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IN THE HIGH COURT OF DELHI AT NEW DELHI

**Reserved on: 30.05.2017 & 14.07.2017
Pronounced on: 21.09.2017**

+ W.P.(C) 3162/2017 & CM No.13795/2017

TIRUPATI CYLINDERS PVT. LTD. & ANR Petitioners

versus

INDIAN OIL CORPORATION LIMITED & ANR

..... Respondents

+ W.P.(C) 3163/2017 & CM No.13797/2017

BHIWADI CYLINDERS PVT. LTD. & ORS Petitioners

versus

BHARAT PETROLEUM CORPORATION LIMITED & ANR

..... Respondents

+ W.P.(C) 3165/2017 & CM Nos.13801/2017 & 16990/2017

TIRUPATI CYLINDERS PVT. LTD. & ANR Petitioners

versus

HINDUSTAN PETROLEUM CORPORATION LTD. & ANR

..... Respondents

+ W.P.(C) 3167/2017 & CM No.13806/2017

BHIWADI CYLINDERS PVT. LTD. & ORS Petitioners

versus

INDIAN OIL CORPORATION LTD. & ANR

..... Respondents

- + W.P.(C) 3168/2017 & CM No.13808/2017
TIRUPATI CYLINDERS PVT. LTD. & ANR Petitioners
versus
BHARAT PETROLEUM CORPORATION LIMITED & ANR
..... Respondents
- + W.P.(C) 3169/2017 & CM No.13810/2017
BHIWADI CYLINDERS PVT. LTD. & ORS Petitioners
versus
HINDUSTAN PETROLEUM CORPORATION LTD. & ANR
..... Respondents
- + W.P.(C) 4771/2017
HYDERABAD CYLINDERS PVT. LTD. & ORS Petitioners
versus
UNION OF INDIA & ANR Respondents
- + W.P.(C) 4772/2017
HYDERABAD CYLINDERS PVT. LTD. & ORS Petitioners
versus
UNION OF INDIA & ANR Respondents
- + W.P.(C) 4776/2017 & CM No.20710/2017
FOX HILL CYLINDERS PVT. LTD. & ANR Petitioners
versus

HINDUSTAN PETROLEUM CORPORATION LIMITED & ORS
..... Respondents

+ W.P.(C) 4777/2017

HYDERABAD CYLINDERS PVT. LTD. & ORS Petitioners

versus

UNION OF INDIA & ANR Respondents

+ W.P.(C) 4778/2017

VANDANA KISHOR KELA & ORS Petitioners

versus

UNION OF INDIA & ORS Respondents

+ W.P.(C) 4779/2017

LAURUS INDUSTRIES PVT. LTD. Petitioner

versus

UNION OF INDIA & ANR Respondents

+ W.P.(C) 4780/2017 & CM No.20717/2017

FOX HILL CYLINDERS PVT. LTD. & ANR Petitioners

versus

BHARAT PETROLEUM CORPORATION LIMITED & ORS
..... Respondents

+ W.P.(C) 4782/2017 & CM No.20722/2017

DAKINI HEALTH FOODS Petitioner

versus

BHARAT PETROLEUM CORPORATION LIMITED & ORS
..... Respondents

- + W.P.(C) 4808/2017 & CM No.20804/2017
DAKINI HEALTH FOODS & ORS Petitioners
versus
INDIAN OIL CORPORATION LIMITED & ORS Respondents
- + W.P.(C) 4809/2017 & CM No.20805/2017
FOX HILL CYLINDERS PVT. LTD. & ANR Petitioners
versus
INDIAN OIL CORPORATION LIMITED & ORS Respondents
- + W.P.(C) 4810/2017 & CM No.20806/2017
DAKINI HEALTH FOODS & ORS Petitioners
versus
HINDUSTAN PETROLEUM CORPORATION LIMITED & ORS Respondents
- + W.P.(C) 5667/2017
KRISHNA CYLINDERS AND ANR Petitioners
versus
UNION OF INDIA & ANR Respondents
- + W.P.(C) 5668/2017
KRISHNA CYLINDERS AND ANR Petitioners
versus

	UNION OF INDIA & ANR	 Respondents
+	W.P.(C) 5676/2017	
	DAYA INDUSTRIES & ORS	 Petitioners
	versus	
	UNION OF INDIA & ANR	 Respondents
+	W.P.(C) 5677/2017	
	DAYA INDUSTRIES & ORS	 Petitioners
	versus	
	UNION OF INDIA & ANR	 Respondents
+	W.P.(C) 5678/2017	
	DAYA INDUSTRIES & ORS	 Petitioners
	versus	
	UNION OF INDIA & ANR	 Respondents
+	W.P.(C) 5692/2017	
	M/S KRISHNA CYLINDERS	 Petitioner
	versus	
	UNION OF INDIA & ANR	 Respondents

Present: Mr. Balbir Singh, Sr. Adv., Mr. Akhil Sibal, Sr. Adv. with
Mr. Amol Sinha, Mr. Anshum Jain, Mr. Rahul Kochar &

Mr. Vijay Verma, Advs. for petitioners in W.P.(C) Nos.3162/2017, 3163/2017, 3165/2017, 3167/2017, 3168/2017 & 3169/2017.

Mr. Abhijit Banerjee with Mr. Amit Goel, Advs. for petitioners in W.P.(C) Nos.5667/2017, 5668/2017, 5676/2017, 5677/2017, 5678/2017 & 5692/2017.

Mr. Tushar Mehta, ASG with Mr. Rajat Nair, Ms. Ayushi Gupta & Ms. Tannishtha Singh, Advs. for IOCL in W.P.(C) Nos.3162/2017, 3165/2017, 3167/2017 & 3169/2017.

Mr. Rajeev Mishra with Mr. Sanand Ramakrishnan & Mr. Madan Mohan Bora, Advs. for BPCL in W.P.(C) Nos. 3163/2017 & 3168/2017.

Mr. Neeraj Kumar Raheja, Adv. for HPCL in W.P.(C) Nos. 3165/2017, 3169/2017, 4776/2017 & 4810/2017.

Mr. Dayan Krishnan, Sr. Adv. with Mr. Rishi Agrawala, Ms. Niyati Kohli and Ms. Aakash Lodha, Advs. for applicants in CM No.16990/2017 in W.P.(C) No.3165/2017.

Mr. Arpit Shukla, G.P. for R-2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

MR. JUSTICE S. RAVINDRA BHAT

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Facts:

1. The Petitioners have been manufacturers and suppliers of LPG cylinders including 14.2 kg LPG cylinders across the country for the last several years. They challenge the tender conditions published by the Indian Oil Corporation Limited (hereafter "IOL", the first respondent), a Central Public sector undertaking and an oil marketing company ("OMC") and other OMCs (BPCL, HPCL) *inter alia*, for procurement of 14.2 kg LPG capacity cylinders, as discriminatory and arbitrary. The Union of India through its Ministry of Petroleum ("the Union" hereafter) is arrayed as the second

respondent (Both respondents are collectively referred to, hereinafter as “the Respondents”).

2. This court had indicated after consultation with counsel for the parties (when all these proceedings were taken up and bunched) that WP 3162/2017 would be treated as the lead case, for discussing facts, as all legal issues involved are identical. The petitioners have separate units situated in Muzzafarnagar, U.P., Dehradun and Bangalore, and have been supplying cylinders to OMCs including to IOL on a regular basis. IOL published a tender (“NIT” hereafter) for the procurement of about 234.59 lakh of 14.2 kg LPG cylinders with IS – 3196 (latest) specifications, with SC Valves (hereafter “the product”) at various LPG bottling plants on 30.03.2017. The bids were to be submitted till 19.04.2017 and the tender was opened on 20.04.2017 at 3.30 P.M. This tender was floated by the Respondents in a state wise manner, and for the first time it introduced a price band width, by mentioning the floor rate price and the ceiling rate price, and in case a bid by any tenderer fell outside of the band it could not be accepted.

3. The NIT created or classified the country into two geographical zones, for the purpose of allotment of supply contracts. It directed that special preference is to be given to manufacturers situated in the region defined as Zone 1 (comprising the entire states of Bihar, Jharkhand, Chhattisgarh, Odisha, West Bengal, the North Eastern states, Eastern Madhya Pradesh and Eastern Uttar Pradesh) over the manufacturers situated in Zone- 2 (remaining part of the country other than Zone-1) for the supply of 14.2 kg capacity LPG cylinders procurement in Zone-1. While evaluating, preference or priority in allotment was given to the manufactures/bidders situated in the said Zone 1 over other bidders situated in Zone 2. Any bidder

from Zone 1 who quoted in Zone 1 states was to be given preference over the bidders situated in Zone 2 even if the bidders quoted same floor rates.

4. This NIT, based on the policy formulated by the Union, the controlling authority over centrally owned OMCs, is questioned in all these writ petitions as discriminatory and arbitrary. This court had issued notice to the Respondents and was informed that an effort to centralize similar proceedings pending in various High Courts was on, in the form of a transfer petition before the Supreme Court. Eventually, by order of the Supreme Court, dated 27 April 2017, the transfer petitions were disposed of; various writ petitions pending before the Allahabad, Andhra Pradesh, Punjab & High Courts were transferred to the file of this court. On account of this development, this court accommodated counsel appearing on behalf of petitioners in those proceedings as well and heard submissions on their behalf.

