

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 26.10.2018	Delivered on 21.02.2019
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CORAM

THE HONOURABLE MR. JUSTICE R.MAHADEVAN

Writ Petition Nos.22878, 22888, 22945, 22946,
22956, 24369, 25142, 25284, 26282, 26732,
26890 and 27059 of 2018

and WMP.Nos.26750 to 26752, 26761, 26762, 26837 to 26840, 26851
to 26853, 28372, 28373, 29211, 29212, 29391, 29392, 30550,
30532, 31096, 31231, 31236, 31470 and 31471 of 2018

Appu Food Products
rep. by its Authorised Signatory
P.Uma Maheshwari

... Petitioner in
WP.22878/2018

M/s.Sunthar Poultry Farm
rep. by its Proprietor
M.Sunthararajan

... Petitioner in
WP.22888/2018

M/s.Sri Vengamamba Poultry Farm
rep. by M.P.Venkatramana
Manager

... Petitioner in
WP.22945 & 22946/2018

M/s.Vasuki Poultry Farms
rep. by its Authorized representative
Karur

... Petitioner in
WP.22956/2018

M/s.Kisan Poultry Farm
A Partnership Firm
1.M.Srinivasan

2.M.Gopinath

3.S.Nizam Sherif

4.P.Karthikeyan

5.T.Selvakumar

6.G.Ramaraj

All are rep. by their

Authorised Signatory S.Krishnan

... Petitioners in
WP.24369 & 26732/2018

Natural Food Products

rep. by its Authorised Signatory

T.Gnanasekaran

... Petitioner in
WP.25142 & 26890/2018

M/s.Suvarnabhoomi Enterprises Pvt. Ltd
rep. by its Authorised Signatory
R.Lokeshkumar

... Petitioner in
WP.25284 & 27059/2018

Sri Kuppanna Poultry Farm
rep. by its Proprietor
S.Muthulakshmi

... Petitioner in
WP.26282/2018

Vs.

1.The State of Tamil Nadu,
represented by the Principal Secretary to Government,
Social Welfare and Nutritious Meal Programme (SW.4-3) Dept.,
Fort St. George,
Chennai - 600 009.

2.The Director cum Mission Director,
Integrated Child Development Services,
Pammal Nallathambi Street,
Taramani, Chennai- 600 113. ... Respondents 1 and 2 in
WP.22878,22888,22956,
24369,25142,25284,26292
26732,26980 & 27059/2018
and Respondent 3 & 3rd Respondent
WP.Nos.22945 & 22946/2018

3.Akram
(R3 impleaded as per the order of this Court dated
25.09.2018 in WMP.No.28406/2018) ... 3rd Respondent in
WP.No.22878/2018

4. Tamil Nadu Poultry Farmers Association
rep. by its President P.Chinraj
(R4impleaded as per the order of this Court dated
25.09.2018 in WMP.No.28010,28012,28013/2018)
... 4th Respondent in
WP.No.22878,22945 & 22946/2018

R3 impleaded as per court order
dated 25/09/2018 in WMP 28011/18,28014/18

... 3rd Respondent in
WP No.22888,22956/2018

1.State of Tamil Nadu
rep.by its Principal Secretary,
Secretariat,
Fort St. George,
Chennai - 600 009.

..1st Respondent in WP No.22945 &
22946/2018

WP.No.22878/2018: Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari to call for the records of the first respondent contained in the impugned G.O.(Ms) No.57 dated 20.08.2018 and all consequential proceedings thereto, including Tender No.Roc.20304/NMP/2018 dated 20.08.2018 issued by the second respondent and to quash the same as arbitrary, unjust and illegal.

WP.No.22888/2018: Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari to call for the records of the second respondent in connection with Tender No.Roc.20304/NMP/2018 dated 20.08.2018 and quash the same as arbitrary and unreasonable.

WP.No.22945/2018: Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus to call for the records pertaining to G.O.Ms.No.57 Social Welfare and Nutritious Meal Programme Department dated 20.08.2018 issued by the second respondent and quash the same and consequently, direct respondents 2 and 3 to allow poultry farmers from other States to participate in the tender.

WP.No.22946/2018: Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus to call for the records pertaining to Tender No.Roc.20304/NMP/2018 dated 20.08.2018, which opens on 05.09.2018 issued by the third respondent and quash the same and consequently, direct respondents 2 and 3 to allow poultry farmers from other States to participate in the tender.

WP.No.22956/2018: Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus to call for the records in the G.O.Ms.No.57, Social Welfare and Nutritious Meal Programme Department dated 20.08.2018 issued by the first respondent and the consequential tender notification issued by the second respondent in Roc.No.20304/NMP/2018 dated 20.08.2018 and quash the same and consequently direct the respondents to float block wise tender for procurement of eggs by revising the terms and conditions in the interest of the small poultry farmers.

WP.No.24369/2018: Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus to call for the records of the first respondent relating to G.O.(Ms) No.57 dated 20.08.2018 Social Welfare and Nutritious Meal Program (NMP.3) Department and the consequential Tender No.Roc.20304/NMP/2018 dated 20.08.2018 issued by the second respondent, quash the same and direct the respondents to

revert to State level yearly tender.

