

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 16765 of 2017

With

R/SPECIAL CIVIL APPLICATION NO. 16773 of 2017

With

R/SPECIAL CIVIL APPLICATION NO. 17991 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH

Sd/-

and

HONOURABLE MR.JUSTICE A.Y. KOGJE

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

M/S BIPSON SURGICAL(INDIA) PVT. LTD.,

Versus

STATE OF GUJARAT

Appearance:

Special Civil Application Nos.16765/2017 & 16773/2017

MR SI NANAVATI, SR. ADVOCATE with MS ANUJA S NANAVATI(5229) for the PETITIONER(s) No. 1,2

Special Civil Application No.17991/2017

MS MINU SHAH, ADVOCATE for the PETITIONER(S)

Special Civil Application Nos.16765/2017, 16773/2017 & 17991/2017

MR KAMAL TRIVEDI, ADVOCATE GENERAL with MS SANGITA VISHEN, ASSISTANT GOVERNMENT PLEADER/PP(99) for the RESPONDENT(s) No. 1

DS AFF.NOT FILED (N)(11) for the RESPONDENT(s) No. 1

MR MITUL K SHELAT(2419) for the RESPONDENT(s) No. 2

CORAM: HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE A.Y. KOGJE

Date : 27/03/2018

COMMON ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

[1.0] RULE. Ms. Sangita Vishen, learned Assistant Government Pleader waives service of notice of Rule on behalf of the respondent No.1 and Shri Mitul Shelat, learned Advocate waives service of notice of Rule on behalf of the respondent No.2.

[1.1] As common question of law and facts arise in this group of petitions, they are disposed of by this common judgment and order.

[2.0] By way of this petition under Article 226 of the Constitution of India, the respective petitioners have prayed for an appropriate writ, direction and order quashing and setting aside the impugned decisions / order of the respondent No.2 – Gujarat Medical Services Corporation Ltd. (hereinafter referred to as “GMSCL”) being Email Ref.No.GMSCL/DRUG/2017-18/ as well as give effect to the change in Tax Structure whereby 12% GST has been introduced on goods that are supplied by the petitioners to respondent No.2 – GMSCL.

[2.1] By way of amendment the petitioners have also prayed to quash and set aside the impugned decision of the respondent No.2 – GMSCL being Agenda Item No.22/15 and Agenda Item No.22/25 of the Minutes of 22nd Meeting of the Board of Directors of GMSCL dates 23.08.2017.

[3.0] For the sake of convenience, Special Civil Application No.18765/2017 is treated as a lead matter and the facts in the said Special Civil Application are narrated which are as under:

[3.1] That the petitioners are engaged in the business of

manufacture and distribution of Surgical Dressing items such as Bandages, Gauze etc. That the respondent No.2 GMSCCL is a procuring agency of Government of Gujarat which procures the drugs, surgical items etc. from different manufacturers and distributors for the supply of the same to the Government Hospitals throughout the State of Gujarat. That the GMSCCL invited the tenders from the eligible suppliers to supply different items. The petitioners awarded the contracts and were asked to supply 5 different items bearing Item Code 4006, 4024, 4009, 4010 and 4185. That the particulars of the respective online tenders and awarding the contracts in favour of the petitioners are as under:

1. That on 22.07.2015, respondent No.2 GMSCCL had invited Online Tenders bearing Tender Notice No.D-02/2015-2016 and Tender Enquiry No.GMSCCL/D-576/RC/2015-16 (ON RATE CONTRACT BASIS) from all reputed Manufacturers / Direct importers of Disposable Delivery Kit (ETO Sterilized). That the petitioners had filled the Tender Form for Item Code No.4185 i.e. Disposable Deliver Kit (ETO Sterilized) and had submitted Technical and Commercial Bid for which petitioners were awarded the tender through Acceptance Letter dated 07.10.2015. Rate Contract bearing No.GMSCCL / Drugs / RC / 576-4185 / C-166 /66596-66607/2015016 was entered on 28.10.2015 which was valid up to 30.09.2016 which came to be further extended up to 31.05.2017.
2. That on 10.11.2015, the respondent No.2 GMSCCL had invited Online tenders bearing tender Notice No.D-03/2015-2016 and Tender Enquiry No.GMSCCL/D-582/RC/2015-16 (ON RATE CONTRACT BASIS) from all reputed Manufacturers/Direct importers of Cotton Crepe Bandage, absorbable surgical suture catgut etc. That the petitioners had

filled the Tender Form for Item Code No.4009 i.e. Cotton Crepe Bandage (Size 10 cm * 4 mtr) & Item Code No.4010 i.e. Cotton Crepe Bandage (Size 6 cm * 4 mtr) and had submitted Technical and Commercial Bid for which petitioners were awarded the tender through Acceptance Letters dated 14.03.2016. Rate Contract bearing No.GMSCL / Drugs / RC / 582-4009 / C-8 /24559-70/2016-17 for Item Code No.4009 and Rate Contract bearing No.GMSCL / Drugs / RC / 582-4010 / C-91 /24571-821 / 2016-17 for Item Code No.4010 were entered on 07.04.2016 which were valid up to 28.02.2018.

