

(2013) 04 KAR CK 0170

Karnataka High Court

Case No: Writ Petition No"s. 39337-39354 of 2012 (GM-TENDER) , Writ Petition No"s. 41987-41991 of 2012 and 43598-43610 of 2012 (GM-LB BBMP) and Writ Petition No"s. 44763-44777, 45771-45785, 47597-47611, 45771-45785, 45149 and 39597 to 39599 of 2012 (GM-TEN)

Sri B.R. Ganesh and Others

APPELLANT

Vs

The State of Karnataka and
Others
 Gangadharaswamy
M., Y.S. Channakeshava and
Prabhakar Vs Bruhat Bangalore
Mahanagara Palike, The Chief
Engineer, Yelahanka Zone,
Bruhat Bangalore Mahanagara
Palike and The Executive
Engineer Yelahanka Zone Bruhat
Bangalore Mahanagara Palike

 Mahesh Kumar Vs Urban
Development Department and
Others

RESPONDENT

Date of Decision: April 26, 2013

Acts Referred:

- Karnataka Municipal Corporations Act, 1976 - Section 182, 183
- Karnataka Transparency in Public Procurements Act, 1999 - Section 2(d), 5, 7

Citation: (2013) 4 AKR 664 : (2013) ILR (Kar) 2815 : (2014) 1 KarLJ 386

Hon'ble Judges: N. Kumar, J; B.V. Nagarathna, J

Bench: Division Bench

Advocate: V. Lakshminarayana in Writ Petition Nos. 41987-41991 of 2012 and 43598-43610 of 2012 GM-LB BBMP, Writ Petition Nos. 44763-44777 of 2012 GM-TEN, Writ Petition Nos. 47597-47611 of 2012 GM-TEN, Sri Ajoy Kumar Patil in Writ Petition Nos. 39597 to 39599 of 2012 GM-TEN and Sri Jayakumar S. Patil and Sri Deviprasad Shetty, for M/s. Jayakumar S. Patil Associates in Writ Petition No. 45149 of 2012 GM-TEN, Sri R.L. Patil, for Patil and Patil, for the Appellant; R.G. Kolle, AGA for R1, Sri Ashok Haranahalli, a/w Sri R. Subramanya, Advocate in Writ Petition No. 45149 of 2012 (GM-TEN) and Writ Petition

Nos. 39337-39354 of 2012 (GM-TENDER), for M/s. Ashok Haranahalli Associates for R2 to R10 in Writ Petition Nos. 39337-39354 of 2012 (GM-TENDER) and Writ Petition Nos. 45771-45785 of 2012 (GM-TEN), for R1 to R3 in Writ Petition Nos. 39597 to 39599 of 2012 (GM-TEN), for R2 to R11 in Writ Petition Nos. 41987-41991 of 2012 and 43598-43610 of 2012 (GM-LB BBMP), for R2 to R13 in Writ Petition Nos. 44763-44777 and 47597-47611 of 2012 (GM-TEN), Sri K.G. Raghavan, for Smt. Nalina Mayegowda, Advocate for R14 and 15 in Writ Petition Nos. 44763-44777 and 47597-47611 of 2012 (GM-TEN), for R12 in Writ Petition No. 45149 of 2012 (GM-TEN), Smt. Kanchanamala Desai, Advocate for R30 and 31, Sri N. Shankar Rangaraji, Advocate for R33 in Writ Petition Nos. 44763-44777 and 47597-47611 of 2012 (GM-TEN) and Sri Vinayaka B., Advocates for R2 to 11 in Writ Petition No. 45149 of 2012 (GM-TEN), Sri J. Prashanth, Advocate for R23 and R32 and R36 to 40 in Writ Petition Nos. 47597-47611 of 2012 (GM-TEN), for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

N. Kumar, J.

The petitioners are the existing contractors who are the service providers in collection and transportation of Municipal Solid Waste and street sweeping, cleaning of the roads, footpaths, public toilets, urinals, open spaces of the Corporation like schools, colleges, health centres, burial grounds and transportation of waste to designated sites. The petitioners have preferred these writ petitions challenging the notification issued by the respondents inviting tenders through e-procurement regarding solid waste disposal and management from all the zones of Bruhat Bangalore Mahanagara Palike (hereinafter for short referred to as "the BBMP") as per the Karnataka Public Transparency Act, 2000.

BACK GROUND

2. The petitioners challenged the notification dated 30.9.2009 issued by the Corporation in W.P. No. 30417/2009 which was filed by way of a public interest litigation, where a global tender was called for integrated municipal solid waste management for doorstep collection of segregated waste, sweeping and cleaning of streets/drains, transfer of waste collected to transfer stations, etc., The said notification was challenged on the ground that tenders could not have been called as there was no elected body for the Corporation and the administrator was incharge. After service of notice, the learned counsel for the Corporation submitted that they would withdraw the notification and now that elected body has taken charge, a fresh notification would be issued. Therefore, the said Writ Petition came to be disposed of on 17.6.2010. The Corporation passed a resolution prohibiting individuals from participating in the tender process. The same was challenged by filing W.P. Nos. 5440-5458/2011 by the petitioners. An interim order of stay was passed directing the Corporation not to issue the tender notification till the next

date of hearing. In the said Writ Petition a memo was filed on behalf of the respondents to the effect that, the Corporation in the meeting held on 5.2.2011 have allowed individuals to participate along with others in the tender process. Accordingly, the said Writ Petitions came to be dismissed. A tender notification came to be issued on 16.7.2011 inviting short term zone wise tenders for Solid Waste Management by the Corporation. Same was also challenged in W.P. Nos. 32832-836/2011 and other connected matters. According to the petitioners the persons who submitted the tenders were the benami persons acting for Corporators by producing the Certificates belonging to others. However, as the Corporation received single bid in respect of 2 packages out of 92 packages a decision was taken to withdraw the said tender notification dated 16.7.2011 in respect of 92 packages of all 8 zones and issue a fresh tender notification. A memo having been filed to the said effect the said Writ Petition came to be dismissed as infructuous directing the Corporation to issue fresh tender notification for solid waste management in accordance with law as expeditiously as possible. A fresh tender notification dated 12.12.2011 was issued. Again the same was challenged by filing W.P. Nos. 90-121/2012. An interim order was passed in the said proceedings on 12.1.2012 permitting the petitioners therein to participate in the tender process without prejudice to their rights and contentions urged in the Writ Petitions. However, further proceedings including the opening of the tenders and consideration of the same was stayed till the next date of hearing. In pursuance of the interim order the petitioners did not submit their tenders and did not participate in the tender process. By an order dated 20-04-2012, the Corporation was permitted to process the application and they were directed to finalize the tenders and not to issue work orders until further orders. Subsequently, the said Writ Petitions came to be dismissed by an order dated 14.9.2012. Challenging the said order, W.A. Nos. 6265-96/2012 came to be filed. During the pendency of the appeal, the Commissioner of BBMP addressed a letter dated 18.9.2012 to the Government bringing to their notice the aforesaid facts. Further, he informed them that the BBMP wanted segregation at source and therefore, in the tender notification issued already, it is necessary to make some modifications. Further in the Notification already issued the bid amount was not satisfactory. Therefore, he submitted a schedule for approval of the Government. The Government after examining the said request accepted the proposal and accorded approval as sought for by the Commissioner for e-procurement for short term tender in pursuance of Rule 17(2)(1) of the Karnataka Transparency Rules, 2000 (for short hereinafter referred to as "Rules"). After the Government according approval the Executive Engineers and Superintending Engineers of all the eight zones issued a tender notification dated 18.9.2012 initially including 91 packages and later 89 packages were included excluding package No. S7 and S9 after cancelling the earlier tender notifications. The W.P. Nos. 39337-354/2012 were filed challenging the said notification. Writ Appeal Nos. 6265-96/2012 came to be dismissed in view of the fact that a fresh notification inviting tenders had been published on 18.9.2012, reserving the right to

the petitioners to agitate the legality of the reservation to SC/ST as well as use of Standard Tender Document as prescribed by the Government the appeals came to be dismissed.

FACTUAL MATRIX

FACTS IN W.P. Nos. 39337-354/2012 AND OTHER CONNECTED MATTERS

3. The petitioners challenged the tender notification dated 18.9.2012. The case of the petitioners is that there was a public holiday on 19.9.2012 and there was an All India Bandh on 20.9.2012 and the E-portal was having technical problem on 21.9.2012. In the tender notification dated 18.9.2012 only 7 days time was granted. Therefore, there was only four days available for submitting the tender notification. After filing of the Writ Petition on 24.9.2012, an addendum was issued on 26.9.2012 to the notification dated 18.9.2012 altering certain terms and conditions of the tender. Challenging the said addendum the petitioners preferred W.P. Nos. 41987-991/12.

4. Their grievance is that in the addendum issued on 26.9.2012 the changes/amendments have been made in the tender notification:-

The condition No. 15.9.3 at page 15, in the 1st RFP document states that the auto tippers, tippers, compactors all should be the make from 2006 to 2012, whereas in the modified document it is mentioned that the make should be of 2000 to 2012. In Clause 15.9.3 auto tippers and goods auto of 2000-12 make for the first time were introduced and goods auto was not there in the original document. Introduction of goods auto/auto tippers is in violation of MSW Rules. In the first tender document the bidder was expected to make physically available of vehicles within 15 days after receipt of acceptance letter. But, in the modified tender document, the period to replace vehicles prior to 2006 is enhanced to 120 days. To switch over to 2006-12 model vehicles, 120 days time was granted to a bidder after commencement of the work. Such vehicles are not permitted in view of M.S.W. Rules of 2000. Appendix II prescribes number of vehicles and labours (Poura Karmikas). Appendix II of 18.9.2012 and 26.9.12 when compared there is a total change in Appendix I and Appendix II of 26.9.2012. In appendix G the quantity of MSW generation, number of labour requirements, number of vehicles requirement is based on the normative standards. The bidder is required to adhere to the standards and the requirement should not be less than the numbers mentioned in the appendix 2. However, the respondent No. 12 has violated the conditions of the tender documents. In the notification dated 18.9.2012 there was total reduction of poura karmikas and vehicles by an addendum. In the first RFP document in condition No. 15.9.5 the successful bidder shall also furnish performance security by way of irrevocable bank guarantee, issued by nationalized bank or scheduled bank located in India in favour of the Commissioner as required under the agreement for an amount equivalent to 5% of the annual contract value and valid for entire contract value and valid for 3

months thereafter. In the modified RFP document in condition No. 15.9.4 the performance security was reduced to 2% annual contract value and valid for entire contract value and valid for 3 months thereafter. It was changed only to favour respondent No. 12. In appendix E at page No. 38 of the 1st RFP document the bidder shall submit a solvency certificate from any nationalized or scheduled bank for an amount of 10% of the annual estimated cost. Whereas, in the 2nd RFP document the solvency certificate is fixed at Rs. 25 lakhs which is again to favour respondent No. 12. Solvency certificate should be from 1.4.2012 onwards and financial capability is based on the own financial statement. In Appendix A of the 1st RFP document at SI. No. K. collection of construction debris of 250 kgs is prescribed. In the modified RFP, at SI. No. K, 250 Kg is removed and only dry and wet waste is included only to favour respondent No. 12. In the first tender document at page 25 the tenderer has to obtain the compliance certificate from citizens/RWA's/Suchi-Mithra notified by the BBMP. That the said condition has been removed in its entirety only to favour respondent No. 12. Appendix 2 has also been changed. Classification has been provided in the qualification criteria. Class-I and Civil Contractor is different than MSW contractors. One year experience is provided to Class I and Civil Contractors in the new tender document. Financial offer is the most important offer. In Appendix F of 18.9.2012 tender document rates of vehicles, labourers and supervisors is mentioned. Rates of financial offer has been removed totally. In the new document package minimum requirement, rates per unit is mentioned with the vehicles and the pourakarmikas. Column No. 3 i.e. rates per unit (as per BBMP Monthly analysis) has been totally deleted. Implementation plan is not specified in the first document and the new document. The provisions of KTPP Act, 1999 was amended in 2001 with effect from 25.8.2001 by Act No. 21/01. Section 4(e) was introduced by including the procurement entity as per Karnataka Municipal Corporation Act, 1976. The definition of Procurement Entity also includes the Corporation. Under Rule 17 of the Rules, the minimum time has to be reckoned from the date of publication of notice of invitation of tender in the bulletin and last date fixed for submission of the tenders. In the absence of publication of notice of invitation of tender in the tender bulletin, the period cannot be determined. Therefore, there is no proper publication. The respondents did not follow the standard tender document in public procurement of goods service. The tender document issued is contrary to the Circulars dated 29.8.2003 and 25.2.2004 issued by the Government. Both the Government Orders dated 6.8.2005 and 14.10.2008 envisage the modification of standard tender document to take care of local need/specific requirement. In the MSW contract by tender, the number of houses and labourers and the minimum wages, specification of the vehicles in terms of MSW Rules has to be provided. Therefore, Appendix I, II and E.F.G. have been provided. Therefore, it is only combination of KW-4 and Appendix I, II, E.F.G. standard document is compulsory. Any modification can only be in terms of law. The notification provides two cover system lumpsum bidding process for selection of the service provider to carry out Municipal Solid Waste Management services through individuals/registered firms/company incorporated

under the Companies Act/Agencies registered under the partnership firm/N.G.O./Public Limited Companies or companion of any of the above for a period of three years. Therefore, the evaluation is only in terms of Rule 28 of the Karnataka Transparency in Public Procurement Rules 2000.