WP.No.25142/2018: Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus to call for the records of the culminating into the order of the first respondent dated 20.08.2018 made in G.O.(Ms) No.57 Social Welfare and Nutritious Meal Program (SW 4-3) Department and the consequential tender notification issued by the second respondent dated 20.08.2018 in Tender No.Roc.20304/NMP/2018 and to quash the same and consequently direct the respondents to follow the earlier procedure prescribed under G.O.Ms.No.264 Social Welfare and Nutritious Meal Programme (NMP) Department dated 17.10.2012 and the conditions prescribed by the second respondent pursuant to the same.

WP.No.25284/2018: Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus to call for the records relating to G.O.(Ms) No.57 dated 20.08.2018 on the file of the first respondent culminating in the Tender Notification No.Roc.20304/NMP/2018 dated 20.08.2018 on the file of the second respondent and quash the same and consequently direct the respondents herein to issue a fresh tender notification on the basis of G.O.Ms.No.264 dated 17.10.2012.

WP.No.26282/2018: Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari to call for the records of the 2nd respondent's Tender Notice in Roc.No.20304/NMP/2018 dated 20.08.2018 and quash the same as illegal and arbitrary.

WP.No.26732/2018: Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned Letter dated 11.07.2018 bearing Roc.No.4554/NMP/2018 on the file of the second respondent and quash the same and consequently direct the second respondent to reconsider the technical bid of the writ petitioners.

WP.No.26890/2018: Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus, to call for the records culminating into the order of the second respondent dated 11.07.2018 made in Roc.No.4554/NMP/2018 rejecting the petitioners bid submitted on 11.07.2018 submitted pursuant to the tender notification made Tender Roc.No.4554/NMP/2018 dated 11.06.2018 and quash the same and consequently direct the second respondent to further process the bid of the petitioner submitted on 11.07.2018.

WP.No.27059/2018: Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus, to call for the records in Notification No.4554/NMP/2018 dated 11.07.2018 on the file of the second respondent and quash the same in so far as it pertains to the rejection of the technical bid of the petitioner and consequently direct the respondents to proceed further on the tender in accordance with law.

For Petitioner : Mr.S.Parthasarathy, SC
in WP.22878/18 for M/s.Arun Karthik Mohan

For Petitioner : Mr.A.Thiagarajan, SC
in WP.22888/18 for M/s.Lesi Saravanan

For Petitioner : Mr.P.S.Raman, SC
in WP.22945 & 22946/18 for M/s.C.Seethapathy

For Petitioner : Mr.Vijayan, SC
in WP.22956/18 for M/s.K.M.Vijayan Associates

For Petitioner : Mrs.Hema Sampath, SC
in WP.24369/18 for M/s.R.Meenal

For Petitioner : Mr.M.S.Krishnan, SC
in WP.25142 & 26890/18 for M/s.K.Kumaresh Babu

For Petitioner : Mr.Masilamani, SC
in WP.25284 & 27059/18 for M/s.Mani Sundargopal

For Petitioner : M/s.K.Sumathi
in WP.26282/18

For Petitioner : Mr.T.V.Ramanujam, SC
in WP.26732/18 for M/s.R.Ramya

For R1 & R2 : Mr.Vijay Narayan, AG and
Mr.C.Manishankar, AAG assisted by
Mr.E.Balamurugan, SGP

For newly impleaded : Mr.R.Krishnamoorthy, SC for
respondents in WP.Nos.22878, Mr.V.P.Sengottuvel
22888, 22956, 22945 & 22946/2018

COMMON ORDER

Inasmuch as the issues involved in this batch of writ petitions are more or less identical, they were heard together and are decided by this common order.

Reliefs sought:-

2.The petitioners, who are the food suppliers/small poultry farms with a capacity to produce less than one lac eggs per day, have called in question the validity of G.O.Ms.No.57 Social Welfare and Nutritious Meal Programme (SW 4-3) Department, dated 20.08.2018 (for short, "G.O.Ms.No.57") and consequential tender floated by the second respondent vide notification in Roc.No.20304/NMP/2018 dated 20.08.2018. The petitioners in WP.Nos.26732, 26890 and 27059 of 2018 have also challenged the rejection of their technical bids submitted, pursuant to the earlier tender notification in Roc.No.4554/NMP/2018 dated 11.06.2018.

Conspectus of facts:-

3.1 Before proceeding to note the submissions of the learned Senior Counsel appearing for the respective parties, it is but necessary to understand the background to the issuance of the impugned Government Order as well as the consequential tender notification.

3.2 The genesis of the mid-day meal scheme is traceable to Pre-Independence India, when a scheme was introduced in 1925 in the Madras Corporation. This was later followed by Pondicherry Government under French Administration in the year 1930. Thereafter, the then State of Madras pioneered the first full-fledged mid-day meal programme, in primary schools in the year 1962-63 with the twin objects of providing at least one good meal a day to young children and to increase the number of children attending the primary schools. Consequently, the Government of Tamil Nadu upgraded the said programme into the Nutritious Meal Programme in the year 1982 to combat widespread malnutrition amongst the children and subsequently, introduced a Scheme for supplying boiled eggs in the noon meal, in the year 1989 with one egg per week and thereafter, it was improved by providing two eggs in a week. The provision of eggs in the noon meal scheme was discontinued temporarily and it was re-introduced in the year 2004. From 2010, eggs are provided on all five days in a week from Monday to Friday to all the beneficiaries in the school noon meal centres.

