

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No 7289 of 2020

1. The Bihar Offset Printers Association through its Working President namely Rameshwar Nath Rai, aged about 68 years, (Male), Son of Late Fagu Rai, Resident of Naya Tola, P.S.-Kadamkuan, District-Patna.
2. M/s Puja Printech Pvt. Ltd. through its Director namely Lok Prakash Singh, aged about 62 years (Male), Son of Late Atma Nand Singh, Resident of Flat No. 301, Atma Smriti Apartment, Budha Colony, P.S.-Budha Colony, District-Patna.
3. M/S Bharat Printing Works through its Proprietor namely Arun Kumar Sinha, aged about 58 years (Male), Son of Late R.R.P. Sinha, Resident of Jai Prakash Nagar, Road No. 6, P.S.-Rajiv Nagar, District-Patna.
4. M/s Imprint through its Proprietor namely Rana Bijendra Singh, aged about 64 years, (Male), Son of Late Rana Raghubansh Singh, Resident of Ranighat, Mahendru, P.S.-Sultanganj, District-Patna.
5. Dhanaraj Printing Press through its Proprietor namely Shahid Ahmad, aged about 42 years, Male, Son of Late Salauddin Ahmad, Resident of Kumkum Singh Lane, Vikhanapahari, P.S.-Pirbahore, District-Patna.

... .. Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Govt. of Bihar, Patna.
2. The Chief Secretary, Govt. of Bihar, Patna.
3. The Principal Secretary, Department of Health, Govt. of Bihar, Patna.
4. The State Health Society through its Executive Director having its registered office at Pariwar Kalyan Bhawan, Sheikhpura, Patna-800014.
5. The Executive Director, State Health Society, Bihar, having its registered office at Pariwar Kalyan Bhawan, Sheikhpura, Patna-800014.
6. The Administrative Officer, State Health Society, Bihar, having its registered office at Pariwar Kalyan Bhawan, Sheikhpura, Patna-800014.
7. The Tender Committee presided over by Dr. Navin Chandra Prasad, Director-in-Chief, Health Services, of State Health Society in E-Tender NIT No. 05/SHSB/IEC (Printing and Supply)/2020-21.
8. The Principal Secretary, Industry Department, Govt. of Bihar, Patna.
9. The Industry Director, Department of Industry, Govt. of Bihar, Patna.
10. The Commissioner and Secretary, Department of Commercial Taxes, Govt. of Bihar, Vikas Bhawan, Bailey Road, Patna-800001.
11. The Managing Director, Bihar State Electronics Development Corporation Ltd. (BELTRON) having its registered office at Beltron Bhawan, Shastri Nagar, Patna-23.
12. The General Manager (Project), Bihar State Electronics Development Corporation Ltd. (BELTRON) having its registered office at Beltron Bhawan, Shastri Nagar, Patna-23.
13. The State Project Management Unit, Bihar Rural Livelihoods Promotion Society through its Nodal Officer, Procurement Specialist, 3rd Floor, Annexe-II, Vidyut Bhawan, Bailey Road, Patna-800 021.
14. Principal Secretary/ Secretary, Finance, Government of Bihar.
15. New Ratan Priya, a proprietorship firm, having its registered office at



- Langartoli, D N Das Lane, Pandul Kothi, PS – Kadam Kuan, Patna – 800 004 through its proprietor Sudhir Prakash, son of late Vijay Prakash Narayan Singh, resident of Pandui Kothi, D N Das Lane, Langartoli, PS – Kadam Kuan, Patna – 800 004.
16. The Offsetters (India) Pvt Ltd through Director Rohit Jain, aged about 55 years (Male), son of Santosh Kumar Jain, resident of 69/4, Dr T N Banarjee Road, Chajjubagh, PS – Gandhi Maidan, Patna – 1
 17. M/s Patna Offset Press, a registered partnership firm having its Registered office at – Naya Tola, Near Dharahara Kothi, PS – Kadam Kuan, PO – Bankipore, District – Patna through one of its partners – Sri Amit Kumar Singh, aged about 42 years, male, S/o late Ram Naresh Singh, resident of Mohalla – Naya Tola, Near Dharahara Kothi, PS – Kadam Kuan, PO – Bankipore, District – Patna
 18. Sri Amit Kumar Singh, aged about 42 years, male, S/o late Ram Naresh Singh
 19. Smt Supriti Singh, aged about 40 years, female, W/o Sri Shailesh Kumar Singh
 20. Sri Tushit Singh, aged about 22 years, male, S/o late Vinay Singh. All residents of Mohalla – Naya Tola, Near Dharahara Kothi, PS – Kadam Kuan, PO – Bankipore, District - Patna

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr P K Shahi, Sr Advocate with Mr Vikash Kumar, Advocate
For the S t a t e	:	Mr Yogendra Prasad Sinha, AAG VII M/s Nirmal Kr Sinha, Shankar Kr, ACs to AAG VII
For Respondents No 4, 5, 6	:	M/s Kishore Kr Sinha, Shashi Shekhar, Advocates
For Respondents 11, 12	:	Mr Grijesh Kumar, Advocate
For Respondents No 14 to 17	:	M/s Binod Singh, Vagisha Pragya Vacaknavi, Advocate
For Respondent No 18	:	Mr Piyush Lall, Advocate
For Respondent No 19	:	Mr Y V Giri, Sr Advocate with M/s Pranav Kumar, Ashish Giri, Shrishti Singh, Advocates

CORAM: HONOURABLE MR JUSTICE MADHURESH PRASAD

ORAL JUDGMENT

Date : 21-05-2021

On account of the resurgence of COVID – 19 Pandemic, matter is again being considered through Video Conferencing. Parties have made submissions at length yesterday as well as today



from their residence. The Court Master and Secretary are also part of the Virtual Court Proceedings with the aid of Audio-Visual Technology.