5. The respondents have issued a tender notification incorporating relaxation and concession to Scheduled Caste/Scheduled Tribes, SC/ST individuals, Groups/Societies based on the Circular issued by the Directorate of Municipal Administration dated 15.1.2005. The said scheme applies only to small urban area (Municipalities) governed under the Karnataka Municipalities Act, 1964 and not to larger Urban Areas (Corporations) constituted under the Karnataka Municipal Corporation Act, 1976. Therefore the reservation is impermissible. The relaxation of EMD and Solvency Certificate is only 10% of what the general bidder would deposit and not 90%. The said Circular has been misinterpreted and misused by the authorities concerned. There could be no reservation under the provisions of KTPP Act, 1999 and Rules made therein. The reservation totally relaxed for any technical or financial aspects is ultra vires and powers conferred under the Transparency Act and the Rules and impermissible. It is the Government which has to evolve a policy in respect of extending the reservation or providing relaxation to SC/ST Groups. In the absence of policy by the Government, the Corporation has no jurisdiction to extend any reservation.

6. Rule 28(2)(a) of the Rules insist on experience of past particulars in execution of similar contracts such as (a) Financial status and capacity (b) capabilities with respect to personal equipment and construction or manufacturing facilities is a pre-requisite in a two cover system. The mandate of this Rule and the law laid down by the Apex Court have been given a go bye by the respondents in not employing the said criteria in the tender document. Certainty is an important aspect of Rule of law. There is no certainty in the second tender document. Everything is based on a guess work and an abstract estimate. There is no proper offer which a bidder can offer. Hence, the entire process is vitiated. The second document dated 26.9.2012 is a tailor made document only to help Class-I contractors. The BVG India is presently discharging house keeping work. Only to help such companies as it is only a Class-I contractor, the entire conditions have been relaxed. Some interested officials and the Commissioner are interested in the said company. The tender document and all policy decisions have to be resolved and taken only by Standing Committee and the Council. Hence, change of policy on 26.9.2012 is ultra vires the powers conferred under the Karnataka Municipal Corporation Act, 1976 and the Rules made therein. There is no application of mind by the Council and the Standing Committee. There is no approval of the budget by the State Government. If there is change in the entire process and pattern or the rules of the procedure in disposal of M.S.W., said change, reforms has been already conferred on the designated authority called the empowered Committee constituted by the Government and therefore without granting any prior approval of the Government change in the entire procedure is

contrary to law. The magnitude of the expenditure that is nearly Rs. 800 crores definitely falls within the domain of the Council of Ministers. There is no approval by the Cabinet. Therefore, the Government Order has no existence at all. The said Government Order is issued without there being any application of mind. The extraordinary speed with which the tender notification has been issued and the relaxation given contrary to the tender condition is a proof of colourable exercise of power. The second tender document dated 26.9.2012 totally modified the first document without further granting time and the conditions were not the subject-matter of publication so as to provide reasonable opportunity to all the bidders. They proceeded to open both technical and financial bid on 29.9.2012 which decision is arbitrary and capricious only to favour a particular company. Therefore, they sought quashing of the tender document dated 26.9.2012 and also for a mandamus directing the respondent to issue notice of tender strictly in terms of Government Order dated 14.10.2008 and to follow KW-IV document along with correct specifications and certainty of Appendix-I, II, E, F and G strictly in terms of KW-IV.

7. After the filing of the second batch of writ petitions, the Special Commissioner (BBMP) put up a note to the Public Health Standing Committee and the Council. They by means of a resolution dated 26.10.2012 approved the packages of 80 in Nos. pertaining to eight zones. The said resolutions have been approved by the Council by means of a resolution dated 30.10.2012. Therefore, the petitioners filed one more Writ Petition seeking a writ of certiorari for quashing the resolution dated 26.10.2012 issued by the President, Public Health Standing Committee, BBMP, Bangalore, and also the resolution dated 30.10.2012 and wanted a declaration that the approval of the tender in favour of the respondents is totally without authority of law, arbitrary, irrational and suffer from malice in fact and malice in law. They also wanted a declaration that the approval of the tender in favour of respondent Mr. Prasanna Shastri is totally without authority of law, arbitrary, illegal and suffer from non application of mind as he has not been registered in the procurement portal.

8. After the filing of the aforesaid writ petitions, the Commissioner sent the proposal for approval to the Hon"ble Chief Minister. The approval was granted as per the Government Order dated 21.11.2012. One more Writ Petition was filed contending that the said approval by the Hon"ble Chief Minister is contrary to the Karnataka State Transaction of Business Rules, 1977, as amended. Therefore, the decision of the Secretary and the Hon"ble Chief Minister is ultra vires the powers conferred under the Constitution of India as a fraud has been played on the Constitution. The Government order dated 21.11.2012 issued by order and in the name of the Governor is again a fraud on the Constitution of India since there is no Cabinet decision and the decision of the Hon"ble Chief Minister or the Secretary cannot be the decision of the Government or the Council of Ministers. The impugned Government Order is aimed at achieving malafide and sinister goal. Therefore, in these writ petitions namely W.P. Nos. 47597-611/12, the petitioners have sought for

a writ of certiorari for quashing the Government Order dated 21.11.2012 as arbitrary, capricious, void ab-initio and unconstitutional. In fact, in W.P. Nos. 45771-45785/12 the petitioners are challenging the notification issued on 3.11.2012 in respect of 12 packages in terms of the Notification dated 18.9.2012. Therefore, they have challenged the notification on the very same grounds as urged in the earlier writ petitions except the grounds urged challenging the addendum dated 26.9.2012.

FACTS IN W.P. No. 45149/2012

9. The petitioner-Sri Mahesh Kumar filed his tender application in respect of Mahadevapura Zone on 26.9.2012, just before the last date on 26.9.2012 at 7.00 PM in the evening the RFP document was changed/modified. The said change was not notified to the general public and also to the petitioner herein. According to him, the tender document was changed/modified only to suit and favour respondent No. 12 that too without notifying the general public or issuing the addendum. There were several changes made in the second modified tender document. Therefore, they have sought for a writ of certiorari quashing the tender notifications issued by respondent No. 4 on 18.9.2012 and a mandamus directing the respondent No. 1 to redo the tenders.

DEFENCE

10. The respondent-Corporation has filed its statement of objections. They contend that, the Corporation had invited tenders in the year 2005 for cleaning, sweeping and transportation of Municipal Solid Waste generated in Bangalore City in terms of the Municipal Solid Waste Management and Handling Rules, 2000. The petitioners are the beneficiaries of the contracts which was awarded in their favour pursuant to the notification issued in the year 2005. The agreements were executed in the month of March, 2007 and the period of contract was three years. The said period has come to an end on 14.3.2010. On expiry of the agreement period the petitioners have been continued from time to time till date. In the interregnum the Corporation had invited tenders for disposal of Municipal Solid Waste. The same was questioned by the existing contractors on one or the other pretext and the same could not get through. Accordingly, the Corporation floated tenders on 13.12.2011 for providing Solid Waste Management Services for a period of three years in different zones of the Corporation area pertaining to 89 packages. The earlier tender notification dated 16.7.2011 in respect of 91 packages was withdrawn in view of the non-response/proper response to the said tender notification.

11. The petitioners and several others filed W.P. Nos. 90-121/2012 and other connected matters challenging the issue of tender notification alleging violations of the provisions of the Karnataka Municipal Corporations Act, Karnataka Transparency in Public Procurements Act, etc., Initially, this Court directed the respondents not to precipitate with the tender notifications. Subsequently, by an order the petitioners

were directed to participate in the tender process subject to the result of the Writ Petition. In the month of April 2012 at the request of the Corporation the interim order was modified permitting them to scrutinize and evaluate the tender submitted. However, the Corporation was restrained from awarding contracts by issuing work orders. The said Writ Petition was heard and the same was reserved for pronouncing of judgment. In the interregnum a public interest petition was filed before this Court on account of the failure on the part of the existing contractors to carry out the cleaning work resulting in accumulation of garbage in Bangalore City. In the course of the said proceedings, this Court on 10.9.2012 directed the Corporation to segregate the dry waste, wet waste and inert waste at source. The Writ Petition which was reserved for judgment was disposed off by order dated 14.9.2012. The challenge to the tender notification dated 13.12.2011 was rejected. Thereafter, the Corporation took a decision to invite fresh tenders having regard to the direction issued by this Court in public interest petition to segregate the dry waste, wet waste and inert waste at source by abandoning the tender process pursuant to the notification dated 13.12.2011. The Corporation approached the State Government for its approval to re-tender. The Government has accorded its approval permitting the Corporation to cancel the earlier tender and also to invite fresh tenders. In view of the Government order dated 18.9.2012 cancelling the earlier tender process in relation to 89 packages, effective steps were taken to invite fresh tenders by upholding the tender documents through e-procurement on 18.9.2012. On 24.9.2012 addendum notification was issued to the bidders modifying certain terms and conditions with an intention to have the larger participation in the process. The petitioners have once again questioned the decision taken by the Corporation to invite fresh tenders and also the notification inviting fresh tenders dated 18.9.2012 and the addendum notification issued. The petitioners herein did not participate in the tender proceedings. The Corporation contends the petitions are liable to be dismissed at the threshold for the reason that they have not approached this Court with clean hands. They are not performing the work entrusted to them up to the mark. It has caused inconvenience to the public at large in view of the accumulation of garbage. The petitioners have approached the Criminal Court by filing criminal complaints against the Corporation and its officers raising similar issues. They cannot maintain parallel proceedings on the very same subject. On that ground also the petitions are liable to be dismissed.

12. The respondent authorities having regard to the urgency involved in taking steps to clear the accumulated garbage issued the present short term tender. Rule 17(2) provides that the time specified under sub-rule (1) can be reduced by an authority superior to the tender inviting authority by recording reasons. The State Government being the superior authority and the authority for according approval for entering into contract, having considered the proposal sent by the Corporation had accorded its approval under Rule 17(2) of the Rules for inviting short term tender more particularly in terms of the calendar of events mentioned in the

proposal.

13. The allegation that the Corporation ought to have invited tenders in conformity with the standard tender documents is untenable. The Government Order on which reliance is placed is not applicable to service tenders. There is no standard document prescribed in relation to the service tenders and the work of this nature. The standard tender documents are pertaining to the civil contracts executed through the Public Works Department of the State Government. The standard tender document prescribed under the said Government Order is for the procurement entity under the State Government. The Government Order dated 6.8.2005 and the subsequent orders has no application to the instant tender invited by the Corporation. The contract for procurement of services is governed by Rule 6A of the KMC Rules which came into effect from 2.6.2009. The contract relating to procurement of services cannot be considered under Rule 6 of the KMC Rules. The Corporation has followed all the procedures in terms of Rule 6A of the Karnataka Municipal Corporation Rules, 1977 in relation to the procuring of services.

14. The challenge to the terms and conditions of the tender is not maintainable inasmuch as the same is in the realm of contract. The Corporation has invited tenders with the terms and conditions required for the purpose of execution of the works involved, which is purely contractual. The Writ Petition itself is not maintainable as there cannot be any challenge to the terms and conditions of the contract. The same is not open to judicial scrutiny. The petitioners being the existing contractors are responsible for the accumulation of the garbage inasmuch as they have failed to perform their duties in terms of the contract. Therefore, at their instance the interference is uncalled for. The entire tender process has been strictly followed by the Corporation. Therefore, there is no merit in these Writ Petitions. Accordingly, they have sought for dismissal of the Writ Petitions.

15. The contention of the petitioners that there is no estimate in respect of the work involved and the same is in violation of the provisions of the Transparency Act is devoid of merits. The Corporation has assessed the value of the work involved for its own purpose. The same need not be disclosed in as much as the same would discourage the competitive bids. Even otherwise in a service tender there cannot be any exact valuation of the works involved unlike in the supply of goods or civil works. The bidders will have to assess the quantum of work and also the expenses to be incurred in execution of the work in terms of the tender conditions and thereafter they will have to quote their bids. Therefore, the contention that in the absence of estimation, the tender proceedings will have to be cancelled, cannot be accepted. The estimation is not disclosed in order to maintain healthy competition and to get competitive rates without sacrificing the quality of work involved. The bidders were given sufficient opportunity to get the clarification required before submission of their bids. Even in respect of the addendum notification as the petitioners have not participated in the tender proceedings at all, they have no right

to challenge the same.