5. Before proceeding to outline the rival submissions and contentions, it would be advantageous to notice the salient features of the NIT. It classified (Clause 2) prospective bidders into three categories, i.e., (i) “*existing bidders*” manufacturers of cylinders who should have supplied a minimum of 50,000 Nos. of 14.2 kg cylinders from all units put together and having the same PAN number, to all PSU OMCs during any three previous years (March 2014-February 2015; March 2015-February 2016; March 2016-February 2017). The bidders also had to possess valid PESO and BIS licenses for manufacture of 14.2 LPG cylinders in terms of IS-3196 Part I and relevant ISO 9001:2015 certifications. (ii) “*New vendors*” are manufacturers with valid PESO and BIS licenses for manufacture of 14.2 kg LPG cylinders in terms of IS-3196 Part I; (iii) “*Upcoming new vendors*”

were bidders who “are already in the process of setting up a new unit for manufacturing of cylinders and are in a position to submit acknowledged copies of the receipt of application from PESO and BIS as on the due date of tender”. Echoing the classification laid down in Clause 2, Classification 3, (which deals with pre-qualification conditions) additionally sets out that Existing, New and Upcoming new vendors should also possess PAN number; importantly, it prescribed that these three categories of bidders should not be in the “Holiday list/Black Listed by IOCL/BPCL/HPCL and/or MOP & NG” (Clause 3.0 to Clause 3.3). Clause 3.4 stated that if Upcoming New Bidders did not obtain and furnish PESO and BIS license within 3 months from their date of Letter of Intent (“LOI”), their LOIs would be cancelled (Clause 3.4). The minimum quantity offered for each tenderer was 1,00,000 units of 14.2 kg cylinders per unit and multiples of 10,000 thereafter for the contract period (Clause 4). Clauses 6 and 7 indicated a separate category of preference- to firstly, central Public Enterprises, in terms of extant policies and to Micro and Small Enterprises (MSEs) and MSE owned by Scheduled caste or Scheduled tribe entrepreneurs in terms of purchase preference under prevailing state policy, for which separate conditions were detailed.

6. The most contentious part of the NIT is contained in Annexure 5 to the bid document which is part of the NIT (in the case of IOC; in the case of other OMCs, the conditions are identical, but they may be located at a different part of the NIT). It would be convenient to extract the same, at this stage:

“a. Classification of Zones for the purpose of Order Allotment:

Order allotment shall be carried out separately for two different Zones. Zone-1 comprises of the following 8 nos. States/Group States:

- a. Entire State of Bihar*
- b. Entire State of Jharkhand*
- c. Entire State of Chhattisgarh*
- d. Entire State of Odisha*
- e. Entire State of West Bengal*
- f. North East States comprising of entire states of Assam, Meghalaya, Manipur, Mizoram, Tripura, Nagaland, Sikkim*
- g. Eastern Madhya Pradesh comprising of Jabalpur, Satna, Rewa, Chhindwara, Katni, Shahdol, Mandla, Singroli, Panna, Damoh, Anuppur, Umaria, Sidhi, Dindori, Balaghat, Seoni, Narsimhapur districts*
- h. Eastern Uttar Pradesh comprising of Gorakhpur, Jaunpur, Varanasi, Allahabad, Faizabad, Basti, Gonda, Balia, Azamgarh, Sultanpur, Balrampur, Kushinagar, Deoria, Mau, Gazipur, Chandoli, Mirzapur districts*

Zone-2 covers the rest of India not included in Zone-1

b. Evaluation Criteria:

- i. Through this tender, BPCL seeks to surface the lowest price supplier for each state. Hence, price bid evaluation shall be done at the level of individual state.*
- ii. Tender will be evaluated State-wise on the basis of “Net cost to BPCL” quoted by the tenderer. Only “Net cost to BPCL” that fall within the price band declared by BPCL shall be acceptable and valid.*
- iii. Ranking of tenderers will be based on valid “net cost to BPCL” quoted by them. Order distribution shall be done such that there are minimum two tenderers for each state and not*

more than 80% requirement of any state is allocated to a single tenderer.

iv. Considering the afore-mentioned distribution rule, order allotment shall be done such that the procurement at the floor rate of the price band of each state is maximized.

v. Further, Cylinder manufacturing units situated in Zone-1 would be given orders up to their offered quantity subject to such units offering floor rates in at least 5 States/ Group States/ Region out of the 8 States/ Group States/ Region that comprise of Zone-1. This preferential allotment would however be limited to the tendered quantity of these States/ Group States/Regions for only those vendors whose bids are received at floor rate in these States/ Group States/Regions.

It may be noted that vendor quoting for the State of UP & MP shall be considered to have quoted for the Eastern Madhya Pradesh (Region) & Eastern Uttar Pradesh (Region) of Zone 1. Vendors quoting in one or more states in Assam, Sikkim and North east would be treated as single state for the purpose of determining the eligibility for preferential treatment in Zone-1

This preferential treatment would not be applicable for the purpose of risk purchase or pruning & reallocation.

c. Order Allotment Criteria at Floor rates: Based on the above, order allotment would be done in a three-step process described below:

1 Order allotment at floor rates for Zone-1:

In this step, order allotment for only Zone-1 shall be done to cylinder manufacturing units situated in Zone-1 and qualifying for a preferential allotment (pl. refer clause B.v above). They would be given orders up to the quantity offered by such units, limited to the tendered quantity of the Zone- 1 States/ Group States/Regions where such units have quoted at the floor rates.

In the event of the total offered quantity by units situated in Zone-1 exceeds the tendered quantity of all the State/ Group State/Region lying in Zone-1, allocation of quantity shall be equally divided (unit-wise) amongst all the tenderers qualifying for preferential allotment and have quoted at the floor rate in that state/group state/region, subject to the offered quantity of such tenderers (unit-wise).

In case any tendered quantity of Zone-1 remains unallocated as above, it shall flow to the next step of allotment.

(2) Order allotment at floor rates for Zone-2 and unallotted quantity of Zone-1:

In the next step, only quotes received at the floor rates shall be considered and 75% requirement of Zone-2 and 75% of the unallotted requirement of Zone-1 would be allotted.

In case several vendors quote at the floor rate of any state then its 75% requirement would be distributed amongst them in the ratio of their proven capacity. A proven capacity based on past performance would be determined for all existing vendors by the following method:

<i>Period</i>	<i>Quantity supplied in 12 months to all OMCs</i>	<i>Weightage</i>	<i>Weighted performance for all OMCs</i>	<i>Quantity supplied to Corporation in 12 months</i>	<i>Weightage</i>	<i>Weighted performance for Corporation</i>
<i>Mar'14 - Feb'15</i>	<i>D1</i>	<i>25%</i>	<i>D1*25% = X1</i>	<i>A1</i>	<i>100%</i>	<i>A1*100% =X4</i>
<i>Mar'15 - Feb'16</i>	<i>D2</i>	<i>25%</i>	<i>D2* 25% = X2</i>	<i>A2</i>	<i>100%</i>	<i>A2*100% = X5</i>
<i>Mar'16 - Feb'17</i>	<i>D3</i>	<i>25%</i>	<i>D3* 25% = X3</i>	<i>A3</i>	<i>100%</i>	<i>A3*100%= X6</i>

Proven capacity of nth vendor (V_n) = Highest of X1_nor X2_n or X3_n or X4_nor X5_norX6_n

Thereafter, one state shall be taken at a time and 75% requirement of that state would be divided amongst all the existing bidders who have

quoted at floor rate in the ratio of their proven capacity as calculated above. Balance quantity of each Zone-1 vendor (i.e. total quantity offered less allotment already done in previous step, if any) would be considered available for this step.

If this part order exceeds the quantity offered by that vendor, then his order allotment would be reduced to the quantity offered. For all such cases, the difference between the sum total of the part order and the quantity offered would be carried forward to the next step of allotment.

(c) Allotment of balance quantity

Allotment of balance quantity would be done on least cost-to-BPCL basis. In this step, all the valid quotes received would be considered and all bidders (including existing /new / upcoming new unit/units) quoting the same rate for any state shall be treated at par and accordingly balance requirement would be equally divided amongst the units (for vendors having multiple units, each unit would be considered as a separate entity) to the extent of balance quantity of each vendor. Balance quantity of each vendor (i.e. total quantity offered less allotment already done in previous steps, if any) would be considered available for this step.

Adding the allotments made in steps (1), (2) and (3) as mentioned above would give total allotment on each vendor.

(4) Order Reallocation

The entire allotment done at the floor rates as described above would be reallocated amongst those states where such orders have been allotted and vendors who have quoted at floor rates, such that the overall vendor accrual is maximized without changing the state-wise allotment at floor rates, vendor-wise allotment at floor rates and the net cash outflow of OMC.

(5) Minimum order assurance for vendors quoting at floor rate in minimum 10 states

If required the allotment in step C above would be redone to ensure that the order on all tenderers who have quoted at floor rates in at least ten states, is minimum 50,000 cylinders. However, for vendors having multiple units (i.e. group of units having same PAN number), allocation would be redone only if the aggregate order allotment (at group level) on such vendors is less than 50,000 multiplied by the number of units of the vendor, provided he has quoted at floor rates in at least ten states in such units.

Say, a vendor has 3 units (A, B and C) and gets total order allotment of 80,000, 20,000 and 30,000 cylinders in units A, B and C respectively aggregating to 1,30,000 in regular course.