3. That on 17.02.2016, respondent No.2 GMSCL had invited Online tenders bearing tender Notice No.D-04/2015-2016 and Tender Enquiry No.GMSCL / D-588 / RC / 2015-16 (ON RATE CONTRACT BASIS) from all reputed Manufacturers / Direct importers of Bandage Cloth, Rolled Bandage etc. That the petitioners had filled the Tender Form for Item Code No.4006 i.e. Bandage Cloth with ISI Mark & Item Code No.4024 i.e. Rolled Bandage (5 mtr * 5 cm) with ISI Mark and had submitted Technical and Commercial Bid for which petitioners were awarded the tender through Acceptance Letter dated 23.08.2016 for Item Code 4024 and Acceptance Letter dated 09.09.2016 for Item Code 4006. Rate Contract bearing No.GMSCL / Drugs / RC / 588-4006 / D-166 / 68536-68547 /2016-2017 for Item Code No.4006 and Rate Contract bearing No.GMSCL / Drugs / RC / 588-4024 / D-93 /64815-64826 / 2016-2017 for Item Code No.4024 were respectively entered on 28.09.2016 and 06.09.2016 which were valid up to 31.05.2018.

[3.2] It is the case on behalf of the petitioners that as per the

tender terms, the petitioners were asked to provide rates pre-packing unit (without applicable VAT / CST) as well as provide percentage of VAT / CST, if applicable in different columns. According to the petitioners, as per Clause 13(b)9 of the respective tender documents dated 22.07.2015, 10.11.2015 and 17.02.2016 as well as Bidding Schedule attached to the tender documents, petitioners had to include Excise Duty, Packing, Forwarding, Insurance Charges etc. in pre-packing unit (without applicable VAT / CST). Thus, according to the petitioners, VAT / CST were to be borne by the GMSCL which although were recovered by the petitioners but was indeed paid to the State Government or appropriate Authority on behalf of the GMSCL.

[3.3] It appears that on 12.04.2017, based on recommendation of GST Council, Parliament had passed Central Goods and Services Tax (CGST) Act, 2017 (hereinafter referred to as “CGST Act”), The Integrated Goods and Services Tax (IGST) Act, 2017, The Union Territory Goods and Services Tax Act, 2017 and The Goods and Service Tax (Compensation to States) Act, 2017 (hereinafter referred to as “GST Act”). That the aforesaid laws were given effect from 01.07.2017. It appears that by the aforesaid laws / Acts, the taxes levied and collected by the Centre such as Central Excise Duty, Duties of Excise (Medicinal and Toilet Preparations), Additional Duties of Excise, Additional Duties of Customs, Special Additional Duty of Customs, Service Tax and Central Surcharges and Cess have been subsumed in GST. Similarly, the taxes levied and collected by State such as State VAT, Central Sales Tax, Entry tax, Luxury tax, Entertainment and Amusement Tax, taxes on advertisement etc. have been subsumed in GST. It is the case on behalf of the petitioners that in view of the introduction of the GST and the rate of GST and change in tax structure, on 26.05.2017,

the petitioner wrote a letter to the Managing Director of the GMSCL by which the petitioners asked the GMSCL to consider new GST Rates which would be applicable to the product supplied by the petitioners and pay the duty amount, if any. That vide communication dated 14.07.2017, GMSCL had asked the petitioners to provide applicable GST to the products that were supplied by the petitioners to the respondent No.2 GMSCL alongwith HSN Code. That the petitioners replied vide communication dated 29.07.2017 and provided the information sought in the previous email dated 14.07.2017. That additionally the petitioners also stated in their letter that GST was applicable at 12% to the products the petitioner was supplying to GMSCL. The petitioner also requested the GMSCL to make appropriate changes or accommodate the new tax rates which were applicable to the products that were supplied by the petitioner to respondent No.2 GMSCL. According to the petitioners, on 14.08.2017, the petitioners wrote a letter to the GMSCL asking for the payment that was due where the petitioner had also agreed to accept the payment as per 5% tax subject that in future the petitioner gets payment for rest 7% tax. That thereafter vide impugned communication dated 31.08.2017, the GMSCL had asked the petitioners to make necessary arrangement / amendments in their price for those items which petitioners were supplying. That in the meantime the GMSCL in its meeting held on 23.08.2017 wherein two Agenda Items i.e. Agenda Item No.22/15 titled as Amendment in Rate Contract due to GST and Agenda Item No.22/25 titled as Amendment in Tax due to GST were passed and the GMSCL resolved that “since the Finance Department, Government of Gujarat did not agree to revise a rate due to GST effect, the Board decided to seek consent of firms for supply of the items as per rate contract”. It was also resolved that “if the firms do not agree, the

