11.2013 issued by the Ministry of Micro and Small Enterprises for consideration of the respondent No. 1. During the pendency of the review application filed by the respondent No. 3, the said respondent No. 1 considered Notification dated 1.11.2013 and found that the said Notification covers the grievances of the respondent No. 3 for a legitimate consideration for opening of the price bid of the respondent No. 3 alongwith other participated bidders. The price bid accordingly was opened on 24.1.2017. The respondent No. 1 before opening the price bid asked for clarification from MSME Development Institute, Guwahati and it was confirmed by the said Institute that the non-tax benefit under MSME Order, 2012 would be available to the upgraded enterprises for 3 years from the date of upgradation. Accordingly, he submits that the benefit is liable to be enjoyed by the respondent No. 3 and as such the respondent No. 1 had correctly taken the decision and rightly considered the price bid of the respondent No. 3.

21] Mr. Keyal, learned Assistant Solicitor General of India, for the respondent Union of India submits that the respondent No. 3 is not entitled for the benefit and he supports the information obtained by the petitioner under the RTI Act from the Deputy Director in the office of the Development Commissioner, Micro, Small and Medium Enterprises, Government of India wherein it was specifically mentioned that the Notification does not entitle an enterprise to participate in tender specifically meant for MSEs even if it graduates to Medium Enterprise.

22. From the pleadings of the parties to the writ petition, the following two issues are seen to be involved and the same are to be decided by this court:

A :- Whether the decision making process of the respondent No. 1 on the face of the terms stipulated in the NIT, once the technical commercial (qualifying) bid of the respondent No. 3 was rejected and subsequent reconsideration of the said decision of the rejection of the technical commercial bid of the respondent No.3 on the basis of the Notification dated 1.11.2013 is arbitrary and violative of Article 14 of the Constitution of India?

B:- Whether the technical bid of the respondent No. 3 is to be considered owing to clause (ii) of the Note in the NIT under the heading 'For Procurement Tender' as referred hereinabove?

23] The petitioner and the respondent No. 3 (the petitioner in WP (C) No. 7912/2016) are enterprises engaged in the manufacture or production of goods pertaining to the Industry specified in the first schedule to the Industries (Development) Regulation, 1951. The admitted position culled out from the submissions of the learned counsels and the various pleadings filed are as follows:

(a) The petitioner is a Small Enterprise within the definition under Section 7 (a)(ii) of the Act of 2006.

(b) The respondent No. 3 is a Medium Enterprise within the definition under Section 7 (a)(iii) of the Act of 2006, which graduated to the Medium Enterprise with effect from 27.2.2015 from Small Enterprise.

(c) The Notification dated 1.11.2013 referred hereinabove, without any ambiguity refers to the Micro, Small and Medium Enterprises as envisaged under Section 7 of the Act of 2006 and specifically intends to promote the graduated enterprise and permit to enjoy and avail non-tax benefit of its original category notified by the Ministry of Micro, Small and Medium Enterprises for a period of 3 years from the date of such graduation to the higher category. The term non-tax benefit includes Market Development Assistance (MDA) Scheme and Design Clinics Scheme. The MDA Scheme offers funding for participation in the international fairs and trade delegations to help MSMEs develop overseas markets. The Design Clinics Scheme is aimed at encouraging application of design and innovation to promote design as a value-adding activity. The said notification was issued as per Section 9 of the Act, 2006.

(d) The graduation starts from Micro to Small Enterprises and then to Medium Enterprises. The respondent No. 3 graduated on 27.2.2015 as the Medium Enterprises. So, 3 years time-period expires on 27.2.2018.

(e) The NIT (E-tender) was meant for quotation and participation only from the bidders falling under the category of Micro and Small Enterprises (MSEs) but not from Medium Enterprises nor the same was an open tender allowing every manufacturer irrespective of the qualifications so stipulated with respect to the items mentioned therein to participate.

(f) The respondent No. 1 expressed its intention by acting on the terms of NIT thereby rejecting the technical bid of the respondent No. 3 holding that the NIT was meant for Micro and Small Enterprises and not for a Medium Enterprises.

(g) Subsequently, respondent No. 1 on the strength of the Notification dated 1.11.2013 allowed the respondent No. 3 to participate after taking opinion from the Assistant Director (Chemical) (MSEs) Development Institute Guwahati, Ministry of Micro, Small and Medium Enterprises, Govt. of India to the effect that the respondent No. 3 could avail the benefit of the Public Procurement Policy (MSE) Order, 2012 as per the Notification. The Director opined with regard to the entitlement of non-tax benefit to the graduated Medium Enterprises in the affirmative but whether the respondent No. 3 could participate in the tender process specifically meant for MSE enterprises was not opined. The respondent No. 1 accepted the said opinion and allowed the respondent No. 3 to participate in the tender process. Whether the said decision making process of the respondent No. 1 is correct

rect or not?