2 The writ petition has been filed with a prayer seeking quashing of E-Tender (Notice Inviting Tender) (for brevity, *NIT*) Reference No 05/State Health Society, Bihar (for brevity *SHSB*)/IEC (printing and supply)/2020 – 2021 inviting bids from Agencies desirous of entering into rate contract for printing and supplying of various modules, registers, cards etc for the SHSB. The NIT has been assailed on the ground that the same does not provide the benefits of exemption from Earnest Money Deposit (*EMD* for brevity), and purchase preference to Small Scale Industrial Units (*SSIU* for brevity) as contemplated under the Bihar Finance (Amendment) Rules, 2005 (for brevity, *BFR 2005*) and the Stores Purchase Preference Policy, 2002 (for brevity, *SPPP*, 2002). The NIT is therefore legally unsustainable. Petitioners seek a direction to the State Health Society Bihar to follow the procedure of procurement by giving exemptions as per the said Act and Policy.

3 At the very outset, Mr. Y V Giri, learned senior counsel who has appeared on behalf of intervener-respondent No



19, raises a preliminary objection that the petitioners cannot maintain the instant writ petition for the following reasons:

- The benefits have been claimed as being due to SSIU, but based on the certificates issued by the Ministry of Micro Small and Medium Enterprise (*MSME* for brevity), Government of India, brought on record by the petitioners themselves at Annexure 19 of the 04th supplementary affidavit, petitioner No 2 is not a Small Scale Industrial Unit (for brevity, *SSIU*), but has been classified as a medium enterprise.
- Petitioner No 3, has been categorized as a small manufacturing enterprise and not SSIU. Petitioner No 3 has already filed his tender document under the terms and conditions of the NIT and is, therefore, estopped from assailing the terms.
- Petitioner No 4 has been classified as Micro Manufacturing Enterprise and is not an SSIU.
- Petitioner No 5 has also been classified as Micro Manufacturing Enterprise and is not an SSIU.



4 He has further submitted that the writ petition has been filed after considerable delay, after the last date (22.08.2020) fixed for submission of NIT, and is barred by delay and laches.

5 In support of this submission, he has relied upon decision of Hon'ble Supreme Court of India in Central Coalfields Limited & Another -Versus- SLL – SML (Joint Venture Consortium) & Others, reported in (2016) 8 SCC 622.

SUBMISSIONS OF PETITIONERS' SENIOR COUNSEL

6 Learned senior counsel Mr P K Shahi appearing for the petitioners, on the other hand has submitted that petitioner No 1 is an association of offset printers in the State of Bihar, registered under the Societies Registration Act. After the year 2005 every micro, small and medium industry has to be registered online at the Government Portal for MSME (Udyam) registration, by the Ministry of Micro, Small Medium Enterprises, Government of India. Petitioners No 2 to 5 are printers and registered SSIU. No separate registration as SSIU with the State Government is required. Based on certificates issued by the Ministry of MSME the petitioners are entitled to the benefits which they have claimed.

7 The Erstwhile Ministry of Small Scale Industries, Government of India had issued a notification, under the Micro, Small and Medium Enterprises Development Act, 2006 (MSME



Act for Brevity). The same was published in the Gazette of India dated 30.09.2006 (Annexure-22). Based on quantum of investment on plant and machinery, It classified manufacturing enterprises into Micro, Small and Medium category. As per this notification a small manufacturing enterprise was one whose investment on plant and machinery was more than ten lakhs and did not exceed two crore rupees.

8 Subsequent Notification dated 01.07.2020 (Annexure-23), completely altered the concept. It substantially increased the quantum of investment on plant and machinery and also incorporated quantum of turnover as being one of the determining parameters for Micro, Small and Medium “Enterprise” instead of “manufacturing enterprise”. The maximum amount of investment upto which an enterprise could be considered as a small enterprise has been increased to Rupees Ten Crore investment on plant and machinery; and turnover fifty crore. In terms of the new parameters all the petitioners would now be reclassified as Small enterprise. Petitioners therefore would be entitled to the benefits meant for SSIU under the BFR 2005, as well as SPPP 2002.

9 Petitioners also wanted to participate in the tender process. Seeing the advertisement, they found terms and



conditions contrary to the BFR 2005, SPPP 2002, MSME Act, 2006 and several other guidelines issued from time to time by the State as well as Central Government. In the pre-bid meeting dated 09.07.2020, petitioner No 1, the Association, and petitioners No 2 to 5 raised their objection on the terms and conditions incorporated in the advertisement. They sought amendment of the various provisions of the NIT and inclusion of a clause providing the benefit of exemption from EMD to SSIU and purchase preference in terms of Rule 131B of BFR and SPPP 2002.

10 Learned senior counsel has drawn attention of the Court towards Annexure 9 of the writ petition, i e, the Minutes of pre-bid meeting dated 09.07.2020. He submits that a list of bidders, who had sent their queries and participated in the pre-bid meeting had been prepared. Petitioner No 1 figures at serial No 13, petitioner No 2 at serial No 2, petitioner No 3 at serial No 3, petitioner No 4 at serial No 14 and petitioner No 5 at serial No 5. These minutes were uploaded on the website on 12.08.2020. On coming to know of rejection of their claim at the pre-bid meeting, the petitioners represented before the Principal Secretary, Department of Health and Family Welfare, Government of Bihar under the representation dated 14.08.2020 (Annexure 10). The petitioners have voiced their grievance with due diligence



complaining that they have been deprived of their opportunity to participate in the tender process as the NIT does not provide for exemption from EMD to SSIU, to which they are legally entitled in terms of Rule 131B of the BFR 2005 and SPPP 2002. The petitioners' grievance raised in the pre-bid meeting as well as before the Principal Secretary, Department of Health and Family Welfare, Government of Bihar evinced no favourable response from the authorities. The Courts at that point of time were functioning in a very limited manner due to Covid-19 Pandemic related restrictions. The petitioners were faced with extreme difficulties in approaching their lawyer during the Nationwide lock down on account of COVID – 19 Pandemic. Facing all these odds, the petitioners, with due diligence, and as quickly as possible contacted their lawyer. Thereafter they had to seek permission from the High Court for filing their writ petition through Electronic Mode, which was done on 17.08.2020. After permission was accorded, the writ petition was filed and, thus, was registered on 22.08.2020. There is no delay on part of the petitioner. They have acted with due diligence and have continuously been asserting their claim. The question of estoppel or delay and laches does not arise in the aforesaid facts and



circumstances. Objection regarding maintainability of the writ petition is devoid of any substance.