3.3 Originally, eggs were procured through a Centralised State level single tender system. Thereafter, in the year 2006, District-wise tender was floated first by three months and then by every month, which was in vogue till 2012, which led to the formation of cartels and other defects.

3.4 To rectify all the defects, the first respondent

passed G.O.Ms.No.264, Social Welfare and Nutritious Meal Programme Department, dated 17.10.2012 (for short, "G.O.Ms.No.264") and adopted the methodology of floating State-wise tender for the supply of eggs to all the noon meal centres in the entire State. As per the said G.O., the Tender Inviting Authority floated State level tender and the terms and conditions were designed as per the Tamil Nadu Transparency in Tenders Act (for short, "the Act") and the Rules made thereunder and contracts were awarded to the qualified tenderers for the past five years from 2013-14 to 2017-18.

3.5 In the mean while, the said Government Order was challenged before this Court by filing various writ petitions and writ appeals, which were dismissed and the same was also affirmed by the Supreme Court. For the year 2018-19, tender was floated on 11.06.2018 and bids were received, in which, 6 firms participated. However, none got qualified in the technical bid. Hence, fresh tender was notified on 24.07.2018, the technical bid of which was scheduled to be opened on 24.08.2018.

3.6 While so, based on a representation dated 14.08.2018 submitted by the Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society, the Government passed G.O.Ms.No.57 revoking the earlier G.O.Ms.No.264 dated 17.10.2012 and replacing the State level annual tender system to zone-wise tender system for six months. Consequently, the second respondent floated the impugned tender notification dated 20.8.2018, which is challenged herein.

Submissions:-

4.1 Mr.S.Parthasarathy, learned Senior Counsel appearing for the petitioner in WP.No.22878 of 2018 submitted that the policy of a single State-wise tender has proved to be a success, which was even acknowledged by the Government as recently as on 18.07.2018, when it came out with a Press release recognising the history behind the introduction of G.O.Ms.No.264 dated 17.10.2012. Further, the said Government Order has also received the express approval of this Court as well as the Supreme Court, whereas, the impugned G.O.Ms.No.57, which excluded the egg processing units from participating in the tender process, is unconstitutional and therefore, it deserves to be struck down. The learned Senior Counsel further submitted that the stand of the respondents that it is a policy decision, which cannot be challenged, is not reflective of the correct proposition of law. According to him, even a policy decision is amenable to judicial review. In support of the said submission, he placed reliance on the decision of the Supreme Court in Union of India v. Dinesh Engineering [(2001) 8 SCC 491] and the Division Bench of the Delhi High Court in Dhingra Construction v. Municipal Corporation of Delhi, [2005 (79) DRJ 383].

4.2 Adding further, the learned Senior Counsel submitted that the impugned G.O.Ms.No.57 is hit by Article 13(2) and is in

violation of a number of fundamental rights, including the right to equality guaranteed under Article 14 of the Constitution of India. To substantiate the same, he referred to the decision of the Supreme Court in *Railway Board v. Observer Publications*, [(1972) 2 SCC 266]. He also submitted that Article 14 forbids class legislation, but does not prohibit reasonable classification and placed reliance on the judgments in *Budhan Choudhary v. State of Bihar* [AIR 1955 SC 191] and *State of WB v. Anwar Ali Sarkar*, [AIR 1952 SC 75]. According to him, the object of the Government Order is to ensure proper supply of eggs to the noon meal programme and hence, the classification between the producers and processors of eggs, cannot bear any rational nexus with the object, as there is nothing to suggest that the egg processors are somehow incapable of supplying eggs of sufficient quality to the noon meal programme. In support of this submission, he relied on the decision of the Supreme Court in *Kailash Chand Sharma v. State of Rajasthan* [(2002) 6 SCC 562], wherein, it is held that a classification made must be based on empirical data and scientific studies.

4.3 The learned Senior Counsel further pointed out the decisions of the Supreme Court in *EP Royappa v. State of Tamil Nadu*, [AIR 1974 SC 555] and *AL Kalra v. P&E Corporation of India*, AIR 1984 SC 1361] and submitted that Article 14 embodies a guarantee against arbitrariness and it strikes at arbitrariness in executive/administrative action, because, any action that is arbitrary must necessarily involve the negation of equality and as such, the impugned G.O.Ms.No.57 offers no rationale whatsoever for the change of decision to go from a State-wise tender to a District-wise tender for procurement of eggs for the Nutritious Meal Programme. Furthermore, the circumstances under which G.O.Ms.No.264 came to be enforced, have not been negated. Further, according to the learned Senior Counsel, the validity of a Government Order ought to be tested only on the basis of its contents and the Government cannot improve its case through its pleadings, as held by the Supreme Court in *Mohinder Singh Gill v. Chief Election Commissioner* [(1978) 1 SCC 405]. By stating so, the learned Senior Counsel sought to allow this writ petition by quashing the impugned Government Order.