16. The contention that relaxation and exemptions given to the Scheduled Caste, Scheduled Tribe Societies, Groups and individuals could not have been given is also liable to be rejected. The relaxation/concession given to the SC/ST is only at the entry level and the same does not come in the way of competitiveness of the tenderers. The relaxation given is in terms of the circular and the decision of the State Government. The relaxation conferred upon the SC/ST is only in respect of the EMD and solvency certificate. There is no relaxation in respect of the performance security to be executed and the technical qualification which is prescribed under the tender document. The other terms and conditions of the tender remained unchanged for the persons belonging to SC and ST. Article 46 of the Constitution of India provides for economic empowerment of the persons belonging to SC and ST. Keeping in mind the said aspect, relaxation has been extended only in respect of the EMD and the solvency certificate to have the larger participation in the tender process. The relaxation extended to SC/ST has not in any way prejudiced the petitioners from participating in the tender process. Unless and until the prejudice caused to the petitioners are shown and demonstrated, the contention of the petitioners cannot be gone into.

17. The respondent No. 12 has not followed the normative standards of appendix G. A note is put that from one auto 1000 households' garbage is lifted. One labourer has to collect from 300 houses. The services of the labourers should be first used for collection of garbage from 6.30 to 11.30 am and thereafter they have to clean the roads. That after 11.30 till 2.30 only 3 hours is left for cleaning the roads though the time is fixed from morning 6.30 to 11.30. Each worker has to sweep the roads of 4.8 KM. That though it is admitted in the council meeting that respondent No. 12 has not adhered to the normative standards as mentioned above still it is said in the note that on trial basis a single package can be given to the respondent No. 12.

PUBLIC INTEREST LITIGATION

18. In the meanwhile, public interest litigation was filed in W.P. Nos. 24739/2012 and 30450/2012 complaining of improper municipal solid waste disposal management and for directions. Therefore, the Division Bench of the Court dealing with Public Interest Litigation transferred W.P. Nos. 39337-354/2012 to the Division Bench for being heard along with the public interest litigation in order to avoid conflicting orders. That is how these Writ Petitions are before the Division Bench.

RIVAL CONTENTIONS

19. Sri V. Lakshminarayana, the learned counsel appearing for the petitioners assailing the impugned tender notification contended as under:-

Firstly that, the impugned tender document is not in conformity with the standard document which should have been adopted in terms of the two Government Orders

referred to by him. In the tender notification issued they have given a go-by to the conditions regarding the experience, financial ability as stipulated in the earlier tender documents. Elaborating the said contention he submitted, one of the most important conditions to be imposed in the said document is the experience to carry out the work as it is in public interest. In the past, 3 years experience was prescribed, whereas now it has been reduced to one year and even that one year experience has been deleted by an addendum issued on 26.9.2012, just before the time fixed for filing tenders. In so far as the financial ability is concerned, there is considerable reduction in the EMD prescribed earlier and the prescribed document. Secondly, he contended that, as the contract in question exceed Rs. 2 crores, under Rule 17, 60 days time is the period which ought to have been prescribed whereas in the instant case the period prescribed is hardly 7 days. Similarly, according to Rule 28(2) of the Rules, when the contract exceeds Rs. 50 Lakhs, there is an obligation to adopt two cover tender process which has not been followed. Thirdly, in the impugned tender notification, a deviation is made in as much as 30% of the dry waste is permitted to be disposed of by the contractor himself which causes loss to the exchequer which is against the public interest. The way in which a day prior to the expiry of the period for submitting the tenders an addendum was issued also shows the arbitrariness on the part of the authorities in issuing the tender notification which denied a reasonable opportunity to the petitioners to participate in the said document. Fourthly, the tender document does not prescribe the minimum price and even regarding the cost of the tender. From the particulars which they have furnished it is not possible to evaluate and submit the tender and that clause was deleted while issuing the impugned notification. Even the condition regarding the ownership of the vehicles, type of vehicles which are required to be used for carrying out the work have been considerably ignored and therefore he submits the action of the respondents is arbitrary, discriminatory in nature and has denied the petitioners a fair opportunity of participating in the tender process. Fifthly, he contended that, an amount of Rs. 6 Lakhs is stipulated as Earnest Money Deposit (for short, EMD). However, 10% of the above amount is stipulated as EMD for the registered society/individual of SC/ST Groups which is discriminatory in nature and hit by Articles 14 and 15 of the Constitution of India. The contract in question is a commercial contract. Unless, the bidder satisfies the financial capability, he would not be eligible for bagging the contract. In that background, when such concession was shown to persons belonging to SC/ST Groups it is violative of Articles 14, 8B, 15 of the Constitution of India. The reservation under Article 16 or under Article 15 is only in so far as providing reservation in educational institution or employment or in public employment. It has no application to contracts. Chapter 3 of Part 12 of the Constitution provides for property, contracts, rights, liabilities, obligations and suits. In the said Chapter, there is no whisper about the concession, reservation to any backward classes. If the intention of the forefather of the Constitution of India is to provide for such reservation even in public contracts, they would have made a proper provision in the Chapter 3. In the

absence of any such provision, intention is clear. The reservation has to be confined only in public employment or admission to educational institutions and does not extended to public contracts. The said concession was granted on the basis of a Government Order dated 15.01.2005 where on a request made by the Director of Municipal Administration for granting such concession both in respect of EMD as well as solvency certificate, Government granted the concession. In the said Government Order, what is granted is only a concession of 10% of the total amount payable. By placing a wrong interpretation, they have prescribed only 10% of the EMD amount and solvency certificate amount as stipulated for others which is again a patent mistake which vitiates the tender. Further, it is submitted that concession was only meant for the Societies of persons belonging to SC/ST and it is specifically stated that it will not apply to others. In spite of such a condition, the benefit was extended to the persons belonging to SC/ST Groups.

20. Per contra, Sri Ashok Haranahalli, the learned Senior Counsel appearing for the Corporation submitted that the Standard Form on which reliance is placed is applicable to procurement entity under the Act. Though the Bangalore City Corporation is also a procurement entity as defined u/s 2(d) of the Act, it does not form entity under the Act. Therefore, there is no obligation on part of the Corporation to issue tender notification in conformity with the Standard Form prescribed under the Act, to its departments. Next, he submitted that the concession is shown to the persons belonging to SC/ST by virtue of Article 16 of the Constitution of India, which imposed an obligation in the State to promote the special care, the economic interest of the weaker section of the people and in particular, SC/ST. Therefore, the said concession has been shown to those class of people in order to provide a level playing field. It is therefore, policy decision meant for economic empowerment of the said class of people. When all the conditions are similar, this condition is relaxed only to encourage persons of that caste for participating in this process. If for want of finance, they are unable to perform the contract, the contract would be cancelled at the entry level itself. They should not be denied an opportunity. After they enter, there is a level playing field and there is no discrimination and that should satisfy the financial capability which is expected of them to perform the contract.

21. Sri K.G. Raghavan, learned Senior Counsel appearing for the successful tenderer contended that these petitions have to be dismissed at the threshold as the petitioner has no locus standi to maintain these petitions. They have not participated in the tender process and if the candidates belonging to the SC/ST have been preferred, that would have given them cause of action. They having not participated in the proceedings, that ground is not available to them. The petitioners are all existing contractors. They have a direct economic interest. They are to be benefited by either non-completion of tender process or by quashing of the tender process and therefore at their instances, the tender conditions cannot be interfered with. That apart, unless they show any prejudice is caused to them, they cannot

maintain these petitions. Dealing with the concession shown to the Scheduled Caste and Scheduled Tribe people he contended that it is permissible in law, though the contract in question is a commercial contract, the State can extend its helping hand to the persons belonging to depressed classes to encourage them to participate in the tender process. The concession shown is only at the initial stage. Once he participates in the process becomes successful, then the conditions to be fulfilled by them and others are identical which ensures public interest. Relying on Clause 15.9.3 of the tender documents, he points out that if the successful bidder shall make physically available the required number of labourers, pushcarts, auto tippers, goods autos, tippers, compactors along with the documents for the particular package within fifteen days of the receipt of the letter of acceptance, failing which, the award shall be cancelled and the EMD will be forfeited. Similarly, the successful bidder shall also furnish Performance Security by way of irrevocable Bank Guarantee, issued by a nationalized bank or a scheduled bank located in India in favour of the Commissioner, Bruhat Bangalore Mahanagara Palike. In the successful bidder fails to perform the contract, Performance Security amount will be forfeited and the contract could be cancelled. These terms of the contract takes care of public interest. Whereas at the entry level, a concession shown to them would encourage competition from that section of the public also. Thus, the State has discharged its obligations to all the concerned. Therefore, on that short ground, a tender document which is otherwise valid and legal cannot be quashed. He further contended that the purpose of the RFP document is to provide the bidders with the information to assist the formulation of their proposals. This RFP document does not purport to contain all the information each bidder may require. This RFP document may not be appropriate for all the persons, and it is not possible for BBMP, their employees or advisors to consider the business/investment objectives, financial situation and particular needs of each bidder who reads or users of this RFP document. Each bidder should conduct its own investigations and analysis and should check the accuracy, reliability and completeness of the information in this RFP document and wherever necessary, obtain independent advice from appropriate sources. BBMP, their employees and advisors make no representation or warranty and shall incur no liability under any law, statute, rules or regulations as to the accuracy, reliability or completeness of the RFP document. BBMP may, in their absolute discretion, but without being under any obligation to do so, update, amend or supplement the information in this RFP document. In the schedule of bidding process, the BBMP would endeavour to adhere to the schedule mentioned in the bid document itself from the date of issue of notification during the bidding process. From 21.09.2012 to 24.09.2012 was the date prescribed for downloading of the RFP document. 25.09.2012 was the last date for pre-bid queries to be uploaded by the bidders. 26.09.2012 was the date for response to queries. 27.09.2012 upto 16.00 hours was the due date/last date for submission of the RFP. 29.09.2012 at 16.00 hours was the time for opening of technical bid and on the same date upto 17.00 hours was the time for opening of the financial bid. The successful bidder tenderer

has complied with all tender conditions. Contract has been awarded to him being the lowest tenderer. It is nobody's case that the award of the contract to the successful bidder is against public interest and therefore, the Court cannot interfere with the tender process or granting of tender itself.

POINT FOR CONSIDERATION

22. In the light of the aforesaid facts and circumstances of the case, the point that arises for our consideration in these writ petitions is as under:

Whether the Tender Notification issued by the respondent is liable to be quashed on the ground of arbitrariness, discrimination, being contrary to law and opposed to public interest?

23. The relevant statutory provisions which have a bearing in deciding this point requires to be noticed.

STATUTORY PROVISIONS

24. Chapter XII of the Karnataka Municipal Corporations Act, 1976 deals with property and contracts. Section 182 of the said Act deals with general provisions relating to contracts. It provides that the Corporation may enter into any contract and perform such contracts as it may consider necessary or expedient for carrying into effect the provisions of the said Act. Sub-section (2) of the said Section provides that, every contract shall be made by or on behalf of the Corporation by the Commissioner. No contract for performance which sanction in accordance with the provisions of the Act, is modified from one or other Municipal Authorities or of the Government shall be made by the Commissioner unless such sanction has been given. Any contract involving any expenditure exceeding such limits as may be specified in the Rules shall not be entered into by the Commissioner unless the requirement regarding the procedure to be followed has been followed and unless the authority which is competent to accord sanction has accorded such sanction and where the sanction to be accorded is by the Government unless such sanction has been accorded by the Government. Section 183 provides for invitation of tenders. It provides that, at least 7 days before entering into contract or the execution of any work or supply of any materials or goods which will involve an expenditure exceeding such amount as may be notified by the Government from time to time, the Commissioner shall give notice by advertisement inviting tenders for such contract. By Act No. 32/2003 sub-section (2) was inserted. It provides that, in respect of the tenders made in pursuance of the notice given under sub-section (1), the Commissioner may extend or reject any tender in accordance with the provisions of the Karnataka Transparency in Public Procurements Act, 1999. Section 184 provides for saving of certain irregularities. It provides that, when work is given on contract at unit rates and the number of units is not precisely determinable, the contract shall not be deemed to contravene the provisions of Section 182 or Section 183 merely by reason of the fact that the pecuniary limits laid down therein are eventually

exceeding.