11 On merits, Mr Shahi, learned senior counsel for the petitioners has emphasized the fact that the petitioners, are carrying on business as SSIU, and are entitled to be granted 7 (seven) percent price preference; and exemption from the requirement of submitting EMD under Rule 131B of the BFR 2005. The SHSB while issuing the NIT has not provided for such exemptions/preference, and the impugned NIT, purports to take away the privileges/exemptions under Rule 131B of the BFR 2005, the intention of which is to promote SSIU. The impugned NIT, which does not provide the exemptions contemplated under the BFR 2005, is clearly unsustainable as being restrictive against the petitioners. The petitioners, on account of requirement of EMD, are prevented from participation in the tender process.

12 The NIT of the SHSB is also contrary to Government of Bihar SPPP, 2002 which also contemplates providing exemption from EMD. Under communication dated 24.07.2017 (Annexure 3), the Industries Department has directed that duly registered SSIU situated within the State of Bihar be exempted from submission of EMD. Similar guideline has also been issued to the Bihar State Text Book Publishing Corporation Limited in terms of



Rule 131B of the BFR 2005. The Ministry of MSME, under communication dated 29.07.2003 issued to all Ministries/Departments of Government of India, has also granted similar exemption from the requirement of EMD. Referring to these communications, Mr. Shahi strenuously urges that PAN India there is a consistent Policy, for exemption of EMD to entities like the petitioners.

13 The NIT in question which purports to take away the privilege/concession available to the petitioners under the BFR 2005 and SPPP 2002, referred to above, is clearly unsustainable. The entire tender process, based on such tender notice, is, therefore, liable to be quashed. The issue was raised by petitioner No 1 under communication dated 09.07.2020 (Annexure 8 series). At the pre-bid meeting dated 09.07.2020, all the petitioners had raised objection in this regard and sought clarification. Such request was rejected by the SHSB, which held that ***“tendered terms and conditions shall prevail.”*** This decision is to be found in minutes of the pre-bid meeting dated 09.07.2020 (Annexure 9 to the writ petition). Petitioner No 1, the Association, acting on behalf of all the petitioners, thereafter raised the same issue before the Principal Secretary, Department of Health, Government of Bihar under communication dated 14.08.2020 (Annexure 10),



which was received in the office of the Principal Secretary on 17.08.2020. No decision on the same has been communicated to the petitioners.

14 The SHSB is a Society set up by the Government and duly registered under the Societies Registration Act, 1860. The Society is predominantly an extension of the Department of Health and Family Welfare, Government of Bihar. The Society, therefore, is bound to provide exemptions/privileges to SSIU by granting 7 (seven) per cent price preference as well as exemption from submission of EMD with tender document, in terms of Rule 131B of the BFR 2005, and benefits under SPPP 2002.

15 The SHSB is an instrumentality of State within the meaning of Article 12 of the Constitution of India. In all its activities, including grant of contracts through tenders, it is required to maintain fairness and follow the various policies of the Government including the policy as manifested in Rule 131B of the BFR 2005 with the objective of promoting SSIU, for safeguarding their interest so that they do not lose out on the opportunities arising out of such tenders.

16 He submits that the NIT, in so far as it does not provide for any purchase preference and exemption from submission of EMD to the petitioners, purports to take away these



benefits, which have been extended to SSIU, like the petitioners under the BFR 2005 and SPPP 2002. NIT in question is, thus, illegal and unsustainable in the eyes of law.

17 The law is well settled as regards State operating in contractual field. Its actions are required to be in accordance with law, non-arbitrary, non-discriminatory and in furtherance of public interest. In the instant case the impugned NIT is violative of the provisions contained in the BFR 2005 and SPPP 2002 in so far as it does not provide for exemption from EMD and purchase preference. The same adversely affects the petitioners' rights guaranteed under Articles 14, and 19 (1) (g) of the Constitution Of India. This court exercising jurisdiction under Article 226 of the Constitution of India should quash the NIT in question and direct the SHSB to issue tender afresh incorporating the benefits available to SSIU in terms of BFR 2005 and SPPP 2002.

18 In support of his submissions, he has relied upon decisions of Apex Court in the cases of Ramana Dayaram Shetty -Versus- The International Airport, AIR 1979 SC 1628, Tata Cellular -Versus- Union of India, (1994) 6 SCC 651, The Directorate of Education -Versus- EDUCOMP DATAMATICS Limited, (2004) 4 SCC 19, Global Energy Limited & Another -Versus- Adani Express Limited & Others, (2005) 4 SCC 435,



Montecarlo Limited -Versus- NTPC Limited, (2016) 15 SCC 272, Reliance Telecom Limited & Another -Versus- Union of India & Another, (2017) 4 SCC 269, CRRC Corporation Limited -Versus- Metro Link Express for Gandhi Nagar and Ahmadabad (Mega Company Limited), (2017) 8 SCC 282, Shree Subham Logistics Limited -Versus- The State of Rajasthan, an unreported judgment of Rajasthan High Court.

19 Mr. K. K. Sinha learned counsel has made submissions on behalf of the respondent SHSB. Mr. Y V Giri, learned senior counsel appears for intervenor respondent No. 19. Mr. Piyush Lall advocate represents intervenor respondent no.18. Mr Binod Singh, advocate appears for intervenor respondent nos. 14 – 17.

SUBMISSIONS OF RESPONDENTS' COUNSELS

20 Mr Y V Giri, learned Senior Counsel for Respondent No 19, on merits of the writ petition; referring to the affidavit filed by State Government through the Finance Secretary, submits that NIT in question is for procurement of a service. Petitioners are claiming benefits under Rule 131B of the BFR 2005, which are applicable in the case of procurement of goods, and not applicable in procurement of services. He has placed specific reliance on paragraph 16 of the affidavit filed by the Principal Secretary,



Finance Department, Government of Bihar, which reads as follows:

“16. That in the event of procurement of Services no such exemption is applicable as per the provision of the Bihar Finance (Amendment) Rules, 2005.”