If all the three units/vendor have quoted in at least 10 states then his order entitlement would be

$$50,000 \times 3 = 1,50,000 \text{ cylinders}$$

Thus an additional order of 20,000 cylinders would be added to units B and C.

Another, vendor has 3 units (D, E and F) and gets total order allotment of 80,000, 50,000 and 30,000 cylinders in units D, E and F respectively aggregating to 1,60,000 in regular course.

Even if all the three units/vendor has quoted in at least 10 states, he is not entitled for any additional orders i.e. his order entitlement would remain the same i.e. 1,60,000 as his order entitlement would be $50,000 \times 3 = 1,50,000$ cylinders.

In case one or more tenderers who have quoted at floor rates in at least ten states are not getting 50,000 cylinders (or vendor with multiple units are not getting minimum orders as explained above) even after redoing step C-3, then the allocation in step C-2 would also be redone to allot the shortfall.”

Contentions of parties

I. Submission of petitioners

7. The Petitioners attack the new policy as making unreasonable changes in the terms and conditions to the prevailing LPG cylinders procurement policies, thereby significantly altering the entire public policy in procurement of such LPG cylinders. These drastic changes were not preceded by any notice/ nor prior intimation was issued on part of the Respondents, inviting the associated bidders for their objections and suggestions. Unilaterally, the Respondents made sweeping and wide-ranging changes that adversely impacts the petitioners' right to carry on business and commerce, in relation to manufacture and supply of LPG cylinders.

8. The Petitioners contend that the OMC abused their dominant position as purchasers of the products. They were fully aware that only 3 OMCs could obtain these cylinders and the suppliers/bidders including the Petitioners could not supply the cylinders to any third parties, as it is impermissible under the law. The wholesale changes in the procurement policy impugned would adversely affect the supply and diminish fair competition with such one sided conditions that favoured only the bidders situated in Zone-1.

9. It was submitted that Clause 3.1 of the said tender was contrary to the prevailing policy of the OMCs, whereby any individual/manufacture not possessing a license became entitled to bid for the tender. This is clearly arbitrary and without any justification as the same requires a mandatory license before bidding for the tender.

10. The Petitioners argue that the impugned policy discloses clear arbitrariness and unreasonableness which is established by the fact that the new upcoming bidders located in Zone- 1 are to be given preference treatment for tenders on their offered quantity (of LPG cylinders bid by them in the said zone). In other words, such new and upcoming suppliers were to be preferred for the quantities offered by them, over the Petitioners, who were proven and established suppliers. The Petitioners argue that various other clauses of the tender document were arbitrary, unreasonable, unfair and biased.

11. It was argued on behalf of the petitioners by Mr. Vikas Singh, Mr. Balbir Singh and Mr. Akhil Sibal, Senior Counsels, that the zoning policy put in place by the tender based on the respondents' creation of two zones is without any justification, and is contrary to public policy and places business units and manufacturers in Zone 2 at a disadvantage. This amounts to hostile discrimination, based on location of the business enterprise, inasmuch as it assures preference to units in zone 1 on the one hand, and does not confer equal preference to zone 2 units in the zone 2 areas. Such geographical allocation is not based on any cogent reasons and fosters differences.

12. It was argued that manufacturers situated in Zone 1 have been given preference over the manufacturers situated in Zone 2 arbitrarily, with no visible *rationale*. The terms and conditions of the tender showed a clear monopoly and bias on the part of the respondents for the manufacturers situated in Zone 1, which affects the installation capacity and supply of the cylinders of the Petitioners and others located in zone 2.

13. It is argued that the impugned terms and conditions depicted that the Petitioners would get orders in Zone 1 only in case any tendered quantity of Zone 1 remained unallocated from the bids quoted by the manufacturers situated in the said Zone 1. Thus, as between two sets of bidders, an artificial geographical based discrimination, having no nexus with the object sought to be achieved by the tender policy, was created. It was argued in this context that the ratio of total quantity offered in Zone 1 and Zone 2 were almost 45%: 55%, however, the ratio of units situated in Zone 1 and Zone 2 were around 10%: 90%. This has resulted in difference (in allocable proportions of quantities to be given to suppliers) created by the UOI/OMC without any criteria or *rationale*. This difference is purely geographical, unsupported by any reasonable or tested classification premised on scientific or reasonable study. It has the results in treating equals, unequally and thus violates Article 14. It is further submitted that the NIT, on the basis of the UOI's new policy artificially creates or divides states like Eastern Uttar Pradesh and Eastern Madhya Pradesh based on no rational objective and criteria that has no sustainable basis. Furthermore, it is argued that the quantity wise allocation of 106,61,920 (for Zone 1 states, in aggregate) and 127,97,030 (for Zone 2 states) has no co-relation with the production capacity of manufacturers of the said two zones. In this context it is urged that as against the established manufacturing capacity available for Zone 1, i.e., 37,72,305 cylinders, the capacity of Zone 2 manufacturers – as on 31-03-2017 was 4,07,51,943. This meant that the capacity of Zone 1 manufacturers to cater to demands of consumers in that zone was extremely limited. To require them to establish capacity within a short time to gear up to meet the colossal demand, even while shutting out established lines of

supply from opportunity of carrying on business on equal terms, starkly violated the principle of equality of law, under Article 14 of the Constitution of India.

14. It is submitted that the tender process is based on a two bid system, priced and un-priced. The tender, *de hors* the impugned clauses, while granting a special status to the regions comprising Zone 1, did so, with a view to develop those regions in line with the Government of India's thrust towards backward areas. However, the apparent underlying reason instead seemed to be that most steel suppliers were based in Eastern India and freight would be less for vendors/bidders based in Eastern India. This reasoning is unsound and incorrect because if Zone 2 vendors based on their efficiency can deliver or supply cylinders at the same price then they cannot be discriminated against on grounds of efficiency in public procurement. Here it was emphasized that the zoning *differentia*, based on location and proximity to raw material availability, advanced by the respondents to justify the policy is *per se* unsound, because it ignores efficiencies acquired by established producers in other zones, who, because of experience and knowledge in business, can deliver the product at the same rates as those in Zone 1. In such a case, where bidding or award of tender is to be considered, the origin of the manufacturer, or the product is irrelevant; rather, it is the price at which it is offered, other things being equal. As between manufacturers from either zone, who bid in one particular zone, the sole relevant criterion would be the price at which they offer the goods or articles. In abandoning such a uniform norm and establishing the preference-based *regime*, the respondents have manifestly discriminated between two sets of manufacturers.

15. It is argued that the conditions insisted for established manufacturers in the country as a whole on the one hand, and relaxation for the cylinder manufacturing units situated in Zone 1 which are extended to some and denied to others, is not sustainable and is liable to be set aside. It is argued that the impugned tender, under the garb of economic backwardness of Zone 1 encourages procurement of cylinders from existing vendors only, and will not lead to any new capacity creation or new development as the tender seeks to incentivize only existing vendors. Counsel also argued that allowing upcoming new vendors to apply for obtaining all requisite licenses for operating as manufactures contravenes prescribed regulations for checking the supply of LPG cylinders, an essential commodity and governed by the LPG Control Order of 2000 and the Gas Cylinder Rules, 2004 issued under the provisions of the Essential Commodities Act, 1955 in which the new bidders do not have any say.

16. The petitioners' counsel submit that the Union and OMCs acted irrationally in ignoring these regulations. The impugned policy, in facilitating those who merely apply for licenses (and not confining itself to those who have them) subordinates public interest to the private interests of the so-called units and enterprises whose capacities are unproved and untested. Counsel underscored that the Union and OMCs cannot justifiably equate those having essential and mandatory licenses and permissions with those who do not possess such clearances. It is argued that permitting both a level playing field in terms of same norms of participation, rewards those not deemed qualified in terms of the essential conditions of the policy and the law, by privileging them, as against those who in fact answer such

prerequisites, because such privileged category are allowed an illegitimate advantage, unfairly.

17. It is contended that the order of allotment criteria designed by the Respondents in terms of clause C of the special terms and conditions of the tender are illegal, biased and arbitrary as the order of allotment is designed in such a way that even though the bidders who are situated outside Zone 1 (including the Petitioners) bid for the same floor rates, they would not be considered. This amounts to hostile discrimination based on nothing more than geographical location. It is premised on a bland straightjacket assumption that all units in the two zones are different, which is factually baseless. Learned counsels submit that if indeed, the Respondents were to promote new units, granting preferences to such new entrants or manufacturers in both zones would have been logical and acceptable. However, by preferring zone 1 new entrants to the extent of granting dispensation even from mandatory licensing on the one hand, and not showing any preference to new entrants in zone 2 for similar treatment, or in regard to allocations (in zone 1) the Respondents have resorted to discrimination. Learned counsel submit that besides violating Article 14, such pure geographical classification violates Article 15 (1) and 19 (1) (d) of the Constitution of India. Learned senior counsel relied upon the judgments reported as *D.S. Nakara Vs. UOI* AIR 1983 SC 130; *Mahabir Auto Mills v State of J & K* 1996 (11) SCC 39, *Sarbananda Sonowal v Union of India* 2005 (5) SCC 665; *State of Maharastra v Indian Hotels and Restaurants Association* 2013 (8) SCC 519; *Gharda Chemicals Limited vs. Central Warehousing Corporation*, 118 (2005) DLT 159; *National Council for Teachers Education v Shri Shyam Shiksha Prashikishan Sansthan & Ors*

2011 (3) SCC 238 and *Nidamarti Maheshkumar v State of Maharashtra* 1986 (2) SCC 534.