25. In spite of such statutory provisions regulating the award of contracts there were several irregularities in processing of tenders occurring in various Government Departments, Public Sector Undertakings, Statutory Boards, etc., due to inadequate publicity of tenders, restricted supply of tender documents and resulting in lack of transparency in evaluation and acceptance of tenders. Therefore, the Government decided to bring about a legislation to provide for transparency in the tender process and to regulate the procedure in inviting, processing and accepting tenders. Therefore, the Karnataka Legislature enacted the Karnataka Transparency in Public Procurements Act, 1999 (for short hereinafter referred to as "the Act") to provide for ensuring transparency in public procurement of goods and services by streamlining the procedure in inviting, processing and acceptance of tenders by procurement entities, and for matters related thereto. It came into effect from 4th day of October 2000. Section 2 defines Government, Procurement Entity, Services, Tender and Tender Document. Section 5 of the Act mandates that, "On and from the date of commencement of the Act, no procurement entity shall procure goods or services except by inviting tenders for supply". Similarly, Section 7 provides that, no tender shall be invited, processed or accepted by a procurement entity after the commencement of the Act except in accordance with the procedure laid down in the Act or the Rules made there under. The Act provides for Tender Bulletin Officers, Publication of Tender Bulletin, Tender Inviting Authority and Tender Accepting Authority and Tender Security Committee and Opening of Tenders. It also provides for duties of tender inviting authority, how tender is to be accepted, how it is to be rejected and provides for appeal against any order passed by tender accepting authority. Chapter IIA was inserted by Act No. 13/2007 which came into force from 27.11.2006. It provides for e-procurement.

26. In exercise of the powers conferred by subsection (1) of Section 23 of the Act, the Government of Karnataka has framed the Karnataka Transparency in Public Procurement Rules, 2000 (for short hereinafter referred to as "the Rules") which was duly published on 24.10.2000 in the Karnataka Gazette. Rule 2-the definition clause, defines what is Earnest Money Deposit, Pre-qualification, Two Cover System, etc., It provides an elaborate procedure for publication of tender bulletin, Distribution of Tender Bulletins, Details to be mentioned in notice inviting tenders, Publication of notice inviting tenders in news papers, Supply of Tender Documents, Clarification of tender documents, Place and time for receipt of tenders, making of covers in which the tender is submitted, minimum time for submission of tenders, opening of tenders and procedure to be followed for tender opening and other matters. However, at the time the enactment was passed, the legislature did not think of providing for e-tender. In the year 2003, as a part of its e-governance initiative to explore the possibility of using the e-procurement platform for procurements in all its departments was thought of. It was felt that adoption of e-procurement governance would help in demand aggregation, reduced inventory cost, consistent

procurement procedures across the department, reduction in the cost of procurement and the much required transparency in the procurement process, processes like reverse auction saving due to increased competition. In order to achieve the said object, it was necessary to create an e-procurement platform that would enable procurement of services as well as work contracts. In order to finalise the details of e-procurement platforms and then to co-ordinate and implement the object, a High Level steering committee was constituted. The said committee after deliberation recommended to the Government and made its recommendations. Acting on the said recommendation, the Government passed an order on 15-5-2004 approving setting-up of a single unified e-procurement platform to be used by all the Government Departments and public sector undertakings, authorize the steering committee on e-procurement to introduce the e-Governance platform immediately in various departments in phased manner. It also directed to stop all manual tendering processes as and when e-procurement platform is introduced. Further, it appointed a Consultancy agency through competitive process which would help in advising the Government of selection of vendors and setting up of the platform. It also agreed to modify the Act to bring in the concept of e-procurement. Thereafter, the Karnataka Transparency in Public Procurement (Amendment Ordinance), 2006 came to be passed which received the assent of the Governor on 5-11-2006. Subsequently, it is replaced by Act No. 13 of 07 which came into force on 27-11-2006. By the amended Act Chapter II-A dealing with e-procurement has been introduced into the Act. Sec. 18-A which deals with e-procurement reads as under:
Sec. 18-A E-procurement-(1) There shall be a single unified e-procurement platform, for all procurement entity which may be notified under sub-section (2).

(2) With effect from such date, as may be specified by the Government, by notification, a procurement entity in respect of a class of procurement, if any, as may be notified shall procure its procurements through the e-procurement platform.

(3) Notwithstanding anything contained in this Act, the Government may make rules, for specifying a separate procedure to be followed by procurement entities notified under sub-Section (2) for e-procurement through e-procurement platform; and for non-application of other procedure of procurement to e-procurement.

27. According to Section 2(aa) e-procurement means, purchase of goods, obtaining of services or undertaking construction work by the procurement entity through e-procurement platform. As per Section 2(aaa) "e-procurement platform" means, a procurement platform of electronic media comprising of procurement process set-up and managed by the State Government through integrated, internet enabled procurement tools incorporated by customization. This facility is not made available to all the procurement entities under the Act. It is only such procurement entities which are notified are eligible to avail the benefit. Even the class of procurement is also to be notified. In other words, the notification should not only contain the name

of the procurement entity but also should indicate the class of procurement which is permitted by way of e-procurement. This e-procurement dispenses only the paper work. In Section 2(1) "Tender Document" means, the set of papers detailing the schedule of works, calendar of events, requirement of goods and services, technical specifications, procurement criteria and such other particulars, as may be prescribed for evaluation and comparison of tender. For the purpose of e-procurement, the tender papers means set of document in electronic form. In respect of all other matters the procurement entity has to follow the procedure prescribed under the Act and Rules. However, sub-rule (3) provides notwithstanding anything contained in the Act, it is open to the Government to make Rules specifying a separate procedure to be followed for e-procurement and for non-application of the procedure prescribed under the Act and the Rules. Therefore, it is clear that till the Government makes the Rules, the existing Rules apply even for e-procurement. Unless in the Rules to be framed for e-procurement it is explicitly stated that the existing Rules would not apply to e-procurement, the existing Rules does apply for e-procurement also.

28. Rule 14 provides for making changes, modifications or amendments to the tender documents and shall send intimation of such change to all others who have purchased the original tender documents. Rule 17 provides for minimum time for submission of tenders, Rule 18 provides for opening of tenders and Rule 19 provides for the procedure to be followed at tender opening. Rule 28 provide for Two Cover Tenders. Rule 28-A provides for two stage tender systems. Therefore, the Act and the Rules comprehensively deal with complete process of procurement of goods and services by procurement entities transparently by streamlining the procedure in inviting, processing and acceptance of tenders.

29. However, after the passing of the Karnataka Transparency in Public Procurements Act and as a Municipal Corporation being a local authority is included in the definition of procurement entity by virtue of Section 6 of the Act, no tender shall be invited, processed or accepted by a procurement entity after the commencement of the ordinance except in accordance with the procedure laid down in the said Act or the Rules made there under. Thus, the provisions of the Act over-ride the provisions of the Municipal Corporations Act, 1976 and therefore in the instant case the Corporation invited tenders under the provisions of the Act.

30. By virtue of the powers conferred by Sections 3, 6 and 25 of the Environment (Protection) Act, 1986, the Central Government in order to regulate the management and handling of the municipal solid wastes has made the Municipal Solid Wastes (Management and Handling) Rules, 2000 (for short hereinafter referred to as the "MSW Rules". The said Rules define "municipal authority which means Municipal Corporation, Municipality, Nagar Palika, Nagar Nigam, Nagar Panchayat, Municipal Council including notified area committee (NAC) or any other local body constituted under the relevant statutes and, where the management and handling

of municipal solid waste is entrusted to such agency. It also defines what a "municipal solid waste" means. It includes commercial and residential wastes generated in a municipal or notified areas in either solid or semi-solid form excluding industrial hazardous wastes but including treated bio-medical wastes. "Operator of a facility" is defined to mean a person who owns or operates a facility for collection, segregation, storage, transportation, processing and disposal of municipal solid wastes and also includes any other agency appointed as such by the municipal authority for the management and handling of municipal solid wastes in the respective areas. "Processing" is defined to mean the process by which solid wastes are transformed into new or recycled products. "Recycling" means the process of transforming segregated solid wastes into raw materials for producing new products, which may or may not be similar to the original products. "Segregation" means to separate the municipal solid wastes into the groups of organic, inorganic, recyclables and hazardous wastes. "Storage" is defined to mean the temporary containment of municipal solid wastes in a manner so as to prevent littering, attraction to vectors, stray animals and excessive foul odour. "Transportation" means conveyance of municipal solid wastes from place to place hygienically through specially designed transport system so as to prevent foul odour, littering, unsightly conditions and accessibility to vectors. "Vermicomposting" is a process of using earthworms for conversion of bio-degradable wastes into compost.

31. Rule 4 of the said Rules defines the responsibility of municipal authority. Every municipal authority shall, within the territorial area of the municipality, be responsible for the implementation of the provisions of these rules, and for any infrastructure development for collection, storage, segregation, transportation, processing and disposal of municipal solid wastes. Rule 7 provides for management of municipal solid wastes. It provides that, any municipal solid waste generated in a city or a town, shall be managed and handled in accordance with the compliance criteria and the procedure laid down in Schedule-II. The waste processing and disposal facilities to be set up by the municipal authority on their own or through an operator of a facility shall meet the specifications and standards as specified in Schedules III and IV. Schedule II to the Rules provide for compliance criteria, parameters, such as collection of municipal solid wastes, segregation of municipal solid wastes, storage of municipal solid wastes, transportation of municipal solid wastes, processing of municipal solid wastes and disposal of municipal solid wastes. Schedule III to the Rules provides for specifications for landfill sites.

32. When these statutory provisions are contravened, the aggrieved persons have approached the Courts for redressal. The Courts in this Country have not only interpreted the statutory provisions, but in areas not covered by the statutory provisions, they have laid down the law, in particular the Apex Court of the Country under Article 141 of the Constitution. In fact the subsequent legislations are based on the principles laid down by the Courts. Therefore, it is necessary to keep in mind

the legal position as determined by the legal pronouncement over a period of time.

LEGAL POSITION

33. (a) Re-contractual matters:- The learned counsel for the parties cited a plethora of decisions of the Apex Court on the point. That, in contractual matters, and in particular, in the matter of tendering for the contract, how the Government should act, what are the principles which have to be kept in mind while entering to such contract. What can be deduced from those decisions could be broadly stated as under:

34. When the Government is trading with the public, the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot arbitrarily at its sweet will and, like a private individual deal with any person it pleases, but its action must be in conformity with standards or norms which are not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

35. Though ordinarily a private individual would be guided by economic considerations of self-gain in any action taken by him, it is always open to him under the law to act contrary to his self-interest or to oblige another in entering into a contract of dealing with his property. But the Government is not free to act as it likes in granting largess such as awarding a contract or selling or leasing out its property. Whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the Government awards

a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.

36. Any action taken by the Government with a view to giving effect to any one or more of the directive principles would ordinarily, subject to any constitutional or legal inhibitions or other overriding considerations, qualify for being regarded as reasonable, while an action which is inconsistent with or runs counter to a directive principle would prima facie incur the reproach of being unreasonable. The concept of public interest must as far as possible receive its orientation from the directive principles. What according to the founding fathers constitutes the plainest requirement of public interest is set out in the directive principles and they embody par excellence the constitutional concept of public interest. If, therefore, any governmental action is calculated to implement or give effect to a directive principle, it would ordinarily, subject to any other overriding considerations, be informed with public interest.

37. Where any governmental action fails to satisfy the test of reasonableness and public interest, and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some directive principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. There may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and; it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the Court would have to decide whether the action of the Government is reasonable and in public interest. But one basic principle which must guide the court in arriving at its determination on this question is that there is always a presumption that the Governmental action is reasonable and in public interest and it is for the party challenging the validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, there are a large number of

policy considerations which must necessarily weigh with the Government in taking action and therefore the court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the court under the Constitution to invalidate the governmental action. This is one of the most important functions of the court and also one of the most essential for preservation of the rule of Law.

38. One of the limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. The Government need not deal with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. Its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance and it is a rule of administrative law and the said rule emanates from the doctrine of equality embodied in Article 14. The Government has a right, for good and sufficient reason, not to accept the highest bid but even to prefer a tenderer other than the highest bidder. There is no reason why the power vested in the Government to refuse to accept the highest should be confined to inadequacy of bid only. There may be a variety of good and sufficient reasons, apart from inadequacy of bids, which may impel the Government not to accept the highest bid. It cannot be disputed that the Government has the right to change its policy from time to time, according to the demands of the time and situation and in the public interest. Change of policy by the Government, subsequent to the action but before its confirmation, may not be a sufficient justification for the refusal to accept the highest bid. If the Government has the power to accept or not to accept the highest bid and if the Government has also the power to change its policy from time to time, it must follow that a change or revision of policy subsequent to the provisional acceptance of the bid but before its final acceptance is a sound enough reason for the Government's refusal to accept the highest bid at an auction.

39. It is for the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it merely performs an executive function. The correctness of its conclusion is not open to judicial review. No case of contravention of Article 19(1)(g) or Article 14 can arise in these cases. Public auctions are held to get the best price. Once these aspects are recognised, there is no basis for contending that the owner of the privileges in question who had offered to sell them cannot decline to accept the highest bid if he thinks that the price offered is inadequate. There is no concluded contract till the bid is accepted. Before there is a concluded contract, it was open to the bidders to withdraw their bids. By merely giving bids, the bidders had not acquired any vested rights. The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive

owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government, nor can there be any infringement of Article 14 if the Government tries to get the best available price for its valuable rights. The reasonableness in administrative law must, therefore, distinguish between proper use and improper abuse of power. Nor is the test the courts own standard of reasonableness as it might conceive it in a given situation.