24] From the aforesaid sequence of facts, let us take up Issue No. A for a decision.

Issue No. A:- The Act of 2006 defines the classification of the Micro, Small and Medium Enterprises. Section 7 of the Act, 2006 stipulates three categories of enterprises engaged in manufacturing process which are as follows:

(a) Micro Enterprises :- Having investment in plant and machinery which does not exceed Rs. 25,00,000/-

(b) Small Enterprises :- Having investment, plant and machinery more than Rs. 25,00,000/- but does not exceed Rs. 5,00,00,000/-

(c) Medium Enterprises :- Having investment in plant and machinery more than Rs. 5,00,00,000/- but does not exceed Rs. 10,00,00,000/-

From the above, it is seen that for graduation of an enterprise from its original classification to the higher classification, the only criteria involved is the financial investment in the plant and machinery. There is no amendment in the said classification in terms of the Notification dated 1.11.2013 allowing the graduated enterprises to hold the dual status both original and graduated one, at least for a period of 3 years from the date of graduation.

25] The Notification dated 1.11.2013 is specific that enterprises falling under any of the three categories as defined in the Act of 2006 which graduates to a higher category from its original category or beyond the purview of the Act, 2006, shall continue to avail non-tax benefit of its original category notified by the Ministry of Micro, Small and Medium Enterprises for a period of three years from the date of such graduation to higher category.

26] Section 11 of the Act 2006 stipulates that for facilitating promotion and development of Micro and Small Enterprises the Central Government or the State Government is to notify from time to time preference policies in respect of procurement of goods and services produced by the Micro and Small Enterprises by its Ministries, Departments and the Public Sector Undertakings. Again let us examine Section 9 of the Act, 2006, which speaks of measures for promotion and development of micro, small and medium enterprises, particularly of the micro and small enterprises. It is provided that for the said purpose the Central Government from time to time by way of development of skill in the employees, management and entrepreneurs, provisioning for technological upgradation marketing assistance, infrastructure facilities etc. specify by the notification such programmes, guidelines etc.

27] The Central Government in exercise of the powers conferred under Section 11 of the Act, 2006 by order notified the Order of 2012 vide S.O.581(E) dated 23rd March, 2012 published in the Gazette of India Extra Pt-II, Section 3(ii) No. 503 dated 26-3-2012. By the said Order, every Central Ministry or Department or Public Sector Undertakings are required to set an annual goal of procurement from Micro and Small Enterprises for the financial year 2012-2013 and onwards in order to achieve an overall procurement of minimum 20% of total annual purchase of products produced and services rendered by Micro and Small Enterprise for a period of 3 years. After a period of three years i.e. from first April, 2015, the overall procurement goal of minimum 20% shall be mandatory to be procured from Micro and Small Enterprises.

28] In order to protect the competitiveness of the Micro and Small Enterprises in an open tender the participating Micro and Small Enterprises quoting the price within the price band L-1+ 15% shall also be allowed to supply a portion of requirement by bringing down their price to L-1 price in a situation where L-1



price is from someone other than a Micro and Small Enterprise and as such MSEs shall be allowed to supply up to 20% of the total tender value. By the said order specific items for procurement are reserved for exclusive purchase from Micro and Small Enterprises only. There are 368 items mentioned in the appendix to the Order dated 2012 which includes items mentioned in the present NIT in question at Sl. No. 72 of the said appendix. The act of reserving the tender participants amongst the Micro and Small Enterprises and the stipulation thereof in the NIT shows compliance of the mandate of the Order 2012 so notified by the Central Government.

29] Coming to Notification dated 1.11.2013, on the basis of which the respondent No. 3 had claimed and the respondent 1 had allowed the respondent 3 to participate in the tender process. The intent and purpose of Section 9 of the Act of 2006 has been discussed hereinabove. The said notification was issued within the parameters of Section 9 of the Act of 2006. So, it can very well be inferred that the benefits so mentioned in the said Section 9 are non-tax benefits and said benefits on the strength of the notification dated 1.11.2013 cannot overlap the benefits envisaged and granted under Section 11 of the Act, 2006 which speaks of procurement preference policy to be followed by the Government Departments, Public Sector Undertakings. The same is a direction to be followed by the Government Departments mandatorily for facilitating promotion and development of micro and small enterprises only.