18. It is argued that the ratio of total quantities offered in Zone 1 and Zone 2 are almost 45%: 55%. However, the ratio of units situated in Zone 1 and Zone 2 are around 10%: 90%. The ensuing distribution disparity created by the Respondents through the policy is therefore, discriminatory and violates Articles 14 and 301 of the Constitution of India. The Respondents' hostile intent is most evident in the effect as well as the choice of favouring Zone 1 suppliers on the one hand, and discriminating against Zone 2 manufacturer-suppliers on the other. The advantages of the latter category are neither inherent nor conferred because of conscious state policy of the areas where they are located; rather they are the result of entirely subjective factors such as innovation, entrepreneurial ingenuity, capital generation capacity, employment practices and a host of other factors that are uniquely developed, over the years. Therefore, the industrial capabilities established by the exertions and work of Zone 2 units, cannot be the legitimate basis of the disadvantage showed to them and the barriers to trade, created by the impugned policy. Indeed, if the respondents wished to promote new units, there were other reasonable and legitimate techniques, such as granting quotas for new entrants, relaxation in previous performance norms, etc. Even parity of new enterprises in both zones, in regard to opportunities to secure the contracts, would have resulted in fresh capacity generation, without disrupting existing units. However, the zoning and the resultant bundle of preferences shown to zone 1 units, without anything more, is arbitrary and discriminatory. It is stated that the so called *differentia* is nothing but a disguised illogical geographical based class, forbidden by

Article 14. In this regard, it was argued that the irrationality writ large in the classification strikes at the root of the classification, outlawing it. Counsel relied on the judgment reported as *Tata Cellular v Union of India* 1994 (6) SCC 651, *Monarch Infrastructure (P) Ltd v Ulhasnagar Municipal Corporation* 2000 (5) SCC 287; *Michigan Rubber (India) Limited Vs. State of Karnataka & Others*(2012) 8 SCC 216 and *Quippo Oil & Gas Infrastructure v Oil Natural Gas Corporation* 2016 (230) DLT 384.

19. It is further argued that the stated objective of economic development of Zone 1 underlies a guarantee of supply contract of a certain minimum number of cylinders for which new vendors are to bid, in order to incentivize supply in Zone 1. The *rationale* of the Respondents is that of optimal freight cost for East India (Zone 1) based producers. Yet, that subsidy burden for cylinders through means of the present policy will be reduced, is a flawed premise, because 'cooking gas' is what is subsidized and not the cylinder. Besides, argue the petitioners, the *rationale* of freight cost and minimal raw material movement is a simplistic argument, given that the structure of bidding presupposes floor prices, which will tend to drive down the cost, rather than increase it. In other words, the underlying advantage seen to be in favour of Zone 1 manufacturers is in fact imaginary, because they, in order to be competitive, are to bid at the lowest possible rates, like all other tenderers.

20. It is submitted that the Respondents' action, in encouraging uniform, all India, capacity expansion in the past- on the one hand, and the sudden *volte face*, by creating an artificial restraint on supply of such increased capacity to manufacturers of one zone (Zone-1) on the other hand, is biased and unreasonable. The ostensible objective of the impugned policy is based

on improper facts and assumptions, as the existing registered production capacity is less than the requirement. Therefore there is no reasonable basis for creating the impugned tender conditions specifically for Zone 1 manufacturers. Tender conditions for the requirements of Zone 1, requiring existing vendors to quote floor price for 5 out of 8 Eastern states, violates the tender condition for price discovery for these states and are thus liable to be set aside.

21. Mr. Sibal also argued that the said gas policy is only for the 14.2 kg cylinder and not for the 5kg cylinder. However both are used for cooking and the Ujwala Yojana programme with cylinders generally, not differentiating between the 14.2 kg and the 5kg cylinders. This fact, counsel argues, exposes the conjectural nature of the classification, rendering it suspect. Counsel stated that for Zone-2 the proven capacity is 5.38 crore, whereas the total requirement is 5.51 crore units and the allocated quantum is 3.17 crore. According to Mr. Sibal this *ipso facto* showed the impact and inefficiency of the policy move.

22. Counsel argues that inasmuch that the rationale behind the policy has been stated to be penetration (i.e. availability of gas cylinders to households) such a *rationale* is valid if the number of bottling units were increased and diversified. Even accepting the policy aims and objectives, its terms are destructive of the object. He argues that a manufacturer in Zone-2 who is closer to the bottling plant is actually deprived in preference to a much farther located Zone-1 manufacturer.

23. Learned counsel also argued that the NIT violates the MSME procurement norms as issued by the Government of India, which provide that 25% of all public procurement has to be done through MSMEs and in

fact most of the cylinder manufacturers are MSMEs. The tender seeks to carve out eastern based vendors who are MSMEs for preferential treatment which is not the intention of the policy.

II. Submissions of the Respondent

24. The OMCs argue that the impugned tenders seek to procure a total quantity of 551.60 lakh LPG Gas cylinders at an estimated value of ₹ 6668.84 within 12 months from the date of placement of purchase orders. The break-up of the quantity of cylinders to be procured by the OMCs are as under:

- (i) BPCL- 167.01 lakh cylinders at a total cost of ₹1968.02 crores.
- (ii) HPCL- 150.00 lakh cylinders at total cost of ₹ 1833.44 crores.
- (iii) IOCL- 234.59 lakh cylinders at total cost of ₹ 2867.38 crores.

25. The purpose of the procurement and the system evolved for it (which is under challenge) has public interest intrinsically woven into it. The reasons given by the respondents for the zonal classification are that all the three OMCs have their bottling plants in each state. In many states, the states are divided into zones from where LPG gas can be filled. However, as on date a substantial number of manufacturers are situated only in NCR, Himachal Pradesh and Hyderabad and they enjoy the dominant position in the country. The respondents point out that as on date, the existing manufactures (situated mainly in the northern part of the country) source steel (which is the main ingredient in manufacture of LPG gas cylinder) from Jharkhand, Orissa or Chhattisgarh and after manufacturing the

cylinders transport them back to the eastern region (which again mainly consists of Jharkhand, Orissa, Chhattisgarh and other North Eastern States) resulting into avoidable increase in costs of empty gas cylinders.

26. The existing cylinder manufacturers are not only in a dominant position in the country to stall every competition, but have acquired a monopolistic character. As a matter of fact, the Competition Commission of India had to pass a detailed order holding that the existing manufacturers are even guilty of “cartelization”. The Union, given the above circumstances, aims for a benevolent long term economic policy to reach poor women belonging to backward class communities and falling in the below poverty line (BPL) category. It is submitted that the Union announced its pan-India socio-economical long term policy i.e. Pradhan Mantri Ujjwala Yojna (PMYU) scheme under which crores of women belonging to BPL (initially targeted at 5 crore women) and who were using conventional fossil fuel till date are to be allotted new LPG cylinder connections free of cost. The CG has earmarked ₹ 8000 crores for this initially.

27. The selection of beneficiaries, under the said scheme would be as under:

“5. Selection of beneficiaries

While the selection of beneficiaries would be from BPL families only, preference would be given to SC/ST and weaker sections of society. While providing the new connections to BPL households, priority would be given to the states which have lower LPG coverage (compared to the national average) as on January 1, 2016.”

28. The NIT was issued by OMCs in furtherance of and to give effect to the national socio-economic policy evolved by the Central Government viz.,

PMUY. It is urged that to give effect to the said policy in letter and spirit and to ensure that the said policy is sustained and given effect to in the years to come, a commercial decision was taken by OMCs to classify the country in two zones so as to create self-sufficient local market zones and to achieve other objects elaborated in the affidavits/counters. It is argued that OMCs as commercial entities enjoy a legitimate right and choice as to with whom and on what terms they contract with. Further, as OMCs are dealing with a notified essential commodity, scarcity of which leads to adverse civil consequences, they also have a constitutional obligation to equitably distribute the product. In discharging that obligation the respondents can identify areas/sectors which need promotion to ensure self-sufficient market/zones are created, where right from cylinder manufacturers, bottling plants and consumers- all would be located in one zone/area, so as to meet the ever increasing demand of the consumers.

29. In the peculiar case of distribution of LPG gas cylinders as domestic fuel, timely delivery of LPG gas cylinders to consumers, at their doorstep, is essence of the said mandate. The said mandate cannot be sustained for years, implemented or executed till all the facilities/ancillary industries, including LPG cylinder manufacturing units required to produce and deliver the final product, i.e. LPG, is also equitably and proportionally manufactured across the country. In absence thereof, disruption of supply chain is inevitable. In the longer run, the OMCs cannot rely on supplies from a limited part of the country to meet the demand in the rest of the country. It is stated that to cater to the domestic fuel requirement of the citizens located in different geographical locations, it is imperative for OMCs to develop and/or promote all the facilities/industries such as bottling units, cylinder manufacturing

units etc. in the same or nearby area where consumers of domestic fuel i.e. bottled LPG reside.