21 He submits that the NIT in question is for procurement of the services of printing of various modules, registers, cards etc, and. Supply of the same is incidental to the service being provided. Exemption and price preference under Rule 131B of BFR 2005, is to be given in procurement of goods, and thus would not apply to the NIT in issue. Referring to the first paragraph of the NIT, he submits that bare reading of the same makes it clear that bids were invited from eligible entities for providing “services”; and not goods.

22 The learned senior counsel has also drawn attention of the Court towards Clauses 13 and 14 of the Scope of Work (hereinafter referred to as *SoW* for brevity) specified in Section IV of the NIT. The same stipulates that the authorities at SHSB will provide the creative design, logo, picture, customized messages, creatives etc; which will have to be printed on the modules, registers, cards etc by the supplier as and when required. The designs etc are to be the sole property of the SHSB, concerned Government Healthcare facility, or office of the Health



Department in the districts. The Agency would not have any right to alter or use the same anywhere else.

23 He has referred to one Circular issued by the Government of India in the Ministry of Finance, Department of Revenue, Tax Research Unit dated 20.10.2017 (Annexure C to the State's counter affidavit). As per paragraphs 4 and 5 of the Circular, when the intangible inputs are provided for by the purchaser, and the physical inputs including paper for printing belongs to the printer who supplies printing of the content to the recipient of supply (purchaser), the principal supply would be supply of a "service". NIT in question is also for supply of printing of the content which is intangible. The same has to be done on the physical inputs, which are not to be provided by the agency. Physical inputs on which the intangible content has to be printed under the NIT are belongings to the printer. Thus, it is clear that the NIT is for procurement of a "service" and not "goods". Benefit of Purchase preference and exemption from EMD contemplated under Rule 131B of BFR 2005, is concerned with procurement of goods, and therefore, shall not apply to the NIT in question.

24 Submissions of the learned senior counsel for the petitioners, based on the Notifications dated 30.09.2006



(Annexure-22), and 01.07.2020 (Annexure-23), in absence of any factual details regarding individual investments and turnover of the petitioners is devoid of any substance. It is also not the petitioners' case that till date they have all been certified as small enterprise in terms of the notification dated 01.06.200 (Annexure-23). Therefore, there is no basis for the petitioners to claim benefits under Rule 131B of BFR 2005, or under the SPPP 2002.

25 Petitioners, therefore, have no right to claim either exemption from EMD or purchase preference. Petitioners have not made out a case of arbitrariness, mala fide or any other illegality in the NIT in question. There are no legal and valid grounds for invoking the writ jurisdiction of this Court under Article 226 of the Constitution of India. Modern trend in exercise of writ jurisdiction for judicial review of State action in the field of tender matters points to judicial restraint. In absence of any legal or valid grounds, the terms of invitation of tender are not open to judicial review. Moreso, when there is no public interest involved.

26 He has relied upon the following decisions of the Supreme Court of India - Directorate of Education & Others -Versus- Educomp Datamatics Limited & Others (2004) 4 SCC 19, Tejas Constructions and Infra Private Limited -Versus- Municipal Council, Sendhwa & Another (2012) 6 SCC 464, Michigan



Rubber (India) Limited -Versus- State of Karnataka & Others (2012) 8 SCC 216, Consortium of Titagarh Firema Adler -Versus- Nagpur Metro Rail Corporation Limited (2017) 7 SCC 486, Municipal Corporation, Ujjain & Another -Versus- BVG India Limited & Others (2018) 5 SCC 462, and Cartel Infotech Limited -Versus- Hindustan Petroleum Corporation Limited & Others, (2019) 14 SCC 81.

27 The writ petition by the instant petitioners, challenging the terms of NIT is unsustainable in law and facts, devoid of any merit and fit to be rejected.

28 Mr K K Sinha appearing for the State Health Society has submitted that he adopts the submissions advanced by Mr Y V Giri, learned senior counsel for intervener-respondent No 19. He, however, adds that delay in approaching the Writ Court has to be seen in light of the fact that the petitioners, as per their own case, had participated and were present in the pre-bid meeting dated 09.07.2020 where their claim for exemption of EMD under Rule 131B of the BFR 2005 and SPPP, 2002 was rejected. The fact that the writ petition has been filed much later, after the last date for submission of NIT (20.08.2020) is glaring proof of the delay and laches by the petitioners in approaching the writ court.



29 Once the last date for submission of NIT had lapsed and other tenderers had submitted their bids, giving rise to third party interest, the issue of delay and laches would arise in the matter. Even public interest would suffer if this court under Article 226 of the Constitution of India were to interfere in the tender process now after so much delay. The same would unnecessarily prolong a decision regarding the procurement of services under the NIT by the State Health Society, which in some way or the other, directly or indirectly is for procurement of a service which is a component in discharge of the State's obligation for providing Health Care Services throughout the State of Bihar. The writ petition is fit to be dismissed only on the ground of delay and laches.

30 Mr Sinha has also referred to Clause 3.8 of the eligibility criteria contained in SECTION V of the NIT which prescribes one of the eligibility criteria for bidders; and the mandatory documents to be submitted in support of fulfillment of such criteria.

Clause 3.8 reads as follows:

***“3.8** The bidder should operate the printing press facility and should be located in Bihar for which*

a) The bidder must provide rent agreement copy with house owner/property owner, if the Printing Press is on rental place.



*Or,
b) If the bidder property is self-owned, then the copy of the deed of conveyance must be provided.”*

31 Thus, it is submitted that only bidders, who operate printing press facility located in the State of Bihar, were eligible for submitting their bid in response to the NIT in question. In view of such exclusive eligibility criteria, the claim of the petitioners in respect of price preference under Rule 131B of BFR 2005 is clearly unsustainable. Price preference over the goods produced by the industries located outside the State of Bihar will not apply. There is no basis for such claim in the NIT in question as all the bidders were required to be from within the State of Bihar and there was no scope whatsoever to have any competition with goods produced by industries/bidder from outside the State of Bihar.