5.1 Mr.A.Thiagarajan, learned Senior Counsel appearing for the petitioner in WP.No.22888 of 2018 submitted that the decision taken by the second respondent is not a policy decision, but an executive order of the Government. He further submitted that the documents filed by the respondents would show that such decision was taken by the Minister for Social Welfare and Nutritious Meal Programme based on the representation dated 06.08.2018 given by the Tamil Nadu Muttai Kozhi Pannayalargal Marketing Society, which was registered only in the year 2015; the minutes of the meeting stated that only two departments have

recommended calling of zone-wise tender for procurement of eggs for the benefit of poultry farmers, besides the Additional Chief Secretary, Finance, whereas, as per the Constitution of India, policy decision has to be taken by the Cabinet Ministers/Council of Ministers chaired by the Chief Minister and as the nutritious noon meal scheme is not the policy decision of the Government, the decision now taken by the respondents cannot be sustainable in law.

5.2 The learned Senior Counsel also submitted that when the earlier decision taken by the respondents vide G.O.Ms.No.264 was challenged and was ultimately affirmed by the Division Bench as well as the Supreme Court, the respondents are estopped from proceeding with a different method, which was negated in the earlier round of litigation. That apart, the present Government Order was issued nullifying the Supreme Court decision, which is not permissible under law. Thus, according to the learned Senior Counsel, under the new system of zone-wise tender, there is neither equitable opportunity given to the persons like that of the petitioner nor beneficial to State Exchequer and that, the petitioner and the similarly placed persons are continuously denied their right to participate in the tender due to arbitrary and discriminatory conditions imposed by the respondents.

6. Mr.P.S.Raman, learned Senior Counsel for the petitioner in W.P.Nos.22945 and 22946/2018 submitted that the statistics regarding demand of eggs by the Anganwadi and Noon Meal Centres do not justify or validate the restriction on egg producers from outside the State from participating in the tender; there is no reasonable justification for restricting the participation of the egg producers; the embargo on egg producers from outside State from participating in the tender has no rationale to the object sought to be achieved; there are various procedural defects, such as, non-publication in Indian Trade Journal and All India News Papers by the respondents; since a prospective bidder is entitled to bid for a minimum of three zones, the value of the tender comes to more than Rs.100 crores and therefore, publication in the All India Trade Journal is mandatory; a policy can always be challenged on the grounds of unreasonableness, discrimination, arbitrariness, perversity and mala fides; non-participation of the petitioner in the tenders from 2012 would not stand in their way from challenging the present impugned tender notification; the executive powers are co-extensive with the legislative powers of the State and hence, the respondents cannot pass an executive order, which creates an artificial restriction on Inter state trade and commerce; and such an arbitrary and unreasonable restriction has been held to be unconstitutional by the Apex Court in *Jindal Stain steel Ltd v. State of Haryana* [2017 12 SCC 1]. Thus, according to the learned Senior Counsel, the impugned Government Order, which prohibits participation of bidders from other States, is ultra

vires Articles 19(1)(g) and 301 to 304 of the Constitution of India and the same is liable to be quashed.

7. Mr.K.M.Vijayan, learned Senior Counsel for the petitioner in WP.No.22956/2018 submitted that no opportunity was ever given to the agriculturists/small poultry farmers to present their case for implementing block level supply of eggs to the beneficiaries under the Noon Meal Programme. According to him, when the representation of the petitioner for floating block level tender was pending from 2013, without any consideration, the Government passed the impugned G.O.Ms.No.57 in a hasty manner by considering the representation of Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society, which would amply prove that the respondents are acting under the behest of some big poultry farmers and in the name of public interest. Hence, the learned Senior Counsel sought to quash the order impugned herein.

8. Mrs.Hema Sampath, learned Senior Counsel for the petitioner in WP.No.24369 of 2018 and Mr.T.V.Ramanujun, learned Senior Counsel appearing for the petitioner in WP.No.26732 of 2018 submitted that the respondents are attempting to project that the present Government Order came to be issued based on the representation given by the Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society, which is only a lame excuse. In fact, the said Society never participated in the tender process; it has no capacity to supply eggs; it has no grading equipment; and it cannot obtain "Agmark" certification. Hence, the representation of such society cannot be cited as a reason for radical alteration of the tender format. The learned Senior Counsel further submitted that there was no necessity to revisit the tried and tested earlier Government Order; none of the poultry businessmen was informed of the meeting alleged to have been held on 14.08.2018; the haste with which the policy decision has been taken smacks of mala fides and the decision is arbitrary. According to the learned Senior Counsel, the small producers cannot satisfy the requirement of the present tender as they cannot show an average annual turnover of Rs.10 crores for participating in each zone; only a very few small producers can supply 1 lakh eggs per day; any farmer with a capacity to supply 1 lakh eggs per day would not be a small farmer and hence, the supply could be made only by forming cartels. They further submitted that the zone wise tender will also lead to corrupt practices and forming of cartels, whereas under old system, all successful bidders were collecting eggs from several small farmers and they were benefitted; and no one has challenged the yearly tender for all these years and as such, it was working really well. The learned Senior Counsel also submitted that since the petitioner has been a successful tenderer for 3 consecutive years by supplying 60%, 30% and 20%

of the required numbers and the supply was always upto the standard expected by the respondents, the rejection of their bid on the ground that the undertaking affidavit and the no objection from the partners were not in the proper format, is arbitrary and illegal.