GMSCCL will float fresh tender and as per the agreement terms and conditions for the existing rate contract for such items”.

[3.4] Feeling aggrieved and dissatisfied with the impugned decision in the communication dated 31.08.2017 (Annexure-A) by which the petitioners were requested to make available their consent in connection of agreement to supply as per the GST rates, without increasing the existing rates and the impugned decision taken by the GMSCCL in Agenda Item Nos.22/15 and 22/25 by which it has been decided to seek consent of firms for supply of the items as per the rate contract, the petitioners have preferred the present Special Civil Application under Article 226 of the Constitution of India.

[4.0] Shri S.I. Nanavati, learned Senior Advocate has appeared on behalf of the petitioner of Special Civil Application Nos.16765/2017 and 16773/2017 and Ms. Minu Shah, learned Advocate has appeared on behalf of the petitioner of Special Civil Application No.17991/2017. Shri Kamal Trivedi, learned Advocate General has appeared with Ms. Sangita Vishen, learned Assistant Government Pleader appearing on behalf of the respondent – State Gujarat and Shri Mitul K. Shelat, learned Advocate has appeared on behalf of the respondent No.2 – GMSCCL.

[5.0] Shri Nanavati, learned Counsel appearing on behalf of the petitioners has taken us to the relevant clauses / conditions of the tender documents more particularly Clauses 13, 44, 49. He has also taken us to the relevant clauses of Rate Contract more particularly Clause 43 of the Rate Contract.

[5.1] It is submitted by Shri Nanavati, learned Counsel appearing

on behalf of the petitioners that as such as per the tender conditions the petitioners were asked to provide rates pre-packing unit (without applicable VAT & CST) as well as provide percentage of VAT / CST, if applicable, in different columns. It is submitted that as per Clause 13(b)(ix) of the tender documents as well as Bidding Schedule attached to the tender documents, petitioners were required to include Excise Duty, Packing, Forwarding, Insurance Charges etc. in pre-packing unit (without applicable VAT / CST). It is submitted that therefore the VAT / CST were to be borne by the GMSCL which although were recovered by the petitioners but was indeed paid to the State Government or appropriate Authority on behalf of the GMSCL. It is submitted that by impugned communication dated 31.08.2017 and the illustration, the GMSCL has forced the petitioner to reduce the contract rate / rates pre-packing unit (without applicable VAT / CST) from Rs.100 to Rs.93.74 as per the calculation given in the impugned order / decision because of the introduction of CGST Act, 2017 and GST Act, 2017. It is submitted that such action is absolutely arbitrary, unfair and violative of Article 14 of the Constitution of India. Relying upon the aforesaid Clauses, it is submitted by Shri Nanavati, learned Counsel appearing on behalf of the petitioners that the rates pre-packing unit which were offered by the petitioners and which came to be accepted by the GMSCL, thereafter cannot be revised under any pretext or reason, including in case of revision of duty / Excise / cost. It is submitted that by impugned communication dated 31.08.2017 as such the GMSCL has asked the petitioners to reduce the rates pre-packing unit (without applicable VAT / CST) against those mentioned in the acceptance letter and rate contract to cover the change in tax structure which was to be borne by the GMSCL. It is submitted by Shri Nanavati, learned Counsel appearing on behalf of the

petitioners that from the illustration provided in the impugned communication dated 31.08.2017, it is evident that the pre-GST rates have been shown in which basic rate i.e. pre-packing unit (without applicable VAT / GST) has been taken as Rs.100 on which 5% VAT or CST was applicable and the final amount of the product was Rs.105/-. It is submitted that against which post-GST rates have been shown in which basic rate that is pre-packing unit (without applicable VAT / GST) has been reduced to Rs.93.74 on which 6% SGST i.e. Rs.5.63 and 6% CGST i.e. Rs.5.63 is applied and the final amount of the product is kept at Rs.105/-. It is submitted that however the petitioner is directed to mention the rate at Rs.93.74 (instead of Rs.105) which as such was not the agreed contract rate. It is submitted that therefore the impugned decision dated 31.08.2017 is absolutely illegal and contrary to the terms and conditions and the relevant clauses of the tender documents as well as the rate contract. It is further submitted by Shri Nanavati, learned Counsel appearing on behalf of the petitioners that so far as other States are concerned and other Corporations in other State such as Rajasthan Medical Services Corporation Ltd., Tamilnadu Medical Services Corporation Ltd., Kerala Medical Services Corporation Ltd. have considered the change in tax structure and have granted the benefit by revising the rate contracts to the suppliers.