32 Learned counsel Mr Piyush Lall has made submissions on behalf of intervener-respondent No 18. Adopting the submissions made by Mr. Giri learned Senior Counsel, and Mr. Sinha, he ,in addition has referred to Clauses 1.1, 1.2 and 1.3 of the TERMS AND CONDITIONS contained in SECTION VI of the NIT regarding use of contract documents and information. The same clearly specifies that without prior written consent of the SHSB, the bidders/agency shall not disclose any information



furnished by or on behalf of the SHSB in connection with the contract to any other person employed by the Agency. Even during performance of the contract, the disclosure is to be done in confidence, and only if necessary for performance of the contract. The same also contemplates that all the documents mentioned in sub-clause 1.1 shall remain property of the SHSB, which along with copies thereof are to be returned to the SHSB on completion of the Agency's obligations under the contract. Clause 2 of the TERMS AND CONDITIONS contains an indemnity clause requiring the bidders/agency to, at all times, indemnify the SHSB, District Health Service and Government Health Department offices against all claims which may arise in respect of goods and services to be provided by the bidder under the contract. Perusal of these terms and conditions make it abundantly clear that the NIT in question is predominantly for procurement of "services" on rate contract. All specifications, designs and logos which are to be printed, are to be supplied by the SHSB. In the circumstance, the procurement under the NIT in light of the terms of Clause iv of the Government of India circular dated 20.10.2017 (Annexure C to the counter affidavit) filed by the Finance Department is essentially procurement of a "service" and not of "goods". He too, has laid emphasis on clauses 4 and 5 of the Government of India circular



dated 20.10.2017. This Court would, therefore, consider it useful to reproduce the same which reads as follows:

*“4. In the case of **printing (emphasis mine)** of books, pamphlets, brochures, annual reports, and the like, where only content is supplied by the publisher or the person who owns the usage rights to the intangible inputs while the physical inputs including paper used for printing belong to the printer; supply of printing of the content supplied by the recipient of supply is the principal supply and therefore such supplies would constitute supply of service falling under heading 9989 of the scheme of classification of services.*

*5. In case of supply of **printed (emphasis mine)** envelopes, letter cards, printed boxes ... wall paper etc falling under Chapter 48 or 49 printed with design logo etc supplied by the ... of goods but made using physical inputs including paper belonging to the ... supply is that of goods and the supply of printing of the ... supply is ancillary to the principal supply of goods and therefore such supplies would come under supply of goods falling under respective headings of Chapter 48 or 49 of the Customs Tariff.”*

33 Referring to the scheme of BFR 2005, Mr Piyush Lall has submitted that Chapter 8 of the BFR 2005 deals with **“procurement of goods and services”**. It contains two sets of Rules. One, from Rule 124 to 131T for procurement of **“goods”**; and the other from 131U onwards for procurement of **“service”**.

34 Perusal of Rule 131B of the BFR 2005 would make it clear that the same contemplates grant of benefits in the matter of



procurement of “goods”, to SSIU and large/medium industries including public sector undertakings who are located and registered in the State of Bihar. For the registration contemplated under the said Rule, registration number was to be given by the Industries Department of the Government of Bihar. In the entire pleadings comprising of writ petition, rejoinder and several supplementary affidavits filed by the petitioners, there is no averment that any of the petitioners were registered in the State of Bihar as an SSIU. The certificates that they have placed on record are in respect of registration with the Government of India, issued under the MSME Act, 2006.

35 The requirement of beneficiary being a registered SSIU in the State of Bihar, under Rule 131B had already been specified in the BFR, in the year 2005. The MSME Act has come much later, i e, in 2006. Learned Senior counsel for the petitioner, however has not shown any rule or provision to substantiate their claim for the benefits under BFR 2005 and SPPP 2002, based on the certificate/s of registration issued under MSME Act, by the Government of India.

36 He submits that requirement of EMD can in a particular case be in support of a bid; otherwise it may also be in support of performance of the contract. The SPPP as well as Rule



131B of the BFR 2005 does not contemplate exemption of EMD at the time of submission of bids. The exemption from EMD contemplated under the BFR 2005, and SPPP 2002 is after emerging a successful bidder and in respect of EMD in support of performance of the contract. Thus, security amount (20%) has been specified in Rule 131B of the BFR 2005 as well as SPPP 2002, for ensuring/guaranteeing performance of the contract and not the bid. The petitioners' claim for such exemption at the bidding stage is clearly unsustainable and the writ petition is fit to be dismissed. Perusal of Rule 131B of BFR 2005 makes it clear that the exemption from EMD contemplated under this provision is at the post bid stage, after the bidder has qualified in the tender process. He is then exempted from EMD; and in lieu thereof required to deposit 20% of the general security amount. Therefore, the Rule contemplates that if the bidders/agencies fails to supply the goods after receiving the purchase order without any appropriate reason, they are to be blacklisted as per the procedure laid down.

37 He has also submitted that the from a bare reading of the first paragraph of the NIT it is clear that the same is for procurement of a service and not goods. Supply of modules, cards, registers etc, being "goods" are only incidental to the predominant



supply of the “service” of printing. This court would thus consider it useful to quote first paragraph of the NIT, which reads as follows:

“NOTICE INVITING TENDER

- 1. The State Health Society, Bihar(SHSB), Patna intends to select agency(s) via e-tendering for rate contract of printing and supply of various modules, registers, cards etc. for State Health Society, Bihar(SHSB), for the period of two years from the date of agreement. The State Health Society, Bihar, invites bids from eligible business entities, in providing the services (**emphasis mine**) as mentioned in this tender document.”*

38 The SPPP 2002 also contemplates exemption from EMD but in the post bid process after the bidder has been declared successful. Attention of the Court has been drawn towards Clause 2.7 of the SPPP which has been brought on record by the petitioners as Annexure 20 series to the 04th supplementary affidavit filed by them. Clause 2.7 of the SPPP is in the same terms as Rule 131B of the BFR 2005. The opening line of Clause 2.7 is **“for the purpose of contract ...”**. Had there been any intention to extend such benefits at the stage of submission of bids, Clause 2.7 or any other clause would have provided for such exemption, but it does not. The exemption under Clause 2.7 from EMD is coupled with a requirement that the SSIU located in the State of Bihar will have to deposit only 20% of the general



security amount. General security amount is clearly to guarantee performance of contract. Such performance guarantee can only be demanded after the Agency has emerged successful at the bid. Thus exemption from EMD contemplated under the SPPP 2002 is not at the NIT/bidding stage.