9.1 Mr.M.S.Krishnan, learned Senior Counsel for the petitioner in WP.Nos.25142 and 26890 of 2018 submitted that the petitioner is supplying eggs to nutritious meal programme for the past 5 years under the State level annual tender; they are the Agmark licence holder of eggs and they have the sufficient grading capacity to supply to the mid-day meal programme. According to the learned Senior Counsel, there is no complaint received by the Government during the period of functioning the State level tender; G.O.Ms.No.264 brought back a time tested and efficient method of ensuring supply of eggs and the same was well reasoned, the validity and efficacy of which, were upheld by the Division Bench in WA Nos.574 and 776 of 2013 and was affirmed by the Supreme Court; and the speedy process of considering the representation made by the Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society would clearly demonstrate the arbitrariness on the part of the respondents in processing the tender. Hence, the learned Senior Counsel submitted that the policy of the Government must be fair, reasonable and non-arbitrary, otherwise, it is subjected to judicial review. In support of the same, he relied on the following decisions:

(i) Union of India and another v. International Trading Company and another [(2003) 5 SCC 437];
(ii) In Re Natural Resources [(2012) 10 SCC 1];
(iii) Essar Steel Ltd v. Union of India [(2016) 11 SCC 1];
and (iv) Afcons Infrastructure Ltd v. Nagpur Metro Rail Corporation Ltd and another [(2016) 16 SCC 818].

9.2 The learned Senior Counsel further submitted that Clause 10(viii)(a) deals with the submission of the affidavit, which is only to be notarised and not the NOC, which is to be submitted under Clause 10(viii)(b) and it does not require any notarisation. However, the second respondent rejected the petitioner's bid on the ground that no objection certificate was not notarised, as per Clause 10(viii)(a) of the tender condition, which is arbitrary, unfair and unreasonable. Even if it is necessary, it is only a minor deficiency, which can be rectified, as observed by the Bombay High Court in B.D.Yadav and another v. Administrator of the City of Nagpur and another [1982 SCC onLine Bom 89: AIR 1984 Bom 351]. Thus, the learned Senior Counsel prayed for allowing the writ petition.

10.1 Mr.G.Masilamani, learned Senior Counsel for the petitioner in WP.Nos.25284 and 27059 of 2018 submitted that by

the impugned G.O.Ms.No.57 as well as the consequential notification, the petitioner, who is an egg supplier, has been precluded from participating in the tender and only the egg producers have been made eligible to participate in the tender, which is arbitrary, unjust and illegal. According to him, the stand of the Government that a producer of eggs would be a better suited person than a supplier such as the petitioner to ensure adequate and proper uninterrupted supply of eggs to the several thousand noon meal centres all over the State, lacks basis or reasoning. The learned Senior Counsel further submitted that when Clause 2(13) specifies that the eggs should be delivered directly to the Anganwadi/Noon Meal centres, ensuring prompt supply of the requisite quantity of eggs requires a central delivery system involving sufficient manpower and skillfully planned logistic support, which can be efficiently executed by a supplier of goods, who has a predominant activity rather than a poultry farmer and hence, the tender condition for the alleged reason of benefitting poultry farmers, has seriously compromised and jeopardised the main object of supplying quality eggs to the noon meal centres for the benefit of children. The learned Senior Counsel also submitted that the previous tender notification permitted both the producers as well as the suppliers of eggs to be the tenderers and there was no stipulation as regards the capacity to produce 1 lakh eggs per day and therefore, any poultry farmer had the possibility to have a consortium with such other person, who had the pre-qualification and participate in the tender, which provided for an even platform for both egg producers and suppliers, whereas, the alleged and purported reasoning for modifying the methodology of the tender i.e. to benefit the poultry farmer, cannot and will not be achieved in terms of the conditions stipulated in the present tender and hence, the tender conditions in the present tender are arbitrary, unreasonable and discriminatory, insofar as they prevent the egg suppliers from participating in the tender. Adding further, the learned Senior Counsel strongly contended that unless there being very compelling reasons, it is not open to the respondents to change the methodology approved by the Division Bench as affirmed by the Supreme Court, especially when there is no change in circumstances. He also placed reliance on the following judgments to support the aforesaid submissions:

(i) Union of India v. Dinesh Engineering Corporation and another [(2001) 8 SCC 491].

(ii) State of Tamil Nadu v. K. Shyam Sundar and others [(2011) 8 SCC 737]

(iii) Dhingra Construction Company v. Municipal Corporation of Delhi [2004 SCC online Del 1096]

(iv) Gharda Chemicals Ltd v. Central Warehousing Corporation [2005 SCC Online Del.170]

(v)Mahesh Varma v. State of Maharashtra [2008 SCC Online Bom 327]

(vi)Gujarat State Petroleum Corporation v. Union of India [MANU/GJ/0376/2008]

(vii)Kakinada Port Steel Barges & Deep Water Port Workers Union v. Government of Andhra Pradesh [2010 SCC Online AP 472]

(viii)Allied Integrated Society v. The State (NCT Delhi) [2018 SCC Online Del.9472]

10.2 The learned Senior Counsel further contended that when the tender document does not stipulate that an agreement with the vendor of the eggs should be submitted along with the tender document and the agreement furnished by the petitioner was only an additional document to establish its bona fides to supply eggs punctually and promptly, the second respondent ought not to have rejected the petitioner's bid on the ground that the agreement of the petitioner with vendors of the eggs was only for a period from 01.05.2016 to 30.04.2019 and it falls short of three months for the tender period i.e., 31.07.2019. The learned Senior Counsel also contended that the petitioner has not filed an appeal within 10 days from the date of rejection of its bid, in terms of Section 11 of the Act, as the subsequent tender notification was floated on 20.08.2018; the statutory period permitting an appeal to be filed within a period of 10 days is procedural in nature, whereas the right to file an appeal is substantive in nature; and the substantive right of the petitioner cannot be denied for mere procedural infraction, especially when the respondents will not be prejudiced in any manner. Thus, the learned Senior Counsel sought to allow the writ petitions.