40. We must not forget that in complex economic matters every decision is necessarily empirical and it is based on experimentation or what one may call trial and error" method and, therefore, its validity cannot be tested on any rigid "a priori" considerations or on the application of any strait-jacket formula. The court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or "play in the joints" to the executive. The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide.

41. The function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts. The function of the court is not to advise in matters relating to financial and economic policies for which expert bodies are fully competent. The Court can only strike down some or entire directions issued in case the Court is satisfied that the directions were wholly unreasonable or violative of any provisions of the Constitution or any statute. It would be hazardous and risky for the courts to tread the unknown path and should leave such task to the expert bodies. (Ref:- [Peerless General Finance and Investment Co. Limited and Another Vs. Reserve Bank of India](#), ; [Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another](#), ; [Ramana Dayaram Shetty Vs. International Airport Authority of India and Others](#), ; [Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another](#), ; [State of Uttar Pradesh and Others Vs. Vijay Bahadur Singh and Others](#), ; [State of Orissa and Others Vs. Harinarayan Jaiswal and Others](#), ; [Union of India \(UOI\) and Others Vs. Bhim Sen Walaiti Ram](#), ; [G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others](#), ; [State of M.P. and Others Vs. Nandlal Jaiswal and Others](#), ; [R.K. Garg and Others Vs. Union of India \(UOI\) and Others](#), .

42. Then we have to keep in mind the scope of judicial review in contractual matters and in particular Tender conditions.

(b) SCOPE OF JUDICIAL REVIEW

43. The scope of interference in tender conditions by the Court is also well settled. A tender is an offer. It is something, which invites and is communicated to notify acceptance. Broadly stated, it must be unconditional, must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, malafide or actuated by bias, the Courts would interfere. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. In the matter of formulating conditions of tender documents and award of contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted. The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative or quasi-administrative sphere. However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should be free from arbitrariness, not affected by bias or actuated by malafides. The Courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The conditions and stipulations in a tender notice will have two types of consequences. The first is, that the party issuing the tender has the right to punctiliously and rigidly enforce them. Secondly it is not that the party issuing tender cannot deviate from the guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. If the changes affected all intending applicants alike, then they were not objectionable. Changes or relaxations would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. Once the changes effected even at the last moment, enure to the benefit of all intending bidders, then the question of discrimination or arbitrariness would not arise. The methods adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process. The bidders participating in the tender process have no

other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated grounds, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

44. It is in the background of these statutory provisions and the settled legal position, we have to consider the contentions urged in the case.

STANDARD TENDER DOCUMENT

45. The first grievance of the petitioners is that, the respondents did not follow the standard tender document in public procurement of goods service. The tender document issued is contrary to the circulars dated 29.8.2003 and 25.2.2004 issued by the Government. The Government Orders dated 6.8.2005 and 14.10.2008 envisage the modification of standard tender document to take care of local need/specific requirement. In the MSW contract, the number of houses and labourers and the minimum wages, specification of the vehicles in terms of MSW Rules has to be provided. Therefore, Appendix I, II and E.F.G. have been provided. Therefore, it is only combination of KW-4 and Appendix I, II, E.F.G. standard document is compulsory. Any modification can only be in terms of law. The Corporation contended that, the Government Orders on which reliance is placed is not applicable to service tenders. There is no standard document prescribed in relation to the service tenders and the work of this nature. The standard tender documents are pertaining to the civil contracts executed through the Public Works Department of the State Government. The standard tender document prescribed under the said Government Order is for the procurement entity under the State Government. The Government Order dated 6.8.2005 and the subsequent orders have no application to the instant tender invited by the Corporation.

46. The Government of Karnataka issued a Circular dated 29.(sic).2003 calling for comments and suggestions to the draft document relating to procurement of goods/services. After receipt of such comments, they proceeded to pass orders on 06.(sic).2005 prescribing a Standard Tender Document for procurement of works from 1st September, 2005 for a period of six months initially. They made it clear that the said order superceded the provisions contained in the Codes, Manuals or any other orders in this regard. Subsequently, by subsequent Government Order dated 21.03.2007, they made it mandatory for every Procurement Entity under the Government to use the Standard Tender Documents for procurement of works given in Annexure-I to VII to the Government Order dated 06.(sic).2005 with liberty to the Procurement Entity to suitably modify the technical provisions to suit their needs from 1st April 2007. It was made clear that this order supersedes the

provisions contained in the Codes, Manuals or any other orders in this regard. Later, when certain modifications were suggested to the said tender document, after detailed discussion, the Committee decided to modify certain clauses of the Standard Tender Document. Therefore on 14.10.200(sic), the clauses mentioned in the said Government Order, i.e., the clauses of the Standard Tender Document as prescribed in the Government Order dated 06.(sic).2005 were modified to the extend noted in the said Government Order.

47. In fact, the Government Order dated 06.08.2005 made it clear that to whom the said Standard Tender Document is applicable. It says one Division each in PWD Buildings Wing and General Wing, one Division each in Water Resources Department and Minor Irrigation Department and one Division each in the Corporations under the administrative control of the Water Resources Department, as may be identified by the Principal Secretary to Government, for a period of six months initially. In the modification in Government Order dated 14.10.2008, in substitution of para 4 of the Government Order dated 21.03.2007, what is substituted is that, "It is proposed to dispense with Form PWG 65 Standard Tender Documents and it will be applicable for all contracts irrespective of the value of the contract. As far as the value costing Rs. 100 Crore and above KW-4 shall be adopted". Relying on the words, "for all contracts", it is contended that, it includes the impugned contract.

48. Section 2(d) of the defines what Procurement Entity means. It reads as under:

"Procurement Entity" means any Government Department, a State Government Undertaking, Local Authority or Board, Body or Corporation established by or under any law and owned or controlled by the Government, and any other body or authority owned or controlled by the Government and as may be specified by it.

50. Therefore, the procurement entity as defined under the Act are as under:-

(a) Any Government Department

(b) A State Government Undertaking

(c) Local Authority or Board

(d) Body or Corporation established by or under any law and owned or controlled by the Government

(e) Any other Body or Authority owned or controlled by the Government as may be specified by it.

50. The Government Order dated 6.8.2005 makes it clear that one Division each in PWD Buildings Wing and General Wing, one Division each in Water Resources Department and Minor Irrigation Department and one Division each in the Corporations under the administrative control of the Water Resources Department, as may be identified by the concerned Principal Secretary to Government, shall

make use of standard tender documents given in Annexures I to VI to this Government Order in procurement of works from 1st of September 2005, for a period of six months initially. Subsequently, the Government Order dated 21.03.2007 made it clear that, every procurement entity under the Government (as defined in Section 2(d) of the Act shall make use of the aforesaid tender document for procurement of works given in Annexures I to VII to the Government Order dated 6.8.2005 with liberty to procurement entity to suitably modify the technical provisions to suit their needs from 1st April 2007. Subsequently, the Public Works Department expressed certain difficulties in the implementation of the Standard Tender Document prescribed vide the Government Order dated 6.8.2005 in so far as

- (1) Minimum financial turnover
- (2) Satisfactory completion of similar works
- (3) Owning of machineries
- (4) Furnishing of 10% of FSD
- (5) Payments to be made within 90 days to the contractor
- (6) Design and drawings part of the agreement,
- (7) Bid capacity, etc.,

51. On considering the said difficulties, the Government decided to modify certain clauses of the Standard Tender Document. Therefore, an order came to be passed on 14.10.2008 modifying certain clauses. One such clause which came to be modified is regarding Part 4 of the Government Order dated 21.3.2007. They dispensed with Form PWG 65 Standard Tender Documents applicable for all contracts irrespective of the value of the contract. As far as works costing Rs. 10.00 crores and above KW4 shall be adopted. The word "all contracts" on which reliance is placed only means all contracts undertaken by the procurement entity under the Government as defined in Section 2(d) of the Act. As set out above, procurement entity as defined includes Government Departments, a State Government Undertaking, Body or Corporation established by or under any law and owned or controlled by the Government or any other Body or Authority owned or controlled by the Government. These are all procurement entities under the Government. The procurement entity also includes "local authority" or "board" which are not procurement entities under the Government. In the instant case, the Government entity is the Bangalore Mahanagara Palike. It is a local authority constituted under the provisions of the Karnataka Municipal Corporations Act, 1976. It is a Municipal Corporation. It is not a procurement entity under the Government. As is clear from the aforesaid narration of facts, the Government Orders refer to procurement entities under the Government. It has no application to a procurement entity constituted under the Karnataka Municipal Corporations Act, 1976 and therefore the entire argument that the tender issued by the Government is not in conformity with

the aforesaid standard tender form and therefore it is liable to be struck down is without any substance.

52. It was contended that, in the past, Corporation had adopted the Standard Tender Form and in the instant case they have departed from the procedure which they were following. Though the Standard Form is not applicable to a Local Authority like the Corporation, if the Corporation wants to adopt the same, there is no impediment for the same. If in the past they had followed the said Standard Tender Form and this time if they wanted to make a departure, they are not precluded from doing so. May be over the period by experience they found that the Standard Tender Forms and the condition stipulated therein are not workable or the same is coming in the way of achieving efficiency in their contract and consciously if they have taken a decision not to adopt the same and to have their own terms and conditions it cannot be found fault with. Therefore, merely on the ground that the Government has not adopted the Standard Tender Form which they were adopting earlier is not a sufficient ground to set aside the entire tender process. We, accordingly, do not find any merit in this contention.

RULE 17

53. Secondly, it was contended that, after the Government accorded approval, the Executive Engineers and Superintending Engineers of all the eight zones issued a tender notification dated 18.9.2012 initially including 91 packages and later 89 packages. In the said tender notification dated 18.9.2012 only 7 days time was granted. The schedule to the said tender document prescribed downloading of RFP document is from 21.9.2012 to 24.9.2012. The last date for pre-bid queries to be uploaded by the bidders was 25.9.2012. Response to queries was on 26.9.2012. Tender due date/last date for submission of RFP was 27.9.2012 up to 1600 Hrs. The opening of the technical bid was by 29.9.2012 on 1600 Hrs and opening of financial bid was 29.9.2012 at 1700 Hrs and the place of opening of technical bid and financial bid was the Office of Executive Engineer, Basavanagudi, South Zone, Bangalore-560 011. The grievance of the petitioners is there was All India Bandh on 20.9.2012 and a public holiday on 19.9.2012 and the E-portal was having technical problem on 21.9.2012. Therefore, there was only four days available for submitting the tender notification. It was a short term tender notice only through e-procurement. The grievance, was as the subject matter of the contract is above Rs. 2 Crores in value, Rule 17 had to be followed and therefore it is liable to be quashed.

54. Rule 17 of the Rules read as under:-

17. Minimum time for submission of tenders.-

(1) The Tender Inviting Authority shall ensure that adequate time is provided for the submission of tenders and a minimum time is allowed between date of publication of the Notice Inviting Tenders in the relevant Tender Bulletin the last date for submission of tenders. This minimum period shall be as follows.-

(a) for tenders upto rupees two crores in value, thirty days; and

(b) for tenders in excess of rupees two crores in value [sixty days]

(2) Any reduction in the time stipulated under sub-rule (1) has to be specifically authorized by an authority superior to the Tender Inviting Authority for reasons to be recorded in writing.

55. A reading of the aforesaid Rules make it clear that, in order to ensure that adequate time is provided for the submission of tenders, a minimum period between the date of publication of the Notice Inviting Tenders and last date for submission of tenders is prescribed for tenders up to Rs. 2 Crores in value 30 days and for tenders in excess of Rs. 2 Crores of value, 60 days. However, sub-rule (2) categorically provides that any reduction in the time stipulated under sub-rule (1) has to be specifically authorised by an authority superior to the Tender Inviting Authority for reasons to be recorded in writing. Therefore, as a Rule, the Tender Inviting Authority shall provide a minimum period prescribed under the Rules. However, in exceptional cases, there could be reduction in the time stipulated under sub-rule (1).

56. The Corporation has met its case effectively. It is their specific case that, having regard to the urgency involved in taking steps to clear the accumulated garbage, the short term tender has been issued. The State Government being the superior authority and the authority for according approval for entering into the contract, having considered the proposal sent by the Corporation it accorded its approval under Rule 17(2) of the Rules for inviting short term tender, more particularly in terms of the calendar of events mentioned in the proposal. The records made available at the time of arguments shows the proposal sent by the Corporation and the order passed by the Government according its approval under Rule 17(2) for inviting short term tender. In this context it is relevant to mention here for the first time in the city of Bangalore there was an uproar regarding the accumulation of garbage in the city. The Contractors including the petitioners herein challenged the earlier tender notification issued and interim orders were issued by this Court which was later vacated. But, in the meanwhile there was a large quantity of garbage accumulated, there was a threat of diseases spreading out of the said garbage. A Public Interest Litigation was filed before this Court seeking direction to the Corporation to remove the garbage. Under these circumstances, the Corporation as well as the Government had to act immediately. Because of the orders passed by this Court on 14.9.2012 in public interest litigation the Government by its order dated 18.9.2012 exercised its power under Rule 17(2) (ii) of the Rules and granted permission for short term tender by e-procurement. It is in that context, short term tender was floated and the period was reduced to 7 days which is approved by the Government under Rule 17(2) of the Rules. Thus, the short term tender granting 7 days time is in accordance with law and cannot be found fault with. Therefore, we do not find any merit in this contention also.