30. Mr. Tushar Mehta, learned Additional Solicitor General, who appeared for the Respondents, argued that for implementation of the policy objectives, keeping in mind monopolistic concentration of cylinder manufacturing in a particular geographical areas the OMCs decided to promote greater competition procurement of LPG cylinders, to develop cylinder manufacturing industries in areas where cylinders are actually to be supplied and to bring in an equitable policy of granting level playing field to cylinder manufacturers by bifurcating the procurement market of LPG cylinders into two geographical markets. This is a *bona fide* effort, *inter alia*: (a) To bridge the gap between demand and supply of LPG cylinders in eastern area of the country; (b) to remove entry barriers, if any, for new/existing manufactures of LPG cylinders located in under-developed geographical markets of eastern India (where demand for LPG cylinders has grown manifold) and which areas have remained under developed over the years-from where not only the raw material, i.e. steel, used in manufacturing gas cylinders is sourced, but is an area in which the bottled LPG is also sought to be sold and consumed. The ASG argued that the impugned decision is also aimed at curbing the menace of monopolistic pattern clearly visible amongst cylinder manufacturers based in other parts of the country.

31. Counsel urged that to secure a continuous LPG cylinder supply having regard to local demand i.e. within local zones of the state (that are directly dependent on the availability of the empty gas cylinders procured from private manufacturers), the OMCs, considering the larger public interest, as a matter of policy, thought it appropriate to develop self-

sufficient local manufacturing markets, where not only the bottling plant, but also, the cylinder manufacturing units would also be located in the same zone or at a place near to the bottling plant. This apart from bridging the demand and supply gap, in the considered anticipation of the OMCs, was also to result in lowering the price of the cylinders (economies of scale) in the eastern areas categorized by OMCs under Zone 1 where OMCs could obtain cost advantages due to size, output or scale of operation.

32. The ASG urges that the standard adopted for selecting the “*economically backward region*” under the PMUY scheme was based on parameters such as *per capita* income as represented by gross state domestic product (GSDP) per capita; LPG penetration as representation by the percentage of total household having LPG connections *vis-à-vis* the total number of households in a state. The tabular representation of the relative data for the selected states/region was highlighted. The same is reproduced as follows:

S. No.	State	GSDP per capita (2013-14) INR	Penetration as in Jan 16
1.	Bihar	31,199	30.6%
2.	Jharkhand	46,131	26.8%
3.	Odisha	52,559	30.0%
4.	Madhya Pradesh	51,798	41.3%
5.	Chhattisgarh	58,547	30.2%
6.	Uttar Pradesh	36,250	54.1%
7.	North East	52,495	45.3%
8.	West Bengal	70,059	50.3%
9.	National Average	73,591	61.3%

Thus, as per the aforesaid, the priority states having less than national average as on 01.01.2016 were identified as State of Bihar, Jharkhand,

Odisha, Madhya Pradesh, Chhattisgarh, Uttar Pradesh, West Bengal and the North Eastern states.

33. It was argued that as on date it was observed from the website of BIS (licensing authority) that there were in all 133 BIS licensed manufacturers. However, out of this 133, only 23 vendors were from the eastern part of the country (Zone-1 under the present tender). At this stage since the launch of PMUY w.e.f. 01.05.2016, quantities supplied by the manufacturers falling in Zone-1 and Zone-2 needs to be pointed out which were as under:

OMC	Supplies by Zone-1 vendors from 01.05.16 to 31.03.17	Supplies by Zone-2 vendors from 01.05.16 to 31.03.17
IOCL	16,59,478	1,74,05,506
BPCL	9,39,913	1,16,44,271
HPCL	11,72,914	1,17,02,166
Total	37,72,305	4,07,51,943.

The ASG urged that the figures illustrate the disparity in the supply and monopolistic dominant position of suppliers situated in Zone-2. In the current year, the projected requirement for OMCs is estimated to be as under:

OMC	Total tender quantity (cyls. In lakhs)	Zone-1 requirement (cyls. In lakhs)	Available balance quantity in zone II (cyls. in lakhs)
IOCL	234.59	106.60	127.99
BPCL	167.01	66.80	100.21
HPCL	150.00	60.30	89.70
Total	551.60	233.70	317.90

34. Since the demand on Zone 1 surged to 233.70 lakh cylinders, therefore, the OMCs in public interest, applying norms of commercial prudence to develop the Zone-1 capacity commensurate with the requirement of cylinders in Zone-1, formulated the present tender conditions to enhance capacity in Zone-1. This scheme would ultimately lead to creation of more robust and efficient systems being placed to meet the energy requirement of the country. The scheme further helps underdeveloped areas to develop and ensure that monopolistic trends in the LPG manufacturing industry are effectively addressed. It is also highlighted that with improvement of manufacturing capacities in Zone-1, OMCs will get cost and consequential benefits.

35. The ASG argued that demand for empty cylinder after the PMUY scheme nearly doubled- classification of zones in this changed scenario, instead of entailing any detrimental effect on the business of petitioners in fact gives them an opportunity to increase their supply/business as compared to last year, under the present tender. Reliance was placed on the following figures:

OMC	Total procurement from 01.05.2016 to 31.03.2017	Total procurement from 01.05.2015 to 31.03.16	% increase
IOCL	17,493,285	17,666,415	0.98
BPCL	12,584,184	7,490,528	68.00
HPCL	12,875,080	8,141,181	58.15
Total	42,952,549	33,298,124	28.99

After the launch of PMUY w.e.f. May, 2016, the total requirement of BPCL and HPCL has gone up by 68% and 58.15% respectively, while total requirement of three OMCs put together has gone up by 29%. Also Zone-1

requirement for the current tender is only about 40% of the total requirement of the country. Thereby, at least 60% requirement of the total quantity of cylinder sought to be procured would still be available for Zone-2 cylinder manufacturers. According to counsel, that demand for Zone 2 can increase, because the NIT does not place any embargo for Zone-2 manufacturers to participate in Zone 1 bidding, though lower in the process. Given the deficit in proven capacity of the Zone-1 manufacturers viz., the total requirement in Zone-1, the said percentage is most likely to go up. The break-up of the total requirement of all the OMCs viz., zone wise requirement of the OMC for this year is as under:-

OMC	Total requirements of new empty LPG cylinders this year (in lakhs)	Total requirement of new empty LPG cylinders this year in Zone 1 (in lakhs)	Total requirement of new empty LPG cylinders this year in Zone 2 (in lakhs)
IOCL	234.59	106.60	127.99
BPCL	167.01	66.80	100.21
HPCL	150.00	60.30	89.70
Total	551.60	233.70	317.90

36. It was argued by the ASG that in order for cost efficiency to be achieved by bifurcating the country into two zones- that after much deliberation and analysis of the aforesaid data available with the OMCs, it was decided that they should change its procurement policy giving priority to the manufacturers situated and doing manufacturing activities in priority States, to place the OMCs in an advantageous position. It is additionally argued that no embargo has been placed, under the impugned tender for the petitioners to participate in Zone-1 bidding- No price preference is given to manufacturers located in Zone-1. Furthermore, the preference given to

Zone-1 cylinder manufacturers is also circumscribed by onerous conditions of eligibility prescribed under the tender document.

37. It was argued that permitting the upcoming new bidders to be at par with the existing bidders to participate in the tender who do not have requisite licenses and approvals under BIS and PESO at the time of opening of tender, is a further reasonable classification made to satisfy the legitimate expectation of new cylinder manufacturers of participating in the tender process and to grant them a fair opportunity to attain requisite qualifications for supply of LPG cylinders within 3 months of the date of issue of the letter of intent and before the date when the contract is to be actually performed. The ASG also provided a tabular statement, in the written submissions, to say that several manufacturers (including five petitioners) had units in both Zone 1 and Zone 2.

38. The ASG argued that judicial review of matters concerning award of tenders, is limited. As there was a clear public interest in the matter, the Courts should not interfere with this policy decision. Moreover, it was contended that the terms of invitation to tender were not amenable to judicial review. In support *Reliance Telecom Limited v. Union of India*, 2017 SCC Online SC 36; *Census Commissioner v. R. Krishnamurthy* (2015) 2 SCC 796 *Union of India v. M. Selvakumar* (2017) 3 SCC 504; *Villianur Iyarkkai Padukappu Maiyam v. Union Of India*, (2009) 7 SCC 561 were relied upon.

39. It was contended by the Respondents that in economic matters especially, the government enjoys wide latitude of discretion. In such matters, geographical classification which is based on sound rationale and proper reasons is not *per se* violative of Article 14. In support of this

argument, *Parisons Agrotech (P) Ltd v. Union Of India*, (2015) 9 SCC 657; *Anant Prasad Lakshminiwas Generiwal v. State of AP*, AIR 1963 SC 853 *State of Kerala v. TP Roshana*, (1979) 1 SCC 572; *State of MP v. Nandlal Jaiswal* (1986) 4 SCC 566; *Arun Kumar Agrawal v. Union Of India*, (2013) 7 SCC 1; *Narmada Bachao Andolan v. Union Of India*, (2000) 10 SCC 664; *BALCO Employees Union v. Union Of India*, (2002) 2 SCC 333 were relied on.

40. Mr. Dayan Krishnan, learned Senior Counsel appearing for some of the OMCs argued that there is no inherent infirmity in geographical classification. It was submitted that the state or public agencies, to promote objectives of their schemes or programmes, can always classify persons, things, or other objects, based on different criterion peculiarly suited to achieve the objectives. Whereas in the case of one policy or enactment, the classification may be based on income, in another, depending on objective, it may be based on merit or individual competence or ability, premised on fulfilling pre defined criteria, such as marks obtained in exams or interviews. There can be yet others, where region, levels of development, availability of resources or scarcity, form prominent bases for classification. One such known method is geographical backwardness, tested on relevant predetermined criteria.