11. Ms.Sumathy, learned counsel for the petitioner in WP.No.26282 of 2018 submitted that by the impugned G.O.Ms.No.57 as well as the tender notice, the second respondent has introduced new qualifications/conditions for the tenderers, which are highly arbitrary and contradictory to the spirit of the benefitting the poultry farmers/stake holders of the State of Tamil Nadu and also opposed to the Tamil Nadu Transparency in Tenders Act 1998 and the Rules 2000. She further submitted that both the conditions in Clauses 2(3) and 2(4) have no rationale and logic and it would not serve the purpose of restoring the zonal wise tender. Further, there is lack of transparency and bona fides in the process of floating the tender. That apart, Clause 2(5) stipulates that a tenderer can bid for a maximum of three zones only, either individually or by the way of consortium, which gives a scope of two monopolies in the State. Thus, according to the learned counsel, the tender condition is in no way giving any scope for the poor farmers like the petitioner to participate in the tender and hence, the same is liable to be quashed.

12. The respondents 1 and 2 filed a common counter

affidavit in detail, in all the writ petitions, inter alia stating that the policy decision of the Government issuing G.O.Ms.No.264 for procuring eggs at the State level by conducting annual egg tender for one year instead of District level monthly tender, has already been upheld by this Court vide judgment dated 25.04.2014; the present G.O.Ms.No.57 is actually complementing /supplementing the earlier Government Order; there are thousands of poultry farmers in Tamil Nadu producing around 3.5 to 4 crore eggs per day, but under the egg scheme, the average daily requirement of eggs is around 50 lakhs only and hence, it has been decided to procure eggs from egg producers in Tamil Nadu only who otherwise may be exploited by middlemen; the Tender Scrutiny Committee has designed the tender conditions wherein fair opportunities have been given to egg producers of the State to participate directly in the tender process in order to bring healthy competition among the egg suppliers; the minimum production capacity of the prospective bidder has been fixed as 1 lakh egg per day instead of fixing minimum 60% of the tender quantity with the noble intention of allowing more poultry farmers to participate in the tender process; if no minimum capacity of production is fixed, it will not be possible to regulate thousands of farmers, who, with production capacity of even 1000 eggs will be manipulated by unscrupulous elements to participate in the tender and try to create unnecessary difficulties in finalizing the tender, besides trying to create hurdles in providing eggs to poor beneficiaries in Tamil Nadu numbering about 58 lakhs; the State has the freedom of contract and right to decide the conditions of eligibility and it is well settled by a number of judgments of the Supreme Court that the terms and conditions of eligibility in inviting tenders cannot be judicially reviewed and as such, there is no violation of Articles 301 and 303 and 304 of the Constitution; in order to stop exploitation of small farmers by big farmers and traders, the Tender Scrutiny Committee had formulated the tender condition giving scope for entering into an agreement between the tenderer and small farmers; by strictly following all the provisions of the Act and Rules and the various Government Orders, the tender conditions have been framed for the benefit of the beneficiaries and to bring healthy competition among the egg suppliers and support the egg producers of the State. Thus, according to the respondents, G.O.Ms.No.57 and the consequential tender notification are legally valid and the same call for no interference.

13.1 Reiterating the averments made in the counter affidavit, Mr.Vijay Narayan, learned Advocate General defended the impugned G.O.Ms.No.57 on behalf of the respondents 1 and 2. Pointing out the contents made in para 5 of G.O.Ms.No.57, he submitted that vide letter dated 07.08.2018, the remarks of the Commissioner of Social Welfare and the Director of Integrated

Child Development Services Scheme have been called for, who, in turn, have submitted the merits and demerits of the State Level Annual Tender system and District/Zonal wise tender system. Thereafter, a meeting was convened in this regard by the Hon'ble Minister (SW and NMP) with the Chief Secretary to Government, the Additional Chief Secretary (Finance), the Principal Secretary (Social Welfare and Nutritious Meal Programme), the Commissioner of Social Welfare and the Director of Integrated Child Development Services Scheme, on 14.08.2018 to discuss the representation of the Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society, Namakkal dated 06.08.2018 and arrived at the decisions, which resulted in the issuance of G.O.Ms.No.57. Pursuant to the same, the second respondent floated the tender notification dated 20.08.2018.