39 Requirement of registration as SSIU under the BFR 2005, is also recognized by the MSME Development Act and is obvious from bare reading of sections 2(e), 2(m), 7 and 8 of the Act. Therefore, learned senior counsel Mr Shahi's submissions based on the two notifications (Annexure-22 and Annexure-23) under the MSME Development Act, that SSIU are not required to be registered with the State of Bihar is unsustainable. None of the petitioners have claimed to be registered as SSIU with the State Government. No details of registration or certificate of registration in respect of petitioners' registration as SSIU has been produced in these proceedings. In absence thereof, petitioners cannot claim benefit of exemption from EMD or purchase preference under Rule 131B of BFR 2005, or SPPP 2002 respectively.

40 In support of his submissions, Mr Piyush Lall, has relied upon the following decisions: Maula Bax -Versus- Union of India AIR 1970 SC 1955, Prabodh Verma & Others -Versus- State of Uttar Pradesh & Others, (1984) 4 SCC 251, State of Kerala



-Versus- Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) & Others, AIR 1996 SC 906, B L Sreedhar & Others -Versus- K M Munireddy (dead) & Others, (2003) 2 SCC 355. Association of Registration Plates -Versus- Union of India & Others, (2005) 1 SCC 679. Meerut Development Authority -Versus- Association of Management Studies & Another, (2009) 6 SCC 171. AFCONS Infrastructure Limited -Versus- Nagpur Metro Rail Corporation Limited & Another, (2016) 16 SCC 818.

COURT'S CONCLUSION

41 The facts are clear that the all the petitioners have raised objections at the first opportunity, in the pre-bid meeting. The same has been considered by the Authorities, who have rejected the same and uploaded their decision on the website on 22.08.2020. Thereafter, petitioners have also approached the Secretary of the concerned Department who has not taken any notice of the same. Immediately thereafter, they have taken steps for filing the writ petition.

42 Fact that one of the petitioners had submitted his bid in response to the NIT, and was subsequently declared unsuccessful, in the facts and circumstances of the instant case is irrelevant and would not disentitle him to question the terms of the tender. In spite of several unprecedented difficulties on account of



COVID – 19 Pandemic related restrictions, the petitioners have raised their grievance in the bidding process and approached this Court with due diligence. In the considered opinion of this court, preliminary objection raised by learned counsels representing the various Respondents regarding writ petition being barred by delay and laches and that any petitioner is estopped from questioning the terms of NIT, is unsustainable. Objection regarding maintainability of the writ petition, is, therefore, overruled.

43 On merits, submissions made on behalf of the petitioners, hinges on Rule 131 of the BFR 2005, this Court would, thus, consider it appropriate to reproduce Rule 131B of the BFR 2005 for the sake of easy reference. The same reads as follows:

“Rule 131B. Price Preference and other concessions for public sector and state suppliers: A maximum of 2 (two) percent price preference will be given to the goods (Emphasis mine) produced by the large/medium industries (including Public Sector Undertakings) located and registered in the State over the goods (Emphasis mine) produced by the large/medium industries located outside the State of Bihar. Similarly, 7 (seven) percent price preference will be given to the goods (Emphasis mine) produced by the small scale units located and permanently registered in the State of Bihar over the goods (Emphasis mine) produced by the small/medium/large industries located outside the State. While giving price preference, no relaxation is to be made in terms of quality and specifications. The small scale units located in Bihar shall not be liable to deposit earnest



*money. They will have to deposit only 20 percent of the general security amount, however, after receiving the purchase order, if they fail to supply the **goods (Emphasis mine)**, without any appropriate reason, they will be blacklisted as per the procedure laid down.”*

44 The various precedents which have been relied upon by the parties are mainly concerned with the long-settled scope of judicial review in contract and commercial matters.

45 The Court, however, is of the opinion that the primary issues germane to the petitioners’ claim is whether exemption from EMD and Purchase Preference, contemplated under Rule 131B BFR 2005, and SPPP 2002, is applicable to the tender process arising out of the NIT in respect of which relief has been sought? And therefore, whether the petitioners, or anyone for that matter can claim any legal right for these benefits in the process of procurement in question? To arrive at a conclusion in this regard it is essential to first consider and decide the two (2) primary issues:

- (i) *Whether benefits claimed are limited under the BFR 2005, to the procurement of goods, or are available even when the State is undertaking procurement of services, and*
- (ii) *Whether the NIT in issue is for procurement of goods or services?*



46 Based on submissions advanced by the parties, if this Court was to conclude that benefits of purchase preference and exemption from EMD being claimed in terms of Rule 131B BFR,2005, and SPPP 2002 by the petitioners are applicable to the procurement under the NIT in question; then only the court would be required to consider whether the petitioners qualify for the same. If the answer was to be in the affirmative, the next question that would arise is whether by way of a writ petition, within the settled scope of judicial review of contract and commercial activities of the State, the petitioners can claim the benefits and assail the terms of NIT by way of a writ petition.

47 On the other hand, if this court were to conclude that benefits of purchase preference and exemption from EMD under Rule 131B BFR,2005, and SPPP 2002 are not applicable to the procurement under the NIT in question; then there would be no occasion for this court to examine whether the petitioners' qualify for the benefits, or whether they can assail the terms of NIT, under Article 226 of the Constitution Of India.

48 This Court would thus proceed to examine whether the benefits claimed by the petitioners are applicable to the procurement under the NIT in question.



49 From a bare reading of Chapter 8 of the BFR 2005 it is obvious that it deals with “**Procurement of Goods and Services**”. This chapter is divided into two parts. The first from Rule 124 to Rule 131T, deals with procurement of “**goods**”. The second part, Rule 131U onwards, deals with procurement of “**services**”. This separation is obvious from a bare reading of Rule 124 and the heading before Rule 131U.