[5.2] Shri Nanavati, learned Counsel appearing on behalf of the petitioners has further submitted that even the impugned decision taken by the GMSCL in Agenda Item No.22/15 in its meeting held on 23.08.2017 is concerned, the same is absolutely unreasonable, illegal and irrational. It is submitted that the said resolution do not contain any reasons whatsoever for not giving any effect to the enactment in the CGST and GST. It is further submitted that even

otherwise the said decision cannot be said to be a decision of the respondent No.2 GMSCL and the same can be said to be the decision of the Finance Department of Government of Gujarat.

[5.3] It is further submitted that even otherwise the impugned decision dated 23.08.2017 is absolutely illegal, unreasonable and arbitrary. It is submitted that admittedly when the contract was executed, there was no enactment or statute like CGST / GST and prior to introduction of CGST / GST, the taxes were being borne by the Government. It is submitted that therefore on introduction of CGST / GST, obligation is always cast upon the Government to pay any tax inclusive of the GST. It is submitted that therefore the impugned decisions of CGST in not granting the benefit of change in tax structure, by revising the rate contract, deserves to be quashed and set aside.

[5.4] It is further submitted by Shri Nanavati, learned Counsel appearing on behalf of the petitioners that as such at the time when the rates were offered, which were accepted at the time of awarding the contract for supply of goods in question, no one had kept in mind the GST / rates of GST. It is submitted that the rates were offered considering the existing taxes. It is submitted that rate contract was over and above the tax liability whatever may be. It is submitted that in any case rate contract was not inclusive of tax and it was over and above and subject to revision of the tax liability.

[5.5] It is further submitted by Shri Nanavati, learned Counsel appearing on behalf of the petitioners that as such the relevant clauses of the tender documents and the rate contracts more particularly Clause 49 shall bind both the parties. It is submitted

that Clause 49 of the tender document specifically provide that claim of price revision of finished goods under any pretext or reason, including the revision of duty / excise / cost will not be allowed at any stage after the last date of submission of the tender. It is submitted that same shall be applicable to GMSCL also.

[5.6] It is further submitted by Shri Nanavati, learned Counsel appearing on behalf of the petitioners that even otherwise the impugned decisions can be said to be and/or amounts to novation in the contract which may be on change of circumstances more particularly on applicability of CGST / GST.

Making above submissions and relying upon decisions of the Hon'ble Supreme Court in the case of **Zonal Manager, Central Bank of India vs. Devi Ispat Limited and Others** reported in (2010) 11 SCC 186 (Para 28); **ABL International Ltd. and Another vs. Export Credit Guarantee Corporation of India Ltd. and Others** reported in (2004) 3 SCC 553 (Paras 23, 53), it is requested to exercise the powers under Article 226 of the Constitution of India and quash and set aside the impugned decisions.

[6.0] Present Special Civil Applications are vehemently opposed by Shri Kamal Trivedi, learned Advocate General appearing on behalf of the State. Shri Trivedi, learned Advocate General has heavily relied upon Clauses 13(b) and Clause 49 of the Tender Documents and Clause 26 and Clause 43 of the Rate Contracts. Relying upon the aforesaid clauses it is submitted that the rates offered and accepted were the net price inclusive of all duties and sundries. It is submitted that as per Clause 49 of the Tender Documents, the claim of price revision of finished goods under any pretext or reason including of revision of duty / excise / cost will not be

allowed at any stage after the last date of submission of the tenders. It is submitted that therefore there is no clause for variation in case of revision of any tax. It is submitted that therefore the rate quoted by the petitioners were inclusive of VAT, excise duty etc. applicable at relevant time. It is submitted that instead of now VAT, CGST / GST at 12% has been introduced. It is submitted that the rate at which the goods were to be supplied would remain the same i.e. in the present case 49.50 per unit. It is submitted that therefore as such there is no question of permitting the petitioners to change the rate or permit the price revision of the finished goods in view of the aforesaid changed circumstances. It is submitted that even otherwise as per the position prevailing earlier, to pay the taxes including the VAT / excise duty was upon the supplier. It is submitted that in one case VAT applicable at the relevant time was 5 + 1% i.e. 6% and now as per the GST the rate would be 12%. However in absence of any specific clause for variation of the rate and/or price revision under any pretext or reason including the revision of duty / excise / cost the State Government is right in not providing the price revision of rate contract.