CONCESSION TO SC/ST

57. Next it was contended that, in the tender notification issued, the Government has incorporated relaxation and concession to Scheduled Caste/Scheduled Tribes, SC/ST individuals, Groups/Societies based on the Circular issued by the Directorate of Municipal Administration dated 15.1.2005. The said scheme applies only to small urban area (Municipalities) governed under the Karnataka Municipalities Act, 1964 and not to larger Urban Areas (Corporations) constituted under the Karnataka Municipal Corporation Act, 1976. Therefore the reservation is impermissible. The relaxation of EMD and Solvency Certificate is only 10% of what the general bidder would deposit and not 90%. The said Circular has been misinterpreted and misused by the authorities concerned. There could be no reservation under the provisions of Act and the Rules made therein. The reservation totally relaxed for any technical or financial aspects is ultra vires and powers conferred under the Act and the Rules do not permit the same. The Government has to evolve a policy in respect of extending the reservation or providing relaxation to SC/ST Groups. In the absence of policy by the Government, the Corporation has no jurisdiction to extend any reservation.

58. The Corporation contends that, the relaxation/concession given to the SC/ST is only at the entry level and the same does not come in the way of competitiveness of the tenderers. The relaxation given is in terms of the circular and the decision of the State Government. The relaxation conferred upon the SC/ST is only in respect of the EMD and solvency certificate. There is no relaxation in respect of the performance security to be executed and the technical qualification which is prescribed under the tender document. The other terms and conditions of the tender remained unchanged for the persons belonging to SC and ST. Article 46 of the Constitution of India provides for economic empowerment of the persons belonging to SC and ST. Keeping in mind the said aspect, relaxation has been extended only in respect of the EMD and the solvency certificate to have the larger participation in the tender process. The relaxation extended to SC/ST has not in any way prejudiced the petitioners from participating in the tender process. Unless and until the prejudice caused to the petitioners are shown and demonstrated, the contention of the petitioners cannot be gone into.

59. In the tender document, clause 7.1 provides that the bidder shall pay earnest money deposit (EMD) amount of Rs. 6 Lakhs and (10% of the above amount shall be the EMD for the registered society/Individual of SC/ST Groups). Similarly, in so far as financial capability is concerned, the bidder shall submit a solvency certificate from any Nationalized or Scheduled Bank for an amount of Rs. 25 Lakhs only. The Solvency Certificate should be of current financial year from 1.4.2012 onwards. 10% of the above amount shall be the solvency for the registered society of SC/ST groups and SC/ST individuals. This facility will be extended only for those who submit the valid caste certificate issued by the competent authority.

60. It is contended that in the said Government Order, what is granted is only a concession of 10% of the total amount payable. By placing a wrong interpretation, they have prescribed only 10% of the EMD amount and solvency certificate amount as stipulated for others which is again a patent mistake which vitiates the tender. Further, the concession was only meant for the Societies of persons belonging to SC/ST. It is specifically stated that it will not apply to others. In spite of such a condition, the benefit was extended to the persons belonging to SC/ST Groups.

61. A perusal of the aforesaid Government Orders makes two things clear (1) The concession was meant for societies of persons belonging to SC/ST community. It is specifically stated that it will not apply to others. (2) Such societies are shown the concession of paying 10% of the EMD amount meant for others and similarly solvency certificate also should be for 10%. Therefore, the contention that the concession is only of 10% of the total amount payable is not correct. On a proper reading of the Government Order it is clear the concession is 10% of the amount which is payable by others. Therefore, there is no substance in the said contention.

62. Assuming that an obligation is imposed on the State Government to promote and show special care, in particular the economic interest of the weaker section of the people and in particular SC/ST, the Government can show such concession to those classes of people in order to provide a level playing field. The said concession should be strictly in accordance with the Government Order. The Government Order has extended the benefit to the societies belonging to SC/ST, not to individual SC/ST. In the instant case, none of the successful bidders who availed the said benefits is a society of SC/ST. They are all individuals. Nearly 10 such contracts have been granted to them. When the Corporation under the Act cannot have shown such concession and if they are relying on the Government Order for extending the said benefit and when the Government Order did not extend the said benefit to individual SC/ST, providing such concession to them is without the authority of law and therefore the said clause is liable to be struck down and accordingly it is struck down, on the ground it is discriminatory, violates equality clause in the Constitution, violates Article 14 of the Constitution.

63. Reservation under Article 15 or under Article 16 is only for providing reservation in educational institution or employment or in public employment. Chapter III of Part 12 of the Constitution provides for property, contracts, rights, liabilities, obligations and suits. In the said Chapter, there is no whisper about the concession, reservation to any backward classes. If the intention of the forefathers of the Constitution of India was to provide for such reservation even in public contracts, they would have made a proper provision in Chapter III. In the absence of any such provision, the intention is clear. The reservation has to be confined only in public employment or admission to educational institutions and does not extend to public contracts. In the entire scheme of the Act, there is no provision for showing such concession. The said concession was granted on the basis of a Government Order

dated 15.01.2005 where on a request made by the Director of Municipal Corporation for granting such concession both in respect of EMD as well as solvency certificate, Government granted the concession. Therefore, without going into the Constitutional aspect, whether in the absence of a specific provision in Chapter III of Part XII of the Constitution, whether any such concession could be made, in commercial contracts as the concession now extended is contrary to the Government Order which is the basis for granting such concession, the said concession is liable to be struck down.

ADDENDUM

64. It was contended when the petitioners had preferred Writ Petition challenging the tender notification dated 18.9.2012 on 24.9.2012, an addendum was issued on 26.9.2012 altering the terms and conditions of the tender. The argument is that the authorities could not have altered the terms and conditions after issue of tender notification. It is necessary to notice Rule 14 of the Rules which reads as under:-

14. Clarification to tender documents- At any time after the issue of the tender documents and before the opening of the tender, the Tender Inviting Authority may make any changes, modifications or amendments to the tender documents and shall send intimation of such change to all those who have purchased the original tender documents.

65. Therefore, the contention that the tender accepting authority has no power to issue an addendum changing, modifying or amending the conditions in the tender document is without any substance. The addendum issued in this case is valid and legal and cannot be found fault with.

66. In that context it is necessary to notice Clause 3, where it is specifically stated that the bidder is requested to upload queries if any on the website before the pre-bid query on 25.09.2012. Further it is clarified that the BBMP responds to the bid till the pre-bid query date and will be uploaded in the website on 26.09.2012. In Clause 3.3, they have reserved the right for modification in the RFP documents, which may become necessary as a result of the pre-bid queries or in sole discretion of BBMP shall be made exclusively through the issue of an Addendum publishing in the website pursuant to Clause 4. Clause 4 deals with the RFP documents. Before the deadline for submission of bids, the BBMP may modify the RFP documents by issuing addendum and any addendum thus issued shall be part of the RFP documents and shall be communicated through e-procurement portal. To give prospective bidders reasonable time in which to take an addendum into account in preparing their bids, the BBMP shall extend as necessary the deadline for submission of bids, in accordance with Sub-Clause 9.2. Though Clause 9 provides deadline for submission of the RFPs and confers power in BBMP to extend the deadline for submission of RFPs by issuing an amendment in accordance with Clause 4. The BBMP did not exercise that power and extend the deadline. That

cannot be found fault with. The petitioners are all existing contractors who are fully aware of the tender process and even before the issue of addendum they were before this Court by filing Writ Petition challenging the tender notification. Therefore, they cannot be heard to say that non extension of time which was completely in the discretion of the authorities coupled with the fact that this Court in public interest litigation has passed order to expedite the tender process, has prejudiced their interest.

RE. CHANGES IN THE TENDER CONDITIONS:-

67. In para (7) supra, we have set out in detail the changes which are brought about by way of an addendum to the tender conditions. We have already discussed at length with reference to statutory provision, as well as the clauses in the tender, under the heading ADDENDUM, that the tender accepting authority has power to issue an addendum changing, modifying or amending the conditions in the tender document. Therefore, the question is whether the modified tender conditions are arbitrary, discriminatory, malafide or actuated by bias.

68. It is settled law that the bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agendas. It is equally well settled the authorities must have a free hand in setting terms of tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts would interfere. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. In the matter of formulating conditions of tender documents and award of contract, greater latitude is required to be conceded to the authorities unless the action of tendering authority is found to be malicious and misuse of its statutory power, interference by Courts is not warranted. The Courts cannot interfere with the terms of tender prescribed by the authorities because it feels that some others terms in the tender would have been fair, wiser or logical. The terms of invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of a contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The conditions and stipulations in a tender notice will have two types of consequences. The first is, that the party issuing the tender has the right to punctiliously and rigidly enforce them. Secondly it is not that the party issuing tender cannot deviate from the guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. If the changes affected all intending applicants alike, then they are not objectionable. Changes or relaxations would be unobjectionable if the benefit of those changes or relaxations are extended to some but denied to others. Once the

changes effected even at the last moment, enures to the benefit of all intending bidders, then the question of discrimination or arbitrariness would not arise.

69. At this juncture it is also necessary to notice the object behind the authorities undertaking the exercise which they have done. The policy of the Government is to promote efficiency in the administration. When the petitioners herein and other contractors who are holding the contracts for more than a decade formed a cartel were virtually dictating the terms to the Corporation and successfully prevented others from competing with them which resulted in disposal of the municipal solid waste becoming a big problem in the City of Bangalore. The fair name of Bangalore as a "Garden City" was seriously affected, the Corporation could not sit idle. They have to break the monopoly of these petitioners. If they have chosen to embark upon a bold step of revising the terms of the tender which was being followed by the Corporation all these years and relaxed the rigours of such tender conditions which enabled others to compete, it cannot be found fault with. The petitioners being in the business for more than a decade were also benefited. Their grievance is, all these changes resulted in dilution of the rigorous terms and conditions enabling more people to participate, thus it is a threat to their monopoly. That cannot be accepted. It is done in public interest. The petitioners cannot prevent others from participating in the tender process. Their attempt to eschew competition cannot be countenanced by this Court. A healthy competition and an opportunity to more persons to compete in these tender process augur well for the public, and it would prohibit monopolistic tendencies, which is the need of the hour. The Monopolies Inquiry Commission in its report stated that there are different manifestations of economic power in different fields of economic activity. One such manifestation is the achievement by one or more units in an industry of such a dominant position that they are able to control the market by regulating prices or output or eliminating competition. Another is the adoption by some producers and distributors, even though they do not enjoy such a dominant position, of practices which restrain competition and thereby deprive the community of the beneficent effects of the rivalry between producers and producers and distributors and distributors to give the best service. It is needless to say that such practices must inevitably impede the best utilisation of the nation's means of production. Economic power may also manifest itself in obtaining control of large areas of economic activity, by a few industrialists by diverse means. Apart from affecting the economy of the country, this often results in the creation of industrial empires, tending to cast their shadows over political democracy and social values.

70. The intention to acquire monopoly power can be spelt out from formation of a cartel by some of the contractors. The word "Cartel" has a particular meaning with reference to monopolistic control of the market. In Collins English Dictionary, the meaning of the word "cartel" is given as under:

Also called a trust, a collusive international association of independent enterprises formed to monopolize production and distribution of a product or service, control prices etc....

71. In Webster Comprehensive Dictionary, International Edition, the meaning of the word "carter" is given thus:

An international combination of independent enterprises in the same branch of production, aiming at a monopolistic control of the market by means of weakening or eliminating competition.

72. In Black's Law Dictionary, Fifth Edition the meaning of the word "cartel" is given thus:

A combination of producers of any product joined together to control its production, sale and price and to obtain a monopoly in any particular industry or commodity...Also, an association by agreement of companies or sections of companies having common interests, designed to prevent extreme or unfair competition and allocate markets, and to promote the interchange of knowledge resulting from scientific and technical research, exchange of patent rights, and standardization of products.

73. The cartel therefore is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity. The object of formation of a cartel amounts to an unfair trade practice which is not in the public interest.

74. Therefore, in a given case, whether there was a formation of a cartel by some of the contractors which amounts to an unfair trade practice, depends upon the available evidence and the surrounding circumstances. A bonafide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. Seen from this background though there was substantial changes in the terms of tender and relaxation in respect of experience, finance, etc., the object behind the same is to make it more competitive, encourage healthy competition and to break the cartel. All this is done in public interest. There are no mala fides. It is a bona fide decision. Apart from that the said benefits enure to every one including the petitioners.