41. It was submitted that contrary to the petitioners' arguments, the mandate of Article 14 is not one of bland equality; rather it is equality before law, and equal opportunity. Given that levels of development in the country are not uniform, frequently states and the Union, to promote industrialization and employment, provide incentives to people or trades in backward regions, in the form of tax holidays for a certain number of years,

subsidies, grants, etc. These have economic consequences of promoting prosperity and the targeted objective for the peculiar scheme or enactment. In this case, the objective of the geographical based classification was to ensure that greater number of Zone 1 units were promoted, to augment production of LPG cylinders, nearer to the homes of the ultimate consumers; equally it was to optimize available resource utilization of raw materials on the one hand, and also minimize transportation, on the other. This would ultimately lead to greater employment generation in the longer run and also promote the primary objective of the scheme, to ensure overall development of the LPG cylinder manufacturing in the country.

42. Learned Senior Counsel relied on the judgments reported as *MP Oil Extraction and other v. State of MP*, (1997) 7 SCC 592; *State of MP v. Bhopal Sugar Industries* AIR 1964 SC 1179; *Harshendra Choubisa v. State of Rajasthan*, (2002) 6 SCC 393 and *Lakshman v. State of MP*, 1983 3 SCC 275.

Analysis and Conclusions

43. The first question that needs to be addressed is that of geographical classification. To recollect, Article 14 does not forbid classification *per se*, but jurisprudence evolved over the last six decades insists that classification, to pass the test of constitutionality, is to satisfy the twin test of intelligible classification that bears a rational nexus with the object (of the state or public agency, which relies on the classification, in its enactment, or policy) of such policy or measure. The "intelligibility" of the classification too, should be reasonable: it should not artificially divide objects, people or things, which fall within the same grouping. Geographical basis for classification is not inherently offensive under the Constitution, as the

Supreme Court has repeatedly held, in the last 50 years. In *Gopal Narain v State of UP* AIR 1964 SC 370, the court held as follows:

"This Court in more than one decision held that equality clause does not forbid geographical classification, provided the difference between the geographical units has a reasonable relation to the object sought to be achieved. This principle has been applied to a taxation law in Khandige Sham Bhat's Case. In that case, this Court also accepted the principle that the legislative power to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways. It is indicated in "Willis, Constitutional Law". at p. 590, that a State can make a territory within a city a unit for the purpose of taxation. So, the impugned section in permitting in the matter of taxation geographical classification which has reasonable relation to the object of the statute, namely, for providing special amenities for a particular unit the peculiar circumstances whereof demand them, does not in any way impinge upon the equality clause. "

Even earlier, in *Ajaib Singh v State of Punjab* AIR 1953 SC 10, the Court observed that

"the fact that the Act is extended only to the several States mentioned in section 1 (2) does not make any difference, for a classification may well be made on a geographical basis. "

Lachman Das (supra) cited by the respondents was a case, where geographical classification, based on operation of different laws in the same subject matter, in different parts of a state, was upheld, on the ground that such differentia was based on pre-existing laws operating in states that existed before re-organization. In *Anakapalle Co-op Industrial & Agricultural Society v Union of India* AIR 1973 SC 734, geographical classification was upheld by the Supreme Court in the following terms:

"The Commission has pointed out that there is only a small number of units in each one of these States and the costs are more or less similar. Bihar has been divided into two zones and U.P. into three zones. The' reasons are given in para 8.16 of Chapter VIII of the 1969 report. It has been pointed out that the climatic conditions of the' two areas, namely, the Meerut Division of the Western U.P., and Gorakhpur Division are different as they are separated by 300 miles. The units in Central U.P. had also, for the same reasons,' to be constituted into a separate group. On similar basis the units in Bihar had been sub-divided into two zones, North and South. It is, therefore, altogether futile to say that the zoning' should not have been done state-wise. If any other system had been followed it would have become impossible to work out a proper cost schedule for the zone. For instance, if the Chittoor Coop. Sugars Ltd. which is in Andhra Pradesh towards the extreme end and which is very near the State of Tamil Nadu had been grouped with the factories in Tamil Nadu or if the Nizam Sugar factory and the Nizamabad Coop. Sugar Ltd, which are quite near the border of Maharashtra State had been grouped with the factories in Maharashtra, it would have created several problems and difficulties particularly with reference to all the taxes, duties etc. which are levied by each State and also the wages which are payable to the workers in the different States which admittedly vary from State to State."

There are other decisions too, which hold that geographical criterion can be a valid basis for valid classification and also justifiable in an Article 14 based challenge. (See *D.P. Joshi v State of Madhya Bharat* AIR 1955 SC 334; *Kishan Singh v State of Rajasthan* AIR 1955 SC 795; *Gopi Chand v Delhi Administration* AIR 1959 SC 609, *Kangshari Haldar v State of West Bengal* AIR 1960 SC 457; *Shree Sitaram Sugar Company v Union of India* AIR 1990 SC 1277 and *Clarence Pais v Union of India* 2001 (4) SCC 325).

44. In view of the above discussion, the petitioners' threshold argument that *per se* a geographical based classification is impermissible, cannot be sustained. That does not, however end the discussion on the subject. The court has to, in the next step, proceed to determine, if the *rationale* given by the Respondents, is sufficient, in the facts and circumstances of the case, for a geographical classification. *Sarbananda Sonowal (supra)* is a typical example where the court held geographical based classification to be invalid. The Supreme Court had to deal with the application of the Illegal Migrants Determination (Determination by Tribunals) Act (IMDT Act), which authorized the detection and determination after inquiry through a prescribed procedure, of illegal migrants. The enactment was made applicable only to the state of Assam. The court flagged how, in the absence of any justification, the measure fell afoul of the Constitution, in the following words:

“the mere making of a geographical classification cannot be sustained where the Act instead of achieving the object of the legislation defeats the very purpose for which the legislation has been made. As discussed earlier, the provisions of the Foreigners Act are far more effective in identification and deportation of foreigners who have illegally crossed the international border and have entered India without any authority of law and have no authority to continue to remain in India. For satisfying the test of Article 14, the geographical factor alone in making a classification is not enough but there must be a nexus with the objects sought to be achieved. If geographical consideration becomes the sole criteria completely overlooking the other aspect of "rational nexus with the policy and object of the Act" it would be open to the legislature to apply enactments made by it to any sub- division or district within the State and leaving others at its sweet will. This is not the underlying spirit or the legal principle on which

Article 14 is founded. Since the classification made whereby IMDT Act is made applicable only to the State of Assam has no rational nexus with the policy and object of the Act, it is clearly violative of Article 14 of the Constitution and is liable to be struck down on this ground also."

45. In the *Indian Hotel & Restaurants Association case* (*supra*) the court again applied the test of *whether* there was a rational criterion to justify the differentia. Commenting and upholding the High Court's finding about the exemption provisions' discriminatory effect, in exempting certain establishments, situated in certain localities from the prohibition to hold dance performances, the court said:

"The so called distinction is based purely on the basis of the class of the performer and the so called superior class of audience. Our judicial conscience would not permit us to presume that the class to which an individual or the audience belongs brings with him as a necessary concomitant a particular kind of morality or decency. We are unable to accept the presumption which runs through Sections 33A and 33B that the enjoyment of same kind of entertainment by the upper classes leads only to mere enjoyment and in the case of poor classes; it would lead to immorality, decadence and depravity. Morality and depravity cannot be pigeon-holed by degrees depending upon the classes of the audience. The aforesaid presumption is also perplexing on the ground that in the banned establishments even a non-obscene dance would be treated as vulgar. On the other hand, it would be presumed that in the exempted establishments any dance is non-obscene. The underlying presumption at once puts the prohibited establishments in a precarious position, in comparison to the exempted class for the grant of a licence to hold a dance performance. Yet at the same time, both kinds of establishments are to be granted licenses and regulated by the same restrictions, regulations and standing provisions.

103. We, therefore, decline to accept the submission of Mr. Subramaniam that the same kind of dances performed in the exempted establishments would not bring about sexual arousal in male audience as opposed to the male audience frequenting the banned establishments meant for the lower classes having lesser income at their disposal. In our opinion, the presumption is elitist, which cannot be countenanced under the egalitarian philosophy of our Constitution. Our Constitution makers have taken pains to ensure that equality of treatment in all spheres is given to all citizens of this country irrespective of their station in life. {See: Charanjit Lal Chowdhury Vs. Union of India & Ors. (supra), Ram Krishna Dalmia's case (supra) and State of Uttar Pradesh Vs. Kaushailiya & Ors. (supra)}. In our opinion, sections 33A and 33B introduce an invidious discrimination which cannot be justified under Article 14 of the Constitution.