Making above submissions and relying upon the decisions of the Hon'ble Supreme Court in the case of **Rashtriya Ispat Nigam Limited vs. Dewan Chand Ram Saran** reported in (2012) 5 SCC 306 (Paras 39 and 42) and in the case of **Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Another** reported in (2016) 16 SCC 818, it is requested to dismiss the present petitions.

[6.1] Shri Trivedi, learned Advocate General appearing on behalf of the State has also requested to dismiss the present petitions and not to exercise powers under Article 226 of the Constitution of

India in view of the specific arbitration clause in the contract in case of any dispute between the parties by relying upon the decisions of the Hon'ble Supreme Court in the case of **State of U.P. and Others vs. Bridge & Roof Company (India) Ltd.** reported in (1996) 6 SCC 22 (Paras 15, 16 and 21); **Kerala State Electricity Board and Another vs. Kurien E. Kalathil and Others** reported in (2000) 6 SCC 293 (Para 10 and 11) and **Joshi Technologies International Inc. vs. Union of India and Others** reported in (2015) 7 SCC 728 (Paras 70 to 72).

[7.0] Present Special Civil Applications are opposed by Shri Mitul Shelat, learned Advocate appearing on behalf of the respondent No.2 GMSCL also.

An affidavit in reply is filed on behalf of the respondent GMSCL.

[7.1] It is vehemently submitted by Shri Shelat, learned Advocate appearing on behalf of the respondent No.2 that the dispute raised in the present petitions is arising out of the contract between the parties which are in the realm of private law and therefore, any dispute relating to the interpretations of the terms of such a contract cannot be permitted to be agitated in a writ petition under Article 226 of the Constitution of India.

[7.2] It is further submitted by Shri Shelat, learned Advocate appearing on behalf of the respondent No.2 that even the prayer sought in the writ petition is contrary to the express terms and conditions of the contract executed between the parties. It is submitted that the writ petitions are seeking alteration in the terms and conditions of a contract which is not maintainable in law. It is further submitted that under the terms of the contract, any

question, dispute or difference arising under the conditions of the contract or in connection with the contract are to be referred to arbitration in accordance with Clause 33 of the Contract. It is submitted that even otherwise on merits also the petitions deserve to be dismissed. It is submitted that in the present case the writ petitioners have executed the agreement with the GMSCL for supply of the tendered products on rate contract basis. It is submitted that in terms of the contract the price quoted by the petitioners and accepted by the GMSCL is the final price inclusive of all levies and taxes and the petitioners are not entitled to any escalation and/or price revision on any counts including on the count of levy of new tax / revision of tax etc.

[7.3] It is submitted that on the introduction of the GST, the respondent No.2 has also received the representations from the petitioners and other suppliers seeking revision of price of the rate contract to give effect to the levy of GST. It is submitted that in accordance with the terms of the contract, as there was no provision for variation of price on account of increase or additional levy of any tax, the Board of GMSCL after due consideration of representations has thought it fit to seek the opinion of the Finance Department, Government of Gujarat. It is submitted that the Finance Department of the Government of Gujarat after due considerations of the terms of the contract opined that as there was no provision which entitled the variation of price as sought for, the GMSCL to take steps in accordance with the terms of the contract. It is submitted that thereafter opinion of the Finance Department came to be considered by the Board of Directors of the Corporation in its 22nd Meeting held on 23.08.2017. It is submitted that the Board of Directors consisting of Additional Chief Secretary (Medical Services and Medical Education Health and Family Welfare

Department) as Chairman and other members after due consideration of the file resolved that the representation made is contrary to the terms of the contract and could not be acceded to and call upon the vendors to give confirmation regarding supply at the contracted price and in the event of their failure to take further steps in accordance with terms of the contract. Relying upon Clause 10, 13(b), 16, 49 of the Tender Documents and Clause 26 of the Rate Contract, it is submitted that so far as fixation of price is concerned, there is no provision for variation on account of increase in any levy or duty. It is submitted that price / rates quoted by the suppliers were inclusive of all taxes and levies. It is submitted that therefore the petitioners are obliged under the contract to supply the product at the contracted price and there is no question of revision of the contract rate by adding the component of GST.