75. It is well settled that in complex economic matters every decision is necessarily empirical and it is based on experimentation or what one may call trial and error" method and, therefore, its validity cannot be tested on any rigid "a priori" considerations or on the application of any strait-jacket formula. Having regard to

the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the authorities. The function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts. It would be hazardous and risky for the courts to tread an unknown path and should leave such task to the expert bodies.

76. In the instant case, the petitioners have not submitted their bids at all. These petitioners are the existing contractors for several years. They are fully aware of the terms of the tender. In fact, even before the expiry of the period of deadline and even before the issue of addendum they were before this Court by filing a Writ Petition. After the addendum was issued when so many terms and conditions were relaxed they still had the time to submit their tenders. They also had the opportunity to seek clarification. They did not attempt at any of these things. The benefit of all the changes which were effected was available to them also. Their contention that these changes were brought about to benefit one tenderer even if true the said benefit was available to all of them. In spite of the same they did not choose to offer their bids. But, chose to file one more Writ Petition challenging the addendum and after the approval of the said bids they chose to file one more set of Writ Petitions challenging the approval and after award of contracts they filed one more batch of Writ Petitions challenging the award of contracts. Therefore, it is clear as existing contractors their term having come to an end in 2010, by filing Writ Petitions after Writ Petitions challenging the tender process at every stage they have managed to continue to work under the contracts which had come to an end in 2000 itself. The petitioners who did not take advantage of the relaxed terms, did not participate in the tender process, who are least content in obstructing the tender process, cannot complain of discrimination or arbitrariness.

SUBSEQUENT EVENTS

77. As there was no interim order of stay of the tender notification issued by this Court, according to the schedule, the bid was opened and on the basis of the criteria stipulated in the tender notification successful bidders were selected. Contract was also entered into. The Tender Evaluation Committee evaluated all the tenders submitted package-wise at Appendix-1. With regard to each package, details of necessary information, minimum number of personnel and vehicles specified by the BBMP and details of the number of personnel and vehicle numbers mentioned by L-1 bidders and details of evaluation of rates are submitted. M/s. BVG India Limited was successful bidder in 50 out of 89 packages. After considering its bids, it is observed that it has quoted 21.86% higher rates than assessed rate for package W-1 and in the remaining 11 packages, it has quoted lesser rate ranging from -2.10% to

33.86%. But in all the packages, it has quoted less number of personnel and vehicles than specified by the BBMP. This amounts to violation of Appendix-2 under tender conditions (Appendix-G). It has offered explanation of the calculation with regard to lesser numbers quoted. They are:

(i) Segregated garbage from 1000 houses would be gathered through one auto tipper.

(ii) Segregated garbage would be gathered by one Municipal Worker from 300 houses.

(iii) Additional services of the Municipal worker would be employed between 6.30 AM & 11.30 AM to gather garbage from houses and to sweep the streets.

(iv) 4.8 kms of road and the adjacent footpath would be cleaned through street sweeping Municipal Worker..

78. After considering the said explanation, the Committee has observed that it appears that minimum required number of personnel and vehicles is not provided and it would be difficult for the tender applicant to execute all the works. But the said company has urged in the price negotiation meeting that the same company has computed the number of personnel and vehicles required and that they would be able to successfully complete cleaning work, and they would file an affidavit undertaking not to claim money in case of their failure in accomplishing the work. To confirm their efficiency in service, any one of the package may be granted for a short term on experimental basis and thereafter, remaining packages may be granted after confirmation about their efficiency. All the aforesaid facts were submitted before the Standing Committee for decision. The Standing Committee after considering the aforesaid notes prepared, granted approval to the L1 bidders subject to the terms and conditions contained in the note, as the solid waste disposal work is a service based work:

79. On consideration of the aforesaid report, the Commissioner passed an order stating that out of 89 packages, bidders participated for 81 packages and in respect of one among the 81 packages, the tenders were not in conformity with the technical bid and hence was not accepted. However, in the remaining 80 bids, the authorities were directed to issue letter by acceptance subject to the approval by the Government. Subsequently, the Government has also approved the acceptance of these tenders.

80. As set out in the facts pleaded by the petitioner as the writ petition had been filed even before the date fixed for opening of the tender, several writ petitions were filed challenging every stage of the tender process including the approval granted by the Standing Committee. It is in this context the successful bidder of 50 packages has filed a detailed facts setting out what transpired after the acceptance of its bids. Between 02.11.2012 and 07.11.2012, BVG India Limited received the

Letter of Acceptance of BBMP dated 31.12.2012 by registered post in respect of the 50 packages. The said LOA was inconsistent with the RFP documents and the said inconsistencies were brought to the notice of tendering authority of the BBMP. The inconsistencies were found uniformly in all the letters of acceptance issued in respect of the 50 packages. In respect of the same, the BBMP did not take any action to rectify or remove the inconsistencies in the LOA in accordance with the RFP. The said action of the BBMP has caused irreparable prejudice to BVG. Despite that, BVG undertook to carry on and work in nine packages after display as it could bear the damages if any, pertaining to smaller ratio of packages. They had to incur huge sum of investment for setting up infrastructure to carry out the work as per the RFP. Then they have pleaded various defects experienced by them. The said uncertainty has led to the delay in conformity with the terms of RFP. Then they have pleaded the difficulties experienced by them in performing the contract in each zone. They have stated that the BBMP had agreed and consented for extension of time for display of employees, equipments and vehicles which clearly shows that time is not the essence of RFB.

81. The Corporation has filed a counter to this affidavit. Relying on clause 15.9.3. of the tender document, they contend that on failure to make available the infrastructures for physical verification within a period of 15 days, the BBMP was empowered to take action for rejection of bids or cancellation of bids by forfeiting the earnest money deposits. Initially, BBMP had called upon the successful bidders to make available the necessary infrastructures for execution of work within a period of seven days. The said letter was issued having regard to the fact that immediate action was required to be taken for removal of the accumulated garbage in the Bangalore City. However, M/s. BVG and certain other bidders have expressed their difficulty for providing physical verification of men and machinery within a period of seven days and have sought for extension of time. However, even after a period of 15 days men and machinery was not made available. M/s. BVG wrote a letter seeking extension of time for another 30 days to mobilize the vehicles along with the documents for display. In spite of giving sufficient opportunity they did not make available all the men and machineries. A meeting was convened on 18.12.2012 for discussions. M/s. BVG was not in a position to perform their contractual obligation as per the tender conditions. At the time of conclusion of the arguments stated that BVG has displayed its employees, vehicles and equipments in nine packages. They undertook to display employees, vehicles, equipments etc. in 13 packages and they undertook to commence the work in the other mentioned 10 packages immediately upon receipt of work orders labour licenses etc. They undertook to give up its rights pertaining to the 30 packages where it has not displayed its employees, vehicles, equipments etc. for various reasons stated in the affidavit filed subject to receipt of work orders in the remaining 10 packages and consequently, being permitted to commence work in the aforesaid 11 packages. They are also agreeable to 50% of the EMD being refunded and all the bank

guarantees being returned in respect of the remaining 30 packages which they have surrendered. BBMP has filed an additional affidavit stating that M/s. BVG India has displayed men and machinery pertaining to 11 packages in East Zone, West zone and South Zone. In South zone, the display was made in respect of 5 packages out of which 3 packages were successful. Insofar as the East zone is concerned, they failed to display men and machinery and provide relevant documents. Insofar as West zone, M/s. BVG has chosen to display four packages and even in respect of which no proper documents were submitted. They have drawn the proceedings to this effect and the infirmities in displaying the men and machinery etc., is recorded and copies of the same are produced. They intend to issue work orders only in respect of three packages out of 11 packages inasmuch as M/s. BVG India Limited has failed to fulfill and satisfy the authorities by submitting the required documents in respect of eight packages.

82. In the light of the aforesaid facts it is clear that, M/s. BVG India Limited was awarded 50 out of 89 packages. According to clause 15.9.3, the Successful Bidder shall make physically available (own or leased), of the required number of labourers, pushcarts, Auto tipper/Goods autos (make-2000-2012), Tipper (make-2000-2012), and/Compactors (make 2000-2012), along with the documents for the particular package within 15 days of the receipt of the letter of acceptance, failing which, the award will be cancelled and the EMD will be forfeited. However Successful Bidder should replace all old vehicles (prior to 2006 make) within 120 days from the date of LOA, failing which, the award will be cancelled and the EMD will be forfeited. BBMP has got all the right to negotiate with 12 to award contract.

83. According to clause 15.9.4, the Successful Bidder shall execute the Agreement immediately after producing the above requirement. The Successful Bidder shall also furnish Performance Security by way of an irrevocable Bank Guarantee, issued by a nationalized bank or a scheduled bank located in India in favour of the Commissioner, Bruhat Bangalore Mahanagara Palike as required under the Agreement for an amount equivalent to 2% of the annual contract value and valid for the entire contract period and 3 months thereafter. In every monthly bill BBMP will deduct 1% of the monthly service fee as additional Performance Security. These amount will be refund after the completion of contract period successfully, failing which, performance Security amount will be forfeited. In RFP according to Appendix A. As per Clause 1.1.1(g), Auto tipper/Goods autos should have an inbuilt mike system to announce about the door to door collection. Pushcarts shall have to carry appropriate bell ringing system of permissible decibels to draw attention of the community. As per Clause 1.1.4, the Successful Bidders shall submit to BBMP, an action plan on how the MSW is collected & transported, the routing of Push carts, Auto tipper/Goods autos, Compactors 8B closed Tippers and shall give proper directions regarding the same to engaged workers & Drivers. As per Clause 1.1.4(c), the Successful Bidders have to furnish BBMP with the work mobilization chart within 15 days from the day of issue of LOA and before agreement is signed to the

satisfaction of BBMP, clearly stating how the contractor intends to go about with the contract, mentioning the time frame and the methodologies and route map.

84. As per Clause 1.1.4(o), all vehicles like Auto tipper/Goods autos, compactors, closed Tippers and pushcarts shall be completely painted in the lead free green colour with defined package no, Ward number, division number and Zone name along with the contractor name and contract number. As per Clause 1.1.4(r), the Successful Bidder shall engage supervisors for every 30 labours and provide them with mobile phones so that they can be contracted. As per Clause 1.1.4(w), the Successful Bidder shall have to maintain the GPS system installed to the Secondary Transportation vehicles and the smart cards that would be provided by BBMP. In case the equipments provided by BBMP are damaged the same shall be rectified at the cost of the bidder and shall inform BBMP accordingly. As per Clause 1.1.4(y), the Successful Bidder shall establish an office in the areas where he operates and the communication facilities shall be made available to BBMP officials. As per Clause 1.1.4(z), the successful bidder shall identify the place for parking without causing interference to the public in order to avoid the auto tipper/Goods autos/push carts from being left on the roadside. And also provide a room with Toilet facility for changing uniform. As per Clause 1.1.4(cc), the successful Bidder shall provide Photo identity cards for all his employees indicating the name and address, age, Package number, ward number. etc., As per Clause 1.1.4(ee), without prejudice to any other right or remedy which the BBMP may have in respect thereof under this Agreement, upon the occurrence of a Service Provider Event of Default, the BBMP may terminate this Agreement by issuing a termination notice setting out the underlying Event of Default and the termination date, which will be normally be taken to be within 24 hrs of the notice, BBMP will be at liberty to start immediate operations to provide SWM disposal.