30] The Act of 2006 was enacted to facilitate the promotion, development and enhancement, competitiveness of the Micro, Small and Medium Enterprises, particularly all the Micro and Small Enterprises by way of development of skill in the employee's management and entrepreneurs providing for technological upgradation, marketing assistance or infrastructure facilities etc. For achieving said object the Central Government is authorised to specify by notification such, guidelines as it may deem fit and proper. Keeping in view the Act of 2006, the Order 2012 was issued under Section 11 alongwith the list of items reserved for purchase from micro and small scale industrial units stipulated in the Appendix in the said Order. The said benefits are not within the terms non-tax benefits.

31] The respondent No. 1 keeping in view the Government guidelines floated the NIT for items reserved for purchase exclusively from Micro and Small Enterprises and the prospective bidders in the NIT was reserved only for Micro and Small Enterprises. The Micro and Small Enterprises are classified by the Act of 2006. Similarly Medium Enterprises are also classified therein. Thus, the Act of 2006 speaks of 3 different enterprises having its unique feature of formation without deeming provisions in terms of the Notification dated 1.11.2013 and on the date of issuance of NIT i.e. 11.11.2016, the respondent No. 3 already graduated to Medium Enterprise. As per clause 1 of the special note of the NIT, the respondent No. 1 had expressed its intention that the tender is for MSEs vendors only and specifically mentioned that offer from other shall not be considered. There is no relaxation clause for the graduated Medium Enterprises like the respondent No. 3 entitling it to participate.

32] The notification dated 1.11.2013 speaks of enjoyment of all non-tax benefit by the graduated enterprises in its original category for the period of 3 years from the date of graduation within the scope of Section 9 of the Act of 2006. The non tax benefit includes various supports provided by the Ministry of Micro, Small and Medium Enterprises such as market development assistance, funds for designer IPR, quality credit guarantee etc. The Market Development Assistance (MDA) Scheme offers funding for participation in the industrial fairs and trade, delegation to hold the Micro, Small and Medium Enterprises Development Overseas Market. The said benefit cannot be held to include allowing the respondent No. 3 to participate in a tender specifically meant for the Micro and Small Enterprises for purchase of reserved items as per appendix of Order 2012.

33] The respondent No. 1 being a public sector undertaking cannot at all be believed to be unaware of the said Notification dated 1.11.2013 while notifying E Tender on 11.11.20016. The respondent No. 3 is not entitled to its status as Small Enterprises to be reverted back from the status of Medium Enterprise in the tender process specifically meant for the Micro and Small Enterprises. There is no deeming provision in the Notification dated 1.11.2013 on the basis of which the fact of status as Medium Enterprise of the respondent No. 3 could be held to be at par as that of the petitioner or any other Micro and Small Enterprises for the term of three years nor there is a non-obstante clause in the said Notification to that effect.

34] In the case of High Court of Gujrat and another Vs. Gujarat Kishan Majdur Panchayat and others, reported in AIR 2003 SC 1201, the Hon'ble Apex Court on interpretation of the statute held as follows:

36. The Court while interpreting the provision of a statute, although, is not entitled to re-write the statute itself, is not debarred from ironing out the creases. The court should always make an attempt to uphold the rules and interpret the same in such a manner which would make it workable.

Section 20 of the General Clauses Act, 1897 is reproduced herein below:-

20 Construction of Orders, etc. issued under enactments- Where, by any [Central Act] or regulation, a power to issue any [notification], order, scheme, rule, form, or by law- is conferred, then expressions used in the [Notification], order, scheme, rule, form or bye-law, if it is made after the commencement of this Act, shall, unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act or Regulation conferring the power:

35] Keeping the said ratio read with the aforesaid Section 20 of the General Clauses Act, 1897 in view, if the submission of the learned counsel appearing on behalf of the respondent Nos. 1 and 3 are accepted, then the intent of Act of 2006 more specifically the one stipulated in Section 11 of the Act would become redundant. There is no ambiguity in the Act of 2006 which requires any interpretation. But even then if it is given a plain and simple interpretation it clearly gives an indication that the intent of Act of 2006 is to protect the interest of the Micro and Small Enterprises and help them to grow in order to compete with the modern technologies. For the said reason the enterprises are classified in order to grant the benefit to the classified enterprises.

36] The classification of Micro and Small Enterprises are the creation of the statute i.e. the Act of 2006. Similar is the situation with that of the Medium Enterprises. The said statute determines the conditions and circumstances under which the status of Micro and Small Enterprises can be terminated. The respondent No. 3 graduated to Medium Enterprises meaning thereby its original status of Small Enterprises had terminated as per the condition laid down by the statute. The capacity to participate in the tender process is an incident flowing from the status. The NIT is meant specifically for participation fulfilling the status of Micro and Small Enterprises and as such the respondent No. 3 being not a Micro- Small Enterprise has no capacity to participate in the tender process there being no relaxation clause as aforesaid. The items proposed to be purchased are reserved and the statute mandates that these are to be purchased only from the Micro and Small Enterprises. In such a situation the act of respondent No. 1 in purchasing items from the respondent No. 3 is clearly in violation of the statutory provisions and definitely against the public interest. The act of allowing the respondent No. 3 to participate would deprive similarly situated persons who owing to non-mentioning of the relaxation clause as aforesaid might not have participated in the tender process.