104. The High Court, in our opinion, has rightly declined to rely upon the Prayas and Shubhada Chaukar's report. The number of respondents interviewed was so miniscule as to render both the studies meaningless. As noticed earlier, the subsequent report submitted by SNDT University has substantially contradicted the conclusions reached by the other two reports. The situation herein was not similar to the circumstances which led to the decision in the case of Radice (supra). In that case, a New York Statute was challenged as it prohibited employment of women in restaurants in cities of first and second class between hours of 10 p.m. and 6 a.m., on the ground of (1) due process clause, by depriving the employer and employee of their liberty to contract, and (2) the equal protection clause by an unreasonable and arbitrary classification. The Court upheld the legislation on the first ground that the State had come to the conclusion that night work prohibited, so injuriously threatens to impair women's peculiar and natural functions. Such work, according to the State, exposes women to the dangers and menaces incidental to night life in large cities. Therefore, it was permissible to enable the police to preserve and promote the public health and

welfare. The aforesaid conclusion was, however, based on one very important factor which was that "the legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women." In our opinion, as pointed out by the learned counsel for the respondents, in the present case, there was little or no material on the basis of which the State could have concluded that dancing in the prohibited establishments was likely to deprave, corrupt or injure the public morality or morals."

Like *Indian Hotels (supra)* *Shri Shyam Shiksha Prashikshan Sansthan & Ors (supra)* cited by the Petitioners does not aid their case. The court generally reviewed its previous judgments on the doctrine of classification and what criteria are applicable for a valid legislative or executive action; however, the cut off date, challenged as discriminatory in its effect, was upheld. *Nidamarti Maheshkumar (supra)* on the other hand, discusses an interesting facet of the geographical based classification. Holding to be unconstitutional a region wise classification within a state, reserving seats in public medical colleges, the court nevertheless recognized that some region-wise and geographical classifications may not only be justified, but necessary:

"But we would like to make it clear that it would not be unconstitutional for the State Government to provide for reservation or preference in respect of a certain percentage of seats in the medical college or colleges in each region in favour of those who have studied in schools or colleges within that region and even if the percentage stipulated by the State Government is on the higher side, it would not fall foul of the constitutional mandate of equality. There are two reasons why such reservation or preference would be constitutionally permissible. In the first place it would cause a considerable amount of hardship and inconvenience if students residing in

the region of a particular university are compelled to move to the region of another university for medical education which they might have to do if selection for admission to the medical colleges in the entire State were to be based on merit without any reservation or preference region wise. It must be remembered that there would be a large number of students who, if they do not get admission in the medical college near their residence and are assigned admission in a college in another region on the basis of relative merit, may not be able to go to such other medical college on account of lack of resources and facilities and in the result, they would be effectively deprived of a real opportunity for pursuing the medical course even though on paper they would have got admission in the medical college. The opportunity for medical education provided to them would be illusory and not real because they would not be able to avail of it. Moreover some difficulty would also arise in case of girls because if they are not able to get admission in the medical college near the place where they reside they might find it difficult to pursue medical education in a medical college situated in another region where hostel facilities may not be available and even if hostel facilities are available, the parents may hesitate to send them to the hostels. We are therefore of the view that reservation or preference in respect of a certain percentage of seats may legitimately be made in favour of those who have studied in schools or colleges within the region of a particular university, in order to equalise opportunities for medical admission on a broader basis and to bring about real and not formal, actual and not merely legal, equality. The only question is as to what should be the extent of such reservation or preference. But on this question we derive considerable light from the decision in Dr. Pradeep Jain's case (supra) where we held that reservation based on residence requirement or institutional preference should not exceed the outer limit of 70 per cent of the total number of open seats after taking into account other kinds of reservations validly made and that the remaining 30 per cent of the open seats at the least should be made available for admission to students on All-India basis irrespective of the state

or the university from which they come. We would adopt the same principle in case of region wise reservation or preference and hold that not more than 70 per cent of the total number of open seats in the medical college or colleges situate within the area of jurisdiction of a particular university, after taking into account other kinds of reservations validly made, shall be reserved for students who have studied in schools or colleges situate within that region and at least 30 per cent of the open seats shall be available for admission to students who have studied in schools or colleges in other regions within the State."

46. There is also other authority for the proposition that geographical classification cannot, *per se*, be brushed aside, unless upon inquiry the court concludes that such classification is unwarranted given the objective of the policy or legislative measure: *Parisons Agrotech (P) Ltd v Union of India* 2015 (9) SCC 657 for instance stated that -

"This Court in more than one decision held that the equality clause does not forbid geographical classification, provided the difference between the geographical units has a reasonable relation to the object sought to be achieved."

Again, in *State of Mysore v M.L. Nagade*, 1983 (3) SCC 253, the court held that -

"Again we fail to see how the decision would help us because geographical classification based on population criterion is a valid basis for classification."

This Court also notices that in *Kailash Chand Sharma v State of Rajasthan*, 2002 (6) SCC 562, *"the lack of material to establish nexus between the geographical classification and the object sought to be achieved thereby was thus held to be violative of Article 14."*

47. The question therefore is whether the justification provided by the Respondents for the geographical classification can pass muster under Article 14 in these cases. The Respondents answer the charge of an unintelligible *differentia*, against what the petitioners say is a homogenous class of manufacturers, by pointing at empirical data. The data relied on is the proportion of manufacturing units, as compared with the demand, in Zone 1. It is pointed out that the gross state domestic product (GSDP) an indicator of development, in all the Zone 1 states, is less than the national average GSDP- in some states, significantly lower to the extent of half or nearly half the national average. Likewise, to demonstrate the relative backwardness of Zone 1 states, the respondents rely on the penetration of LPG availability in households: as against the national average of over 61% of the households, these states have at least 20% less; in many cases, it is half or less than half the national average.

48. So far as the comparison between the manufacturing units of the two zones is concerned, the figures shown to the court disclose that there were in all 133 BIS licensed manufacturers. Of these 133, only 23 vendors were from the eastern part of the country (Zone-1 under the present tender). The supplies, likewise revealed a similar story: 37,72,305 cylinders were supplied by manufacturers in Zone 1 and 4,07,51,943 cylinders were supplied by Zone 2 manufacturers. The 5.51 crore LPG cylinders tendered for include 2.33 crore cylinders for Zone 1. These statistics are telling. Zone 1 accounts for 42.36 % share of the 5.51 crore cylinders that the Respondents propose to procure through the NIT in question. Zone 2, on the other hand, accounts for 56.64%, i.e. the major share.

49. If one keeps these basic figures in mind, compares it with the relative population spread of Zone 1 states as compared with Zone 2 states that need to be targeted by the scheme, i.e., ensuring greater inclusiveness in regard to supply of LPG cylinders and further takes note of the fact that the level of these states is significantly below the national average in regard to this relevant factor, the Respondents' *rationale* of making the differentia in these cases, cannot be brushed aside. The further explanation of the respondents is that framing a policy that would promote units in Zone 1 by incentivizing their establishment, in the concerned states, is a legitimate concern. Its argument that these areas are actually sources of raw materials that are used to produce LPG cylinders, thus reducing the logistics of ferrying and transportation, is also relevant. The Petitioners' argument that the auctioning methodology adopted by the NIT, where locational advantages are neutralized by floor quotations is no doubt relevant. Yet, that cannot trump the Respondents' submission that the geographical classification broadly, is to be supported for varied reasons.

50. The second limb of the classification test is the *rational* nexus between the *differentia* and the object sought to be achieved by the LPG policy. Here again, the broad policy objective underlined by the state agencies is the need to ensure the greatest inclusivity. As discussed earlier, the Pradhan Mantri Ujjwala Yojna (PMYU) scheme is a long term socio-economic policy whereby crores of women belonging to the BPL category (initially targeted at 5 crore women) and who were using conventional fossil fuel as of now are to be allotted new LPG cylinders connections free of cost. The Central Government has earmarked ₹ 8000 crores for this, initially. The matrix adopted to determine backwardness is not merely population, but

availability of LPG in the concerned states, as compared with the national average of availability. As a good measure, the GSDP average of these states, to see the broad economic development, have apparently been considered. The Union articulates in Para 5 of its policy that “*While providing the new connections to BPL households, priority would be given to the states which have lower LPG coverage (compared to the national average) as on January 1, 2016.*” Thus there is a rational nexus between the geographical differentia and the objective of the policy.

51. It would now be relevant to consider some of the details of specific challenges made to the policy. A general argument, addressed by all counsel, was that as between an upcoming new bidder in Zone 1 and upcoming new bidder in Zone 2, there should be no discrimination in the preference given in either Zone. Instead, the respondents are preferring Zone 1 Upcoming new bidders, and equating them with existing bidders (of Zone 2) thus treating unequals equally and violating the mandate of Article 14 of the Constitution of India. At first blush, this argument seems attractive. The policy differentiates between Upcoming new bidders and existing bidders, to the extent that the latter are to possess valid PESO and BIS licenses for manufacture of 14.2 LPG cylinders in terms of IS-3196 Part I and relevant ISO 9001:2015 certifications. New vendors are described as manufacturers with valid PESO and BIS licenses for manufacture of 14.2 LPG cylinders in terms of IS-3196 Part I. “Upcoming new vendors” are bidders who “*are already in the process of setting up a new unit for manufacturing of cylinders and are in a position to submit acknowledged copies of the receipt of application from PESO and BIS as on the due date of tender*”. Now, if the *rationale* for the basic geographical based *differentia* is understood, the

fact that either of the three classes of manufacturers (Existing, new vendor or upcoming new vendor) of Zone 2 is not afforded equal opportunity with Zone 1 cannot, *per se*, be discriminatory. The essential idea of marking the geographical *differentia* is to *promote* Zone 1 units (who, regardless of their status as existing, new or upcoming new bidders) are to submit a threshold quantified bid as an eligibility condition, through the preference. That state policy of promoting growth of the industrial units in Zone 1, which possibly would result in creation of employment, livelihoods and other indirect economic benefits to the concerned local populations would be lost, if blind equality were to be mandated by the court, as between two classes (say existing bidders of Zone 1 and existing bidders of Zone 2 or upcoming new vendors of Zone 1 and upcoming new bidders of Zone 2).