85. From the correspondences made available to this Court, it is clear that, the reply sent by BVG India Limited on 13.11.2012 in reply to the letter dated 3.11.2012 calling upon them to produce vehicle documents like RC, FC, insurance, etc., implementation plan along with ward-wise office address and labour details, performance security of 2% of annual contract value, labour license, ESI, PF registration documents, package-wise vehicles, manpower and tools and tackles numbers, they replied by saying that most of the documents require liaisoning with various Government Organisations. November being a festival month had many Government holidays. Due to the same reason, they find it extremely difficult to mobilize manpower and the vehicles simultaneously. Due to the same reason, they were unable to finalise the deals with the manufacturers for the purchase of new vehicles. They are finding it difficult to mobilize the said number of vehicles within the specified time line. Given these circumstances, they requested for 30 days time to mobilize the said vehicles along with the documents and display the same. The Corporation addressed a letter on 21.12.2012 bringing to the notice of BVG India Limited the various violations of tender conditions. In reply to the same, BVG India

addressed a letter dated 18.12.2012 to the Executive Engineer, Vijayanagar Division, South Zone, BBMP, pointing out that the LOA had certain deviations from the RFP documents which was highlighted in November which has not been rectified at all. It is stated therein that, they have submitted ESI, PF, Shops and Establishment certificates, request letter for Form V, agreement as per RFP document, bank guarantee and the implementation plan with a covering letter dated 19.11.2012 acknowledged by Additional Commissioner on 22.11.2012 for all packages of South. There was a meeting called by the Corporation at IPP Building, Malleswaram on 22.11.2012, chaired by Health Committee Chairman Shri Venkatesh Babu and Sri Ranganath-MSW Expert, BBMP officials-CE's and Executive Engineers of all zones and was attended by all new contractors who had won the tenders. In the meeting, BVG committed to start the work in South in two stages viz., S1, S2, S3 and S19 on 1.1.2013 and S5, S8, S14, S15, S17 on 15.1.2013. Subsequently, Mr. Gobind Srivatsa-AGM Operations, met the Additional Commissioner on 23.11.2012 and agreed to display the men and machinery for S8, S15 and S17 packages on 29.11.2012 and commence the work for the said packages on 1.12.2012 and the rest of the South Packages on 15.12.2012. The men and machinery required for the above said packages were displayed on 29.11.2012 in front of MLA Sri Vijaykumar, Addl. Commissioner and other BBMP staff present on that day. However, the required number of Pourakarmikas and machinery could not be displayed as there was a strike called by all Pourakarmikas union on 28th and 29th November 2012 which has been documented publicly. They complained that they have not received the work order till date. Apart from work order they requested for issue of Form V which in turn will be submitted to the labour department for issue of labour license specifically for the above said work. They contended that after receiving the labour license they will submit a copy of the same to them. After receipt of the labour licence they requested to give them the work commencement letter. Subsequent to the issue of work commencement letter, they will intimate the labour department about the work commencement and then the actual work on the field would be commenced. They also requested for NOC and location of dump yard and dry collection centers be intimated to them. They have started the work at Yelahanka on 1.12.2012 and the turn of unruly incidents at Yelahanka on 1st, 2nd and 3rd of December 2012 were not conducive for us to scale up the operation in other zones as they had to sort out local issues which are applicable to all the other zones also. The unexpected turn of events including certain violent acts for which they have filed criminal complaints, which they believe at the behest of vested interests, are not only beyond their control, but have created a fear psychosis in some of their staff. They have spent needless time firefighting and sorting such issues, which they could have otherwise gainfully employed to commence work. It is primarily on account of such unanticipated events that they could not expeditiously commence work in all the zones. They also stated that on account of vested interests operating as a cartel, they were unable to obtain trucks/tippers locally and were forced to obtain trucks from Goa. They have not only incurred significant expenditure but

were also forced to involve men and resources in this endeavour, which has further caused a time lag and such time lag cannot be attributed to them. When these facts were brought to the notice of the concerned authorities, they were asked to stabilize the Yelahanka Zone and RR Nagar Zone. They have not only stabilized their performance in Yelahanka, but they are one of the first garbage contractors, who are ensuring segregation of waste at the place of origin. They have also undertaken a campaign to bring about awareness amongst the residents so as to encourage separation of waste at the household itself. The planned implementation in other zones suffered in view of these developments. One more letter was addressed by the Corporation which is dated 17.12.2012 by the Vijayanagar Division pointing out the various violations and also bringing to their notice, if before 26.12.2012 they are not setting right, further steps would be taken in the matter. They have also made much about the authorities insisting on performing their part of the work even before the date prescribed and called it as a breach of the terms on the part of the authorities.

86. The fact remains that, out of 50 packages which was awarded to them, they were able to perform the terms of the contract only in 9 packages. Then, in the remaining 11 packages where they had to display men and machinery, only in 3 packages they were able to meet all commitments. However, in the remaining packages they were not able to comply with the requirements. Now that they have come forward to give up their rights to 30 packages it is clear that they are not able to comply with the requirements in respect of the 50 packages which was awarded to them. The Corporation with the intention of breaking the monopoly of the existing contractors took bold steps and relaxed some of the rigid terms and conditions in the tender earlier. The whole object was to break the monopoly and make it more competitive so that more persons can participate in this tender process so that public interest would be served. Though they are successful in breaking the monopoly or the cartel, the subsequent events show that the Corporation has landed in more trouble. It is a case jumping from the frying pan into the fire. If one company can manage to get 50 packages out of 80 packages again it results in monopoly. It is again not in public interest. It would have the tendency of keeping the Corporation again under the mercy of one contractor. In the process public interest would suffer. In the instant case, though the said company is economically viable, have the requisite expertise because of want of local support and the problem created by local contractors, employees of the Union and may be some officials, now they are finding it very difficult to undertake work in all the 50 packages. Realising the hard reality now they have come forward to surrender 30 packages and request that in the remaining 20 packages they may be permitted to operate. Now that originally 9, subsequently 3, in all 12 packages they are able to perform all their obligations in respect of the remaining 8 packages it is left to the Corporation authorities to evaluate the compliance by them and take appropriate action in accordance with law if there is a breach of the terms of the contract. But, one thing that emerges from these

undisputed facts is, in public interest it is not desirable to throw open all the packages. Therefore, it would be advisable to the Corporation to restrict the number of packages to one company or individual. In fact the learned counsel for the petitioners as well as the Corporation fairly submitted that in view of the facts of this case, the background, the problem the City of Bangalore faced, it would be appropriate for this Court to issue appropriate directions as it is also dealing with the public interest litigation, to see that in future a situation which is now faced do not repeat. In fact the petitioners' counsel has filed a written memo giving his suggestion. Therefore, the subsequent events should make the authorities to think at re-working and rethinking about the format of the tender, and the conditions to be imposed in order to achieve the object and discharge their responsibilities to the public at large. They should not place themselves in a helpless situation.

CONCLUSION

87. Now from the facts set out above, there are several irregularities in the tender document as well as the tender process. Equality clause is breached. One person is shown concessions which enabled him to corner 50 out of 81 packages. But to break the cartel, the authorities seem to have made such changes and shown concession. It appears they were successful in their attempt. They are experimenting or trying what one may call trial and error method. Their action should be viewed with greater latitude.

88. The concession shown to persons belonging to SC/ST has resulted in 10 packages going to persons belonging to the said community. On that score, the valid contracts entered into with others cannot be annulled by quashing the tender document. The fact that 10 persons belonging to SC/ST were able to get the contract by competing with the others shows that they are economically sound. The termination of those contracts may hurt public interest. Therefore instead of setting aside the said contract, the proper thing to do in the circumstances is to validate the said contract by withdrawing the concession and directing them to pay the remaining 90% of the E.M.D. amount and also furnish a fresh solvency certificate for Rs. 25 lakhs. That would meet the ends of justice.

89. The beneficiary of 50 packages was unable to take advantage of the largesse conferred on him. He wants to surrender 30 packages to the authorities which can be again tendered giving an opportunity to the unsuccessful tenderers including the petitioners who did not participate in the tender process, to participate and be successful in getting the contracts.

90. Garbage though it is stinking, has a market value and is in great demand. It can be converted into fertilizer, used in tarring the roads, producing electricity and could be recycled. After the waste is collected from house hold it is segregated into dry waste and wet waste. Dry waste is also recycled. Therefore, in the tender document before addendum, the entire Municipal Waste belonged to the Corporation.

However, in the addendum a right is conferred on the contractors to dispose of the dry waste to benefit them. That is objected to as it results in loss of revenue to the corporation. It is estimated that 1/3 of the waste generated is dry waste. If the cost of dry waste is evaluated and is taken into consideration in deciding the commercial terms of the contract, there cannot be any objection. Otherwise it results in loss to the Corporation. It has to be avoided.

91. The Municipal Solid Waste (Management and Handling) Rules, 2000, casts an obligation on the Municipal authority the responsibility for the implementation of the provision of the said rules and for infrastructure, development for collection, storage, segregation, transportation, processing and disposal of municipal solid wastes. The Secretary incharge of the Department of Urban Development in the State have overall responsibility for the enforcement of the provisions of these rules in the metropolitan cities. State Pollution Control Board shall monitor the compliance of the standards regarding ground water, ambient air leachate quality and the compost quality including incineration standards as specified in schedules II, III and IV. The rules provide for the management of Municipal solid waste generated in the city. In spite of these rules which came into force more than a decade back, all the authorities have not bestowed sufficient attention and importance in the management and handling of municipal solid waste in the city, in terms of the rules. Roughly in about 1/3 of the wards in the city of Bangalore, the municipal solid waste is handled by the Corporation directly and only in the remaining tenders are called for the management and handling of the waste. A competition between the Governmental agency and private agency, should have enured to the benefit of the public at large. But it has not happened. On the contrary it has resulted in cartel and vested interests. From the material on record, the submissions made at the bar and the material on record in the connected public interest litigation, what emerges is the unholy alliance between the contractors, corporators, elected representatives and the Corporation officials. The Government seems to be helpless. Judicial intervention by way of interim orders has added to the misery. In the result, the Bangalore "the Garden City of India" has become a "Garbage City". Roughly about Rs. 1,200 crores is spent annually towards collection, segregation and transportation of this municipal solid waste. Therefore, it is a big business. Naturally every one concerned would like to have their share of cake. Even after having their share, the city is not clean and the public are at the receiving end. This money is squandered, cartels are thriving. It has become an additional source of income to others who are partners in this enterprise. In fact this situation has led to the connected public interest litigation. Therefore, this case cannot be viewed in isolation, and it is not a simple case of enquiring into the legality of tender documents and its conditions. On the touch stone of the law laid down by the Apex Court, the Court also has to take note of the effort made by the authorities to break the cartel, and the consequences flowing there from, and the mistakes which have occurred in the process. The Court has to uphold the rule of law and keep in mind

the public interest and balance the competing interests.

92. We make it clear that this Court is not approving the terms and conditions modified by way of addendum. Now the subsequent events have shown that the modification requires reconsideration in the light of the experience gained. The authorities are at liberty to adopt such form and such conditions which in their opinion is suitable in executing the contract keeping in mind the requirements stipulated in the Municipal Solid Wastes (Management and Handling) Rules, 2000.

93. The petitioners herein in spite of opportunities being given they have not submitted their bid. They have chosen to remain outside the tender process and went on challenging the tender process. In the facts of this case, the problem which the City of Bangalore is facing is because of their conduct. Their conduct is not bona fide and, at their instance the tender process cannot be interfered by this Court. In view of the peculiar facts and circumstances of the present case, we do not think it would be a sound exercise of discretion on our part to upset the decision and void the contract. Therefore this is not a fit case in which we should interfere and grant relief to the petitioners in the exercise of our discretion under Article 226 of the Constitution of India. However, in order to see that in future such mistakes do not occur, it is appropriate to issue the following directions:-

(i) The tender notification should specify the exact area, showing the area by means of a sketch of each package.

(ii) A person is entitled to bid for all the packages. But, he shall not be awarded more than five packages of his choice.

(iii) Benami contracts and name lending should be strictly prohibited. If a person to whom a contract is awarded is found to be a benamidar, or name lender of the officials of the Corporation or the Corporators, including nominated members, or other elected members, the said contract is liable to be terminated.

(iv) There shall be no sub-contract or introduction of a new agency or clandestine arrangement for providing service. If the contract is assigned in any such manner, the contract is liable to termination.

(v) Specifications of the vehicles must be strictly in accordance with schedule II Sl. No. 4 of the Municipal Solid Wastes (Management and Handling Rules), 2000. Vehicles used for transportation of wastes shall be covered. Waste should not be visible to public, nor exposed to open environment preventing their scattering.

(vi) The technical evaluation must be strictly through e-portal and not through department/officials so that intervention of the authorities or outside agencies can be curbed.

(vii) The mobilization of men and material as stipulated in clause 15.9.3 of the tender document should be done in the presence of RTO, the BBMP, vehicle supervisor,

representatives of "Residents Welfare Association" and "Suchi Mitra".

(viii) No objection certificate from representatives of "Residents Welfare Association" and "Suchi Mitra" is to be obtained before release of payment on the monthly bills.

(ix) Once the contract is entered into, the particulars such as the name of the contractor with father's name, the address, the phone numbers, the number of vehicles employed with registration numbers and the make, number of persons employed shall be displayed in the website of the Corporation for the information of the general public.

(x) The tender notification shall be issued at least 120 days before the existing contract expires so that new contract can be awarded immediately after the expiry of the previous contract.

In the light of the above discussion, we pass the following:-

ORDER

(a) Writ Petitions are partly allowed.

(b) The tender condition prescribing concession to SC/ST individual both in respect of E.M.D. amount and solvency is hereby quashed. However, those SC/ST individuals who have secured the contract, in the event of their making good the shortfall namely 90% within two months from today, their contracts shall not be cancelled.

(c) The BBMP shall initiate steps to award contracts in respect of 30 packages which is awarded to B.V.G. India which they have offered to surrender.

(d) The contract awarded to B.V.G. India in respect of (9+3) 12 packages, where they are functioning shall not be disturbed.

(e) In respect of 8 packages awarded to B.V.G. India where breach is alleged, the BBMP shall take steps immediately to resolve the dispute, and in the event the said contracts are terminated, in respect of the same also the tender process shall begin immediately.

(f) While framing the tender conditions the Corporation shall bear in mind the observations and directions issued in this order supra and also the orders passed from time to time in the connected public interest litigation and the steps taken and commitment, received by the Corporation from the bulk generators of garbage, as well as industrial houses and group housing associations.

(g) The terms and conditions of tender shall be in conformity with the Municipal Solid Waste (Management and Handling) Rules, 2000.

(h) Parties to bear their own costs.