37] The submission of Mr. Dubey, the learned counsel, appearing for the respondent No. 3 that on the basis of the interpretation of the Notification dated 1

.11.2013, M/s BHEL, a Public Sector undertaking has been granting the benefit of procurement policy under the Order, 2012 to a graduated unit cannot be accepted inasmuch as the preferential purchase cannot be classified as non-tax benefit which is governed by Section 9 of the Act of 2006. On the other hand, the Procurement Preference Policy for Micro and Small Enterprises under Order 2012 is issued under Section 11 of the Act of 2006 specifying the policy for the promotion and development of micro and small enterprises. Section 9 has taken within its fold the Micro, Small and Medium enterprises unlike Section 11 of the Act of 2006. There is no procurement policy taking under the sweep the Medium enterprises but even then the notification dated 1.11.2013 speaks of non-tax benefits to Medium Enterprises which would definitely mean the measures for promotion and development within the ambit and scope of Section 9 of the Act of 2006 which could safely be termed as non-tax benefit as discussed hereinabove.

38] In the case of Jagdish Mandal Vs. State of Orissa and another, reported in (2007) 14 SCC 517 the Hon'ble Apex Court held as follows:

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made lawfully and not to check whether choice or decision is sound. When the power of the judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment 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 contract or with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/ procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either 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. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) whether the process adopted or decision made by the authority is mala fide or intended or favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached ,

(ii) Whether public interest is affected

Whoever review Administrative Act, it is intended to prevent arbitrariness. Confining to the aforesaid ratio of the Hon'ble Apex Court and on asking the said questions to this court itself, the same are to be answered in the positive and accordingly hold that the decision making process by the respondent No. 1 is arbitrary and violative of Article 14 of the Constitution of India. The respondent No. 3 is not entitled to participate in the tender arising out of the E-tender Reference No. OC05000141 SKD referred herein above.

39] The project Order No. 4500017298 dated 6.2.2017 in favour of the respondent No. 3 and letter of intent bearing reference No. COMM/CO5/3808/JUM/LOI, dated 6.2.2017 in favour the petitioner is set aside. The respondent No. 1 shall evaluate the tender process amongst the bidders leaving aside the respondent No.3 as per the terms and condition stipulated in the NIT including the one mentioned as a special clause. Accordingly, the said issue is decided in favour of the petitioner.

titioner.

401 ISSUE NO-B:

The protection as stipulated in clause (ii) of the note under heading For Procurement of Tender in the NIT and its applicability can be interpreted as follows:

Let 'X' be the total tender value given.

Let 'A' be the L-1 bidder, someone other than the Micro and Small enterprises.

Let 'B' be the bidder from the category of MSEs in the price band of L-1 + 15 %.

In such a situation to protect the competitiveness of Micro and Small Enterprises, B shall be allowed to supply 20% of X at the L-1 price.

40] In the present case in hand, items in the NIT are from the appendix of the Order, 2012 and the respondent No. 1 is bound to purchase from the Micro and Small Enterprises. So, the said clause has no applicability here in this case. The claim of the respondent No. 3 is on the basis of the Notification dated 1.11.2013 claiming non-tax benefit enjoyed by it as Micro and Small Enterprises prior to its graduation to Medium Enterprises. So, the claim of the respondent No. 3 even if taken up for consideration, the said respondent No. 3 cannot be classified as a general bidder on the face of its pleading. As already held herein above, the present NIT being exclusively reserved for the Micro and Small Enterprises without any relaxation even for participation of the graduated enterprises like respondent No. 3 the same cannot bail out the respondent No. 3 inasmuch as the benefit in the form of the NIT, in the present case in hand does not fall within the non-tax benefit as envisaged by the notification dated 1.11.2013. The said clause if taken into consideration shall benefit the Micro and Small Enterprises in a general open tender wherein 20% of the total value of tender is to be reserved for Micro and Small Enterprises but not the graduated enterprises. Accordingly, the Issue No. B is decided against the respondent No. 3 who is the petitioner in WP(C) No. 7912/2016.

41] The Writ Petition (C) No. 638/2017 is allowed and Writ Petition (C) No. 7912/2016 is dismissed. No order as to costs.

42] The interim order passed earlier accordingly stands vacated.