[7.4] It is further submitted by Shri Shelat, learned Advocate appearing on behalf of the respondent No.2 that as such the illustration that after the representations the illustrations mentioned in the impugned communication dated 31.08.2017 has been withdrawn and stands deleted and now the petitioners – suppliers are required to supply the goods at the contracted rate.

[7.5] It is further submitted by Shri Shelat, learned Advocate appearing on behalf of respondent No.2 that as such the decision of the Board of Directors in its meeting held on 23.08.2017 is as such the decision of the Board of Directors after considering the opinion of the Finance Department which was sought. It is submitted that all the members of the Board of Directors have taken a conscious decision as recorded in the Minutes of Meeting of the Board of Directors dated 23.08.2017.

[7.6] It is further submitted by Shri Shelat, learned Advocate appearing on behalf of the respondent No.2 that even earlier also the liability to pay the VAT and the excise duty and other levies was upon the supplier. It is submitted that now VAT and excise duties have been abolished and the same have been substituted by introduction of GST / CGST and the liability to pay the same also would be upon the petitioners – suppliers as per the relevant provisions of the contract as well as as per the statutory provisions. It is submitted that assuming that VAT / excise duty would have been continued and the GST would not have been introduced and the rate of VAT and excise duty have been increased which might be matching with applicability of the rate of GST, in that case the petitioners shall not be entitled to any price revision in view of the aforesaid specific clauses, that no price revision shall be permissible on any ground. It is submitted that therefore the petitioners cannot be permitted to revise the rates and if such prayer is granted it would tantamount to change in terms and conditions of the tender documents / rate contracts, which is not permissible in exercise of powers under Article 226 of the Constitution of India.

Making above submissions and relying upon above decisions, it is requested to dismiss the present petitions.

[8.0] Now, so far as the Special Civil Application No.17991/2017 is concerned, Ms. Minu Shah, learned Advocate appearing on behalf of the petitioners has adopted the submissions made by Shri Nanavati, learned Counsel appearing on behalf of the petitioners of Special Civil Application Nos.16765/2017 and 16773/2017. It is submitted that the additional facts in Special Civil Application No.17991/2017 is that earlier the liability to pay the VAT as well as excise duty was upon the supplier and in the case of Special Civil Application Nos.16765/2017 and 16773/2017 the liability was

only to pay VAT upon the suppliers.

[9.0] Heard learned Counsel appearing for respective parties at length.

At the outset it is required to be noted that sum and substance of the prayer of the petitioners is that they may be permitted to revise the price in view of the change in the tax structure by introducing the GST.

[9.1] It is the case on behalf of the petitioners that at the relevant time when they submitted the bids and quoted the rates which came to be accepted, the GST / CGST was not in existence which came to be introduced subsequently and therefore, in view of the above, they may be permitted to change the rates. Therefore, the short question which is posed for consideration of this Court is whether the respondents are required to be directed to accept the request of the petitioner of price revision in view of the introduction of the GST?

[9.2] While considering the aforesaid main issue the relevant clauses of the tender documents and the rate contracts are required to be considered which are as under:

“RELEVANT CLAUSES OF THE TENDER DOCUMENTS

Clause 13(b) The rates quoted should be F.O.R. destination anywhere in Gujarat basis irrespective of value of order and inclusive of all charges such as packing, delivery, insurance, inspection, etc. per unit of packing as shown in the enquiry document. The rates shown against the item shall be presumed, in all cases, as the net price inclusive of all duties and sundries. No payment against

any duties / delivery charges etc. will be considered under any separate heading under any circumstances. Octroi exemption certificate / Commercial Tax “D” form for, as applicable will be provided by the purchaser, on such request from the tenderer, after order has been placed by the concerned authorities. Tenderer will also have to guarantee for regular and timely supply of all the items.

Clause 49 The claim of price revision of finished goods under any pretext or reason, including the revision of duty / excise / cost will not be allowed at any stage after the last date of submission of the tenders.

RELEVANT CLAUSES OF RATE CONTRACT

Clause 26 The claim of price revision of finished goods under any pretext or reason, including the revision of duty / excise / raw material price or any other cost will not be allowed at any stage after the last date of submission of the tenders.

Clause 43 The above prices are inclusive of excise duty at the rate prevailing on the date of your quotations. If the rate of Excise Duty has since then decreased, you shall charge Excise Duty at the rate prevailing at the time of supply and decrease the price proportionally and inform the office of such decrease if any with detail calculations.”