Rule 124 of BFR 2005 reads as follows: -

*“This chapter contains the general Rules applicable to all ministries or departments, regarding procurement of **goods** (emphasis mine) required for use in the public service. Detailed instructions relating to procurement may be issued by the procuring departments broadly in conformity with the general rules contained in this chapter.”*

The heading before Rule 131U of BFR 2005 reads:

“II Procurement of Services”

50 Rule 131B of BFR 2005, under which the petitioners are claiming benefits, up to Rule 131T falls under the first part of Chapter 8 starting with Rule 124. Rule 124 is in fact a heading for this part of BFR 2005 which makes it clear that this part deals with procurement of goods. It is settled law that a heading can be relied upon as an internal aid to construction of a provision. In this



connection, this court would consider it useful to reproduce **paragraph 19** of Judgement of the apex court in the case of **Commissioner of Customs (Import), Mumbai Vs Dilip Kumar and Company reported in (2018) 9 SCC 1:**

“19. The long title, the preamble, the heading, the marginal note, punctuation, illustrations, definitions or dictionary clause, a proviso to a section, explanation, examples, a schedule to the Act, etc, are internal aids to construction. The external aids to construction are parliamentary debates, history leading to the legislation, other statutes which have a bearing, dictionaries, thesaurus.”

51 The Court would also consider the language of Rule 131B of BFR 2005. In the context of procurement by the State, this provision repeatedly employs the word “goods”. There is no mention whatsoever regarding “services”. From plain meaning of the language of Rule 131B; and the context in which it occurs, on reading the whole of chapter 8 of BFR 2005, the clear and unambiguous conclusion that emerges is that the Rule 131B is susceptible to only one meaning that benefits contemplated therein exclusively concerns a process of procurement of goods. This court would thus invoke a fundamental principle of interpretation, namely principle of plain meaning, i.e. to rely upon the plain meaning conveyed by the language employed in the statute, rule, or document; and the context in which it is employed. When the



words are clear and plain, the court is bound to accept the expressed intention.

52 One such case where the Hon'ble Supreme Court of India stated the said principle and emphasized strict interpretation in the context of another exemption notification, dealing with exemption of Electricity Duty under the Bombay Electricity Act, 1958, was in the case of **Essar Steel India Limited and Another VS State of Gujarat And Another** reported in (2017) 8 SCC 357:

“20. We have noticed above that power purchase agreement allocated the energy to the Gujarat electricity Board to the extent of 58% and 42% power supply was to be given to sister concerns i.e. Essar Gujarat, Essar Steel and Essar Oil as a special case. It is well settled that taxing statute are to be strictly construed specifically the exemption notification. It has been held that the statutory provisions providing for exemption has to be interpreted in the light of words employed in it and there cannot be any addition or subtraction from the statutory provision. This Court in CCE v Favourite Industries, while considering exemption notification issued under the Central Excise Tariff Act, 1985 laid down the following in paras 35 to 40: (SCC pp 167-69)

“35. The notification requires to be interpreted in the light of the words employed by it and not on any other basis. There cannot be any addition or subtraction from the notification for the reason the exemption notification requires to be strictly construed by the courts. The wordings of the exemption notification have to be given in natural meaning, when the wordings are simple, clear and unambiguous.



36. In *Commr of Customs v Rupa & Co Ltd*, this Court has observed that the exemption notification has to be given strict interpretation by giving effect to the clear and unambiguous wordings used in the notification. This Court has held thus: (SCC pp 413-14, para 7)

'7. ... However, if the interpretation given by the Board and the Ministry is clearly erroneous then this Court cannot endorse that view. An exemption notification has to be construed strictly but that does not mean that the object and purpose of the notification is to be lost sight of and the wording used therein ignored. Where the wording of the notification is clear and unambiguous, it has to be given effect to. Exemption cannot be denied by giving a construction not justified by the wording of the notification.'

37. In *CCE v Rukmani Pakkwell Traders*, this Court has also held: (SCC p 804, para 5)

'5. ... It is settled law that exemption notifications have to be strictly construed. They must be interpreted on their own wording. Wordings of some other notification are of no benefit in construing a particular notification.'

38. In *Kohinoor Elastics (P) Ltd v CCE* this Court has held: (SCC p 533, para 7)

'7. ... When the wordings of the notifications are clear and unambiguous they must be given effect to. By a strained reasoning benefit cannot be given when it is clearly not available.'

39. In *Compack (P) Ltd v CCE*, this Court has observed thus: (SCC p 306, para 20)

'20. Bhalla Enterprises laid down a proposition that notification has to be construed on the basis of the language used. Rukmani Pakkwell Traders is an authority for the same proposition as also that a particular notification. The notification does not state that exemption cannot be granted in a



case where all the inputs for manufacture of the containers would be base paper or paperboard. In manufacture of the containers some other inputs are likely to be used for which MODVAT credit facility has been availed of. Such a construction, as has been suggested by the learned counsel for the respondents, would amount to addition of the words “only out of” or “purely out of” the base paper and cannot be countenanced. The notification has to be construed in terms of the language used therein. It is well settled that unless literal meaning given to a document leads to anomaly or absurdity, the golden rule of literal interpretation shall be adhered to.’

40. *In CCE v Mahaan Dairies, this Court has held: (SCC p 800, para 8)*

‘8. It is well settled law that in order to claim benefit of a notification, a party must strictly comply with the terms of the notification. If on wording of the notification the benefit is not available then by stretching the words of the notification or by adding words to the notification benefit cannot be conferred. The Tribunal has based its decision on a decision delivered by it in Rukmani Pakkwell Traders v CCE. We have already overruled the decision in that case. In this case also we hold that the decision of the Tribunal is unsustainable. It is accordingly set aside’ ” (emphasis in original)’

53 Thus, it is clear that benefits contemplated under Rule 131B, therefore, can only be claimed if the procurement process in question is for goods, and not in a process for procurement of services.

54 In so far as the benefits claimed by the petitioners under the SPPP 2002, this Court would observe that first it is



essential to consider whether “stores” includes both goods and services?

55 Definition of the word “stores” has been considered by the Hon’ble Apex Court in Paragraph 12 of the judgment in the case of **Cantonment Board, Dehu Road & Another -Versus- Mahindra Owen Limited & Another, reported in 1986 (Supp) Supreme Court Cases 301**. This Court would consider it useful to reproduce the same:

“12. The expression “stores” has been defined in the dictionaries as meaning :

Articles of particular kind or for special purpose accumulated for use, supply of things needed, (military, naval etc) – The Concise Oxford Dictionary.

Supply or stock of something, especially essentials, for a specific purpose :

The ship’s stores.-Collins English Dictionary.