52. All classification no doubt, results in some discrimination. However, all discriminatory consequences as a result of classification are not necessarily hostile. As long as the state policy does not fall within the Scylla and Charybdis of under classification and over classification and as long as the classification is shown- as in this case- to yield perceptible economic benefits, the courts would not interfere with a policy judgment. There is sufficient evidence on the record to show that even in Zone 2 there is more than 50% (nearly 57%) demand of the overall demand for LPG cylinders in the country. The respondents' concern, in promoting Zone 1 manufacturers by first preferring them in the consideration of bids, before moving on to Zone 2 bidders (in Zone 1 bids) therefore cannot be said to result in hostile discrimination, inviting the wrath of Article 14. Nor are the Zone 2 bidders correct in contending that they would stand to lose substantially. If indeed, the capacity of Zone 1 bidders is not yet developed, the Zone 2 bidders will

have their “look in” i.e., opportunity to successfully bid in Zone 1 slots, that are left out.

53. The reference to Zone 2 bidders’ right to freely carry on trade, commerce and occupation under Article 19 (1) (g) or their rights under Article 19 (1) (d) i.e. “*move freely throughout the territory of India*” has to necessarily be seen from two standpoints, i.e whether the so called restrictions complained of, rob them of their rights altogether, or at least impair the rights to a substantial degree and whether the conditions which the respondent has set as terms for their procurement, are unduly restrictive as to be called unreasonable restrictions. As far as the first aspect is concerned, the judgments of the Supreme Court right from the decision in *State of Madras v V.G. Row* AIR 1952 SC 196 have ruled that -

“The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case. it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all..”

54. It is also settled that the reasonableness of the restraint has to be judged by the magnitude of the evil which the restraint proposes to curb or to eliminate (*Collector of Customs v. Sampathu Chetty*, AIR 1963 SC 316). The court however, has insisted at times, that the restriction, in order to be

within the constitutional framework during normal times, must be *proportionate* i.e., should not be “*beyond what is required in the interests of the public*” (*Chintaman Rao v State of MP* AIR 1951 SC 118) and, recently, that a restriction should be “*narrowly tailored*” (*Shreya Singhal v Union of India* 2015 (5) SCC 1). Similarly, the restriction imposed upon Advocates from practicing in Land Tribunals under a state enactment was upheld in *H.S. Srinivasa Raghavachar Etc. v State Of Karnataka & Ors* AIR 1987 SC 1518. Pertinently, it was held in *Municipal Corporation for the city of Ahmedabad v Jan Mohammed Usmanbhai & Anr* AIR 1986 SC 1205 that the state is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.

55. In the present cases, it is noteworthy that Zone 2 units are not absolutely barred from bidding in Zone 1. It is only that the consideration of their bids will be postponed or rather, would await the effect given to the bidding choices of Zone 1 unit bidders. The data provided shows that existing Zone 1 units could cater to roughly 10% of the consumers of that zone. In other words, without the policy, or capacity augmentation, Zone 1 units cannot compete even within their zone, with producers and suppliers located in Zone 2. Capacity augmentation cannot be reasonably expected to happen overnight or instantaneously. This leads to the reasonable inference that not only would Zone 2 producers and units have sufficient opportunity to supply within their zone but also in Zone 1 states.

56. As far as the complaint with respect to a different standard applicable to upcoming new vendors, i.e., the lower threshold of their having to merely show that they are “*in the process of setting up a new unit for manufacturing of cylinders and are in a position to submit acknowledged*

copies of the receipt of application from PESO and BIS as on the due date of tender” goes, the particular mode shown by way of preference to newcomers as opposed to a higher threshold applicable to existing suppliers, cannot be a point of discrimination. There is sufficient safeguard in this regard, because such upcoming new vendors should acquire the certification and license within 3 months, failing which the grant of tender, would be cancelled. The next grant, naturally would go to those waiting for a vacant slot. Likewise, the complaint that MSME applicants have not been shown any preference is not entirely correct. Clauses 6 and 7 of the applicable NIT conditions show separate categories of preferences- to central Public Enterprises, in terms of extant policies and next, to Micro and Small Enterprises (MSEs) and MSE owned by Scheduled caste or Scheduled tribe entrepreneurs in terms of purchase preference under prevailing state policy, for which separate conditions are detailed. The grievance of no preference to MSME categories is therefore not warranted.

57. Unless the conditions imposed by the state or its instrumentalities are so demonstrably onerous that the right to carry on business is rendered virtually illusory, the court cannot conclude that the circumstances, perceived to be restrictive are unreasonable. The mere prospect of a diminished business, or reduced profits would not render a decision of the state or its agency, taken in the larger public interest, a restriction within the meaning of Article 19 (6). The arguments of the petitioners that the respondents did not consult with them while changing the policy of gas procurement, in the opinion of this court, are inconsequential. No legislation or policy statement of the respondents ever holding out that the prevailing policy would remain unchanged, or would not be changed for some length

of time, was pointed out. Unlike certain statutory policies (notably the Export Import policies) which are framed and apply for a given period of time, executive policies and decisions are necessarily dynamic. A procurement policy, unless expressed to be defined in time duration, would pursue its objectives and goals. The change of a procurement policy in this case cannot result in the violation of any fairness norm or standard, or result in the expectation, much less an enforceable legitimate expectation, of any manufacturing unit.

58. The aphorism “free play in the joints” is most often used when considering a commercial or economic policy decision of the executive or its agency or department. In *R.K. Garg v Union of India* AIR 1981 SC 2138 this principle was articulated in the following manner:

“laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.”

59. More pointedly, in *BALCO Employees Union v Union of India* (2002) 2 SCC 333 it was held that it is -

“neither within the domain of the courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy

can be evolved. Nor are our courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority."

In *Sri Sitaram Sugar Co v Union of India* AIR 1990 SC 1277, it was held as follows:

"The correctness of the reasons which prompted the Government in decision making taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government."

60. *All India Bank Employees v National Industrial Tribunal* AIR 1962 SC 171 is authority for the proposition that the exercise of a fundamental right does not carry with it the further right to claim the fulfillment of its object. Thus, the right to form an association does not carry with it the neighboring right or concomitant right to achieve the objects of the association. Likewise, the right to carry on business does not carry on the concomitant right to achieve the object of setting up that business. It must be

remembered that what is guaranteed is a fundamental right to carry on trade, business or an occupation. That right however does not extend to a right to derive profits. In essence, restrictions in government policy are normal business risks which every tradesman undertakes when he or she carries on business in some commodities or goods, or provides services. The vicissitudes of fortune, dependent upon market conditions, government policies, regulatory changes and taxation laws are factors which businesses and commercial ventures have to contend and adapt to, in a rapidly evolving economy such as India's.

61. This court is of the opinion therefore, that the policy concerns, which impelled the respondents in framing the NIT conditions and the PMUY scheme are not such as can be reviewed appropriately under Article 226 of the Constitution. Nor is there anything manifestly or palpably arbitrary or unreasonable in any element of the policy. The allegations of impaired business opportunities, forming the basis of challenge on the ground of Article 19 (1) (g), and of irrational geographical classification, being the basis of challenge under Article 14, cannot be sustained. As far as the latter goes, the court also recollects that in *Ajoy Kumar Banerjee & Ors. v Union Of India* AIR 1984 SC 1130 it was observed – pertinent to the present context – that -

“in the matter of economic legislation or reform, a provision would not be struck down on the vice of under inclusion, inter alia, for the reasons that the legislature could not be required to impose upon administrative agencies task which could not be carried out or which must be carried out on a large scale at a single stroke. It was further reiterated that piecemeal approach to a general problem permitted by under-inclusive classifications, is sometimes justified when it is considered that

legislatures deal with such problems usually on an experimental basis. It is impossible to tell how successful a particular approach might be, what dislocation might occur, and what situation might develop and what new evil might be generated in the attempt. Administrative expedients must be forged and tested.”

62. There is authority for the proposition that award of a contract, by a public authority, is a commercial transaction. The agency's choice of decision making, framing policy, relaxation of the policy, however, should be for *bona fide* reasons. State agencies and authorities have the added obligation to act fairly toward all, in their decision making process. The exercise of such discretion, unless illegal or *mala fide*, would not be interfered with by courts under the discretionary jurisdiction of judicial review. (*BSN Joshi & Sons v Nair Coal Services Ltd* (2006) 11 SCC 548 *Master Marine Services (P) Ltd v Metcalfe & Hodgkinson (P) Ltd & Ors* (2005) 6 SCC 138 and *Jagdish Mandal v State of Orissa* (2007) 14 SCC 517).

63. Clearly, therefore, without any proven illegality, palpable arbitrariness, unfairness, or *mala fides*, it is not the business of courts to busy themselves with how the state or public agencies carry on their business. No such findings can be rendered in these cases. In view of the above discussion and findings, the petitions have to fail. They are accordingly dismissed but without any order as to costs.

S. RAVINDRA BHAT, J

SEPTEMBER 21, 2017

YOGESH KHANNA, J