[9.3] Considering the aforesaid relevant clauses and even the clauses mentioned in the rate contract which were accepted by even the petitioner – suppliers, the prices offered / rates shown

against the item in all cases, shall be under the net prices inclusive of all duties and sundries. As per Clause 13(b) even no payment against any duties / delivery charges etc. shall be considered in separate heading under any circumstances. As per Clause 49 of the tender document the claim of price revision of any finished goods under any pretext or reason, including the revision of duty / excise / cost shall not be allowed at any stage after the last date of submission of the tenders. Similar are the conditions of the rate contracts. Under the circumstances when the rate contract was inclusive of the duties / taxes / levies and there is no clause for variation / price revision in case of revision of any tax, the petitioner shall not be entitled to change the rate contract / revision of price on any ground which otherwise is not permissible as per the terms and conditions of the tender document / rate contracts. At the cost of repetition it is observed that as such the price quoted as per the rate contract and accepted by the petitioner – suppliers was inclusive of all duty, levies such as VAT, excise duty etc. and there shall not be any deviation permissible on any ground. Therefore, merely because the VAT / excise duty has been abolished, which was there at the relevant time when the prices were quoted and the rate contracts were executed and thereafter has been substituted by the GST, the petitioners cannot be permitted to change the rate contract / rates and cannot be permitted to have the price revision. Otherwise the same shall be contrary to the terms and conditions of the relevant tender documents / rate contracts. It is required to be noted that as such so far as the petitioners are concerned, they will have to pay to the Government the same price which was quoted by them and as per the rate contracts, which otherwise they agreed to charge.

[9.4] The aforesaid issue is required to be considered from another

angle also. As observed hereinabove, earlier and pre-introduction of GST / CGST and as per the rate contracts, the liability to pay the taxes including the VAT and the excise duty was upon the suppliers. That at the relevant time VAT liability was 5% and the excise duty liability was 2%. As per the GST, now the total tax liability would be 12%. For example, if the GST would not have been introduced and instead the VAT and excise duty would have been continued to be levied and the rate of VAT and excise duty have been increased and take an example that the same is increased to 12%, in that case, as per the original terms and conditions of the tender document / rate contracts the liability to pay the revised / enhanced rate of tax was always upon the supplier and as per Clause 49 of the tender document the claim of price revision of any finished goods under any pretext or reason including the revision of duty / excise / cost will not be allowed at any stage after the last date of submission of the tenders. Therefore, merely because now the VAT and excise duty have been deleted and instead the same is substituted by GST which may be at 12%, the petitioners cannot claim the price revision on the aforesaid ground. As observed hereinabove, otherwise also the liability to pay VAT / excise duty etc. was upon the suppliers. Therefore, the grant of any relief as prayed in the present petitions would tantamount to varying terms and conditions of the tender document / rate contracts which in exercise of powers under Article 226 of the Constitution of India shall not be permissible.

[10.0] At this stage few decisions of the Hon'ble Supreme Court relied upon by the learned Counsel appearing on behalf of the State are required to be referred to.

[10.1] In the case of Afcons Infrastructure Limited (Supra), the

Hon'ble Supreme Court in paras 11 to 16 have observed and held as under:

“11. Recently, in *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*⁵ it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. In *Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay*⁶ it was held that the constitutional Courts are concerned with the decision making process. *Tata Cellular v. Union of India*⁷ went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional Courts can interfere if the decision is perverse. However, the constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in *Jagdish Mandal v. State of Orissa*⁸ as mentioned in *Central Coalfields*⁵.

13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.

14. We must reiterate the words of caution that this Court has stated right from the time when *Ramana Dayaram Shetty v. International Airport Authority of India*[6] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance. In this context, the use of the word “metro” in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.”

[10.2] At this stage the decision of the Hon’ble Supreme Court in the case of Rashtriya Ispat Nigam Ltd. (Supra) is also required to be referred to and considered. In the case before the Hon’ble Supreme Court the question was whether under the relevant clause 9.3 of the terms and conditions of the contract between the parties, an employer – Rashtriya Ispat Nigam Ltd. was right in deducting the service tax from the bills of the respondent – contractor ? The relevant clause 9.3 in the said case was as under:

“9.3. The contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the tax authorities for the account of the contractor and the company shall provide the contractor with required tax deduction certificate.”

The learned Arbitrator relying upon Clause 9.3 held that the

liability to pay the service tax would be upon the contractor and the employer rightly deducted the same from the bills of the claimant / contractor. On an appeal the High Court set aside the award passed by the learned Arbitrator by observing that the purpose of Clause 9.3 is not to shift the burden of taxes from the assessee who is liable under the law to pay the taxes to a person who is not liable to pay taxes under the law. The Division Bench confirmed the judgment of the learned Single Judge. On an appeal the Hon'ble Supreme Court quashed and set aside the judgment and order passed by the learned Single Judge confirmed by the Division Bench by observing in paras 39, 40 and 42 as under:

“39. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent.