Supplies of provisions, ammunition etc for an army, ship etc – Chambers Twentieth Century Dictionary.”

The term “stores” is defined in Maritime Law to mean “the supplies of different articles provided for the subsistence and accommodation of ship’s, crew and passengers”. **(As per P Ramanathan Iyer’s Law Lexicon, IIIrd Edition 2012).**

56 These definitions of the expression “stores” in various dictionaries, used in the context of other establishments are



being relied upon as external aid to understand the meaning of “stores”, which has not been defined in SPPP 2002. Court would again rely upon **paragraph 19** of the judgment in the case of **Commissioner of Customs (import), Mumbai (ibid)**.

57 The meaning and various synonyms of the expression “stores” occurring in these various definitions, makes it clear that like “goods”, it also refers to tangible and inanimate things. Expression “stores” under the SPPP 2002, does not and cannot mean “services”.

58 A reading of Paragraph 1 of the Resolution containing the SPPP 2002 also makes it abundantly clear that “stores” connotes goods and not services.

59 This Court, therefore, considers it useful to reproduce paragraph 1 of SPPP 2002 which reads as follows:

“Government of Bihar

*STORES PURCHASE PREFERENCE
POLICY – 2002*

Department of Industries

RESOLUTION

*Subject : Stores Purchase Preference
Policy – 2002.*

1. Whereas industry in general, and the cottage and the small industry in particular contribute significantly to the national and state economies by providing enormous employment



opportunities to the people, both the Central and the State Government have adopted policies to promote and nurture them, hence on the pattern of the national and other State Governments, the Government of Bihar too, as early as in July 1956, decided and directed all State controlled bodies to accord priority and price preference in Government purchases of stores manufactured by the cottage and small industries located within the State. Certain directions were issued by the Department of Industries, Government of Bihar vide resolution nos 726 and 7285 dated 30 July 1956 and 6 June 1984 respectively regarding such priority and price preference. The experience assimilated over the decades reveals that the relevant directions of the existing “Stores Purchase Preference Rules” need to be modified to make them more effective so that the desired objective can be achieved. The State Government has also decided to extend priority/price preference to stores produced by the medium/large industries of the State vis-a-vis the products of industries located outside the State.”

60 The expression “stores” throughout the SPPP 2002 is used in the same context. Again, applying the settled principle of interpretation, namely principle of plain meaning, conclusion is reached that the expression “stores” in the Resolution containing the SPPP 2002 is susceptible to only one meaning i.e. goods; and definitely not “services”.

61 Therefore, even under SPPP 2002, the petitioners, cannot claim the benefits of exemption from EMD or purchase preference in a process of procurement of “service”.



62 The State of Bihar in paragraphs 16 and 17 of the counter affidavits has also taken an unequivocal stand that exemption of EMD is not applicable in the event of procurement of “services” and that for availing the benefit of exemption from EMD, SSIU must be involved in manufacturing of goods process and should have a valid registration number.

63 Having considered the language and placement of Rule 131B within the BFR 2005, The provisions of the SPPP 2002, and in view of the unequivocal stand of the State of Bihar which is also in accord with the BFR 2005/SPPP 2002, answer to the **primary issue number (i)** is clear that the benefits contemplated under the said rule/policy, which are being claimed by the petitioners is limited only to a process of procurement of “goods”.

64 The Court is thereafter required to consider whether the NIT in question is for procurement of goods, or services? In paragraph 1 of SECTION – I of the NIT it has clearly been stated in so many words, as follows: “*The State Health Society, Bihar invites bids from eligible business entities, in providing the services (Emphasis mine) as mentioned in this tender document.*”. Therefore, NIT in question is primarily for supply of the service of printing of the content. The content to be printed, is



owned and has to be supplied to the printer by the SHSB. Supply of the card, module, registers etc., is ancillary to the primary supply of service of printing on these physical inputs. Answer to **primary issues number (ii)** is that the NIT in question is for procurement of service. This is conclusive from bare reading of the NIT issued by the SHSB.

This concludes the courts findings on primary issues No (i) and (ii).

65 Therefore, the petitioners, or anyone for that matter have no right to claim the benefit of exemption from EMD or Purchase preference under BFR 2005, or SPPP 2002; in the process of procurement of a service under the NIT in question.

66 It is axiomatic that existence of a right is a prerequisite to the invocation of writ jurisdiction under Article 226 of the Constitution of India by any person. The petitioners have no subsisting right redressal of which may be prayed for in a writ proceeding under Article 226 of the Constitution of India.

67 In this connection the court would rely upon judgement of the Apex court in the case of **Safin Jahan Vs Asokan K.M. and ors reported in (2018) 16 SCC 368:**

“70. Dealing with the ambit of the powers under Article 226, Gajendragadkar, CJ in State of Orissa v Ram Chandra Dev observed thus: (AIR p 688, para 8)”



8. ... Under Article 226 of the Constitution, the jurisdiction of the High Court is undoubtedly very wide. Appropriate writs can be issued by the High Court under the said Article even for purposes other than the enforcement of the fundamental rights and in that sense, a party who invokes the special jurisdiction of the High Court under Article 226 is not confined to cases of illegal invasion of his fundamental rights alone. But though the jurisdiction of the High Court under Article 226 is wide in that sense, the concluding words of that Article clearly indicate that before a writ or an appropriate order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or threatened. The existence of a right is thus the foundation of a petition under Article 226.”

68 Since exemption of EMD or purchase preference either under the BFR 2005, or SPPP 2002 is not applicable in a process of procurement of services, no one, much less the petitioners have any right to claim the said benefits. Therefore there is no occasion for this court to delve into the issue whether or not the petitioners have locus to claim the benefits, or whether this court would exercise jurisdiction under Article 226 of the Constitution of India having regard to scope of exercise of judicial review in respect of the terms of NIT and State action in contract and commercial activities with reference to the various citations relied upon by the parties.

69 No case is made out requiring any interference with the NIT in question, or for issuance of any direction in favour of the petitioners in respect of the NIT.



70 Writ petition is dismissed.

(Madhuresh Prasad, J)

M.E.H./-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	15.07.2021
Transmission Date	NA