40. If this clause was to be read as meaning that the respondent would be liable only to honour his own tax liabilities, and not the liabilities arising out of the obligations under the contract, there was no need to make such a provision in a bilateral commercial document executed by the parties, since the respondent would be otherwise also liable for the same.

42. It was pointed out on behalf of the appellant that it is conventional and accepted commercial practice to shift such liability to the contractor. A similar clause was considered by this Court in the case of *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*⁹ In that matter, the question was as to whether the contractor was liable to pay and bear the countervailing duty on the imports though this duty came into force subsequent to the relevant contract. The relevant clause 2(b) read as follows: (SCC p. 479, para 16)

“16. ... ‘2. (b). All taxes and duties in respect of job mentioned in the aforesaid contracts shall be the entire responsibility of the contractor...’ ”

Reading this clause and the connected documents, this Court held that they leave no manner of doubt that all the taxes and levies shall be borne by the contractor including this countervailing duty.”

[10.3] In the present case as observed hereinabove as such the liability to pay GST under the GST / CGST Act is upon the supplier. As observed hereinabove the price quoted and the rate contract was inclusive of all the levies and taxes. Therefore, the petitioners shall not be entitled to the revision of price as sought.

[11.0] Now, so far as the submission on behalf of the petitioners that so far as other Corporations in Rajasthan, Tamilnadu, Kerala etc. have permitted the suppliers to change the rates quoted and have considered the change in tax structure and have granted the benefit by revising the rate contracts by the suppliers is concerned, it is required to be noted that as such the relevant rate contracts / tender documents in the case of the aforesaid Corporations are not before the Court. Therefore, what weighed with the said Corporations is not before the Court. Even otherwise merely because some other medical services Corporations might have taken a different view, cannot be a ground to set aside the impugned decisions which otherwise is found to be just and proper. In the present case the decision taken by the respondent No.2 GMSCL in not permitting the price revision is after due application of mind and even after considering the opinion of the Finance Department, State of Gujarat and a conscious decision has been taken by the Committee which is neither perverse nor arbitrary and/or contrary to the terms and

conditions of the tender documents / rate contracts. Therefore also, the impugned decision not suffering from any malafides and/or arbitrariness, the same is not required to be quashed and set aside in exercise of powers under Article 226 of the Constitution of India.

[11.1] Now, so far as the submission on behalf of the petitioners that the impugned decision contained in the meeting held on 31.08.2017 not permitting the price revision is not a decision of the Committee and according to the petitioners the same is the decision of Finance Department is concerned, the same has no substance. It is required to be noted that the Board of Directors thought it fit to consult the Finance Department having financial implications and thereafter the Finance Department opined that considering the terms and conditions of the tender documents / rate contracts price revision is not permissible, thereafter a conscious decision has been taken by the Board of Directors in its meeting dated 23.08.2017. Therefore, the aforesaid submission on behalf of the petitioners that the said decision is not of Board of Directors has no substance.

[11.2] Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of ABL International Ltd. (Supra) and Devi Ispat Limited (Supra) by the learned Counsel appearing on behalf of the petitioner is concerned, there cannot be any dispute with respect to the proposition of law laid down by the Hon'ble Supreme Court in the aforesaid decisions. However, we are of the opinion that the said decision shall not be applicable to the facts of the case on hand. In the present case it cannot be said that either the State and/or the respondent No.2 have acted unfairly and/or unjustly and/or unreasonably and/or the decision of the State / respondent No.2 is contrary to the public good and/or the

public interest. Under the circumstances, the aforesaid decisions shall not be applicable to the facts of the case on hand.

[11.3] Now, so far as the submission on behalf of the respondents that in view of the arbitration clause contained in the agreement / rate contracts, for any dispute the petitioners have to avail the remedy of arbitration is concerned, as the learned Counsel appearing for respective parties have made elaborate submissions on merits and issues involved are important issues and as observed hereinabove the learned Counsel appearing for respective parties have made elaborate submissions on merits, we have considered the present petitions on merits, keeping the said question open.

[12.0] In view of the above and for the reasons stated above, all these Special Civil Applications fail and the same deserve to be dismissed and are, accordingly, dismissed. Rule is discharged in each of the petitions.

Sd/-
(M.R. SHAH, J)

Sd/-
(A.Y. KOGJE, J)

Ajay**