13.2 The learned Advocate General further submitted that following the relevant provisions of the Act as well as the Rules, the impugned G.O.Ms.No.57 came to be passed. Placing reliance on clause 2 of the tender documents, which specifies the qualifying conditions that the tenderer should be a producer of eggs as per AGMARK specifications and he should have been a producer of eggs in Tamil Nadu for the past three years, the learned Advocate General submitted that the suppliers should not be excluded. According to him, the terms and conditions of the tender are beyond the purview of judicial review and the impugned Government Order is a policy decision of the Government and it cannot be subject to judicial review. That apart, it is the submission of the learned Advocate General that nutritious scheme is a very sensible social welfare legislation and 6 separate evaluation has to be done and hence, it is not necessary to publish the tender in Indian Trade Journal, as such, Rule 11(b) is not applicable to the facts of the present case. Further, it is a short tender as per para 7(3) of the tender document and each zone has separate bank guarantee and EMD, which shows that there is separate tender for each zone.

13.3 The learned Advocate General also submitted that the earlier counter filed in previous round of litigation in favour of G.O.Ms.No.264 is not binding on the respondents and the earlier judgment is with regard to upholding the earlier policy decision and hence, they are not estopped from changing the policy decision. On that score, the present policy cannot be tested. Adding further, there is no undue haste in framing the policy as there was a short time due to the expiry of the earlier contract. According to the learned Advocate General, the tender notification need not be published in tender journal as it is a single notification for six months and Articles 301 to 304 of the Constitution are not applicable to the present case. In support of his arguments, the learned Advocate General relied on the following decisions:

(i) Tata Cellular v. Union of India [(1994) 6 SCC 651];

(ii) P.T.R. Exports v. Union of India [1996 (5) SCC 268];
(iii) Krishnan Kakkanth v. Government of Kerala and others [(1997) 9 SCC 495];
(iv) Union of India v. Kanndapara Sangatanda [2002 (10) SCC 226];
(v) Chairman & MD, BPL Ltd v. S.P. Gururaja and others [2003 (8) SCC 567];
(vi) Bannari Amman Sugars v. Commercial Tax officer and others [2005 (1) SCC 625];
(vii) Association of Registration Plates v. Union of India and others [(2005) 1 SCC 679];
(viii) Shimnit Utsch India Private Limited and another v. West Bengal Transport Infrastructure Development Corporation Limited and others [(2010) 6 SCC 303];
(ix) APM Terminals B.V. v. Union of India and another [(2011) 6 SCC 756];
(x) Michigan Rubber (India) Limited v. State of Karnataka and others [(2012) 8 SCC 216];
(v) Bharti Airtel v. Union of India [2015 (12) SCC 1];
(xi) Essar Steel Limited v. Union of India and others [(2016) 11 SCC 1];
(xii) V. Lavanya v. State of Tamil Nadu [2017 (1) SCC 322];
(xiii) JSW Infrastructure Limited and another v. Kakinada Seaports Limited and others [(2017) 4 SCC 170];
(xiv) Combined Traders by its Managing Partners T.J. Cherian v. State of Tamil Nadu [1988 LW page 490];
(xv) International Data Management Ltd and others v. State of UP and others [1991 SCC All 404].

14. To buttress the acts of the respondents 1 and 2, the newly impleaded respondent viz., Tamil Nadu Poultry Farmers Association, in W.P.Nos. 22878, 22888, 22945, 22946 and 22956 of 2018, filed a detailed common counter affidavit, wherein, it is stated that this respondent Association which is having 485 members, has total egg production capacity of 3,74,08,500, while 116 members have production capacity of over 1,00,000 eggs per day and they have the financial capacity and production capacity to supply the required number of eggs per day in all the 6 zones in the State. It is also stated that the poultry farmers, during the period from 2012 to 2018, when G.O.Ms.No.264 dated 17.10.2012 was in vogue, had suffered heavy loss, hardship and injury; their Associations made representations to the Chief Minister as well as to the authorities to reconsider the State Level tender; accordingly, the Government has passed the present Government Order, by which, they extended a helping hand to protect the poultry farmers by enabling them to participate in the tender process by scrapping the State level tender process and by introducing the zone level tender process; and therefore, there is no much deviation except with regard to centralised State level tender for a period of one year. The counter further

proceeds to state that the Supreme Court, in a catena of decisions, has held that the terms and conditions of the tender are in the realm of contract and they cannot be whittled down, unless it is wholly arbitrary, discriminatory and led by malice; and the writ petitions in contractual matters are not maintainable unless it is justified by public interest. Thus, the writ petitions are devoid of merits and untenable and are liable to be dismissed.

15. Mr.R.Krishnamoorthy, learned Senior Counsel appearing for the newly impleaded respondent submitted that the petitioners cannot be the aggrieved parties due to the passing of the impugned G.O.Ms.No.57, as they can still participate in the tender process, provided they are fully qualified as per the tender conditions. He further submitted that it is the policy decision of the Government to call for Zone-wise tender for the supply of eggs and it will not be open to the petitioners to challenge the same, on the grounds that it is arbitrary and passed with an oblique motive. According to the learned Senior Counsel, the impugned G.O.Ms.No.57 has been passed on rational, reasonable and subjective satisfaction not only to ensure the procurement of Agmark specification eggs for Nutritious Meal Programme, but also to encourage the poultry farmers having capacity, capability and financial viability to take part in the tender process and to supply fresh eggs at a reasonable price fixed by the department to prevent loss of revenue to the poultry farmers and to avoid the middlemen from making unjust enrichment by causing loss to the poultry farmers as well as to the department. He also submitted that as per the tender conditions, not only the tenderers, but also the other egg producers who are entering into agreement with the tenderers are also directly benefitted under the impugned tender system. To substantiate his arguments, he placed reliance on the following decisions:

(i) Jagdish Mandal v. State of Orissa and others [(2007) 14 SCC 517];

(ii) Tejas Constructions and Infrastructure Limited v. Municipal Council, Sendhwa and another [(2012) 6 SCC 464];

(iii) Michigan Rubber (India) Limited v. State of Karnataka and others [(2012) 8 SCC 216];

(iv) Sanjay Kumar Shukla v. Bharat Petroleum Corporation Limited and others [(2014) 3 SCC 493];

(v) Montecarlo Limited v. National Thermal Power Corporation Limited [(2016) 15 SCC 272];

(vi) Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and another [(2016) 16 SCC 818];

(vii) Reliance Telecom Limited v. Union of India and another [(2017) 4 SCC 269];

(viii) JSW Infrastructure Limited and another v. Kakinada

Seaports Limited and others [(2017) 4 SCC 170];

(ix) Consortium of Titagarh Firema Adler v. Nagpur Metro Rail Corporation Limited [(2017) 7 SCC 486]; and

(x) Municipal Corporation, Ujjain and another v. BVG India Limited and others [(2018) 5 SCC 462.

Thus, the learned Senior Counsel prayed for dismissal of this batch of writ petitions.

16. In reply to the arguments made by the learned Advocate General, Mr.S.Parthasarathy, learned Senior Counsel for the petitioner in WP.No.22878 of 2018 submitted that the common counter affidavit filed by the respondents 1 and 2 is bereft of any details on the credentials of the Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society, Namakkal and their locus standi to make a representation of this nature and the reasons contained in the representation cannot, under any circumstances, form a basis for a change in policy. According to him, the impugned G.O.Ms.No.57 was issued in absolute haste and no public consultation was made nor was any cost-benefit analysis conducted; further, the respondents have failed to show as to how the existing policy under G.O.Ms.No.264, in any way, affected the procurement and supply of eggs based on the requirements detailed in para 7 of the impugned G.O.Ms.No.57, more so, when the Government had only recently come out with a Press release attesting to the fact that the existing policy under G.O.Ms.No.264 was in fine shape and did not require any alteration.

17.Mr.A.Thiagarajan, learned Senior Counsel appearing for the petitioner in WP.No.22888 of 2018, by way of reply, submitted that the impugned G.O.Ms.No.57 is not the complements/supplements of the earlier G.O.Ms.No.264, but only to satisfy a section of people. According to him, such action of the respondents is arbitrary, discriminatory and unfair, inasmuch as, it targets the upper segment of poultry farmers and egg producers for participation in tender and eliminates small farmers like that of the petitioner. The learned Senior Counsel also submitted that the tender conditions are fanciful, unworkable, onerous and in violation of the Act and also irrational, having no nexus with the object sought to be achieved and the whole object of the tender to promote competition, as claimed by the respondents, is totally baseless, as no promotion of the healthy competition is sought to be achieved between the tenders as major chunk of small farmers like that of the petitioner are still outside the realm of tenders called for by the respondents; there is no fair and equitable treatment of all the tenderers; hence, the questions of fairness, public confidence and interest; and transparency in the matter of procurement are all strikingly absent in the said tender.

18. Mr.P.S.Raman, learned Senior Counsel appearing for the petitioner in WP.Nos.22945 and 22946 of 2018 replied to the arguments of the learned Advocate General by stating that any reasonable restrictions in tenders in public interest have to be brought about only by way of amendment of the Act, which shall be introduced in the Legislature only; further, the right of the State to enter into contract as covered by Articles 298 and 299 of the Constitution is subject to Articles 301 to 304; hence, the State cannot violate the Constitution of India and the act of the State infringing the freedom of trade is unconstitutional. It is pointed out that each and every action of the State is tested on the touch stone of the Constitution and if any act of the State is found to be ultra vires the Constitution, the same should be struck down as unconstitutional. The learned Senior Counsel also submitted that though it is the stand of the respondents that the tender has been floated with a view to safeguard and support the egg producers of the State, in reality, it is just disadvantageous to the small egg producers like that of the petitioners, who are simply left at the mercy of the large players and are eagerly awaiting the decision of the State to encompass within its fold by framing appropriate tender conditions, in order to enable the petitioners to participate in the tender. Denying that if the egg producers are from Tamil Nadu, the respondents can keep a watch on their quality, the learned Senior Counsel submitted that the respondents have no power to supervise the egg producers, since it is only the officers under the Food Safety and Standards Act that can do so; if the quality of the eggs given is not upto the mark, it is open to the respondents to follow due procedure in law under the Food Safety and Standards Act and report it to the concerned authorities in accordance with law; this can be done to egg producers outside Tamil Nadu also by the respondents and this reasoning by the respondents is flawed; further, once the tender is awarded, the terms of the tender will prevail and the tender does not contemplate any inspections or checks by the respondents, that duty falls upon the successful tenderer to submit periodical reports on the hygiene of the poultry farm; and public interest is the consumers and not the egg producers, since the respondents are not defending a taxing statute.

19. Mr.M.S.Krishnan, learned Senior Counsel appearing for the petitioner in WP.No.25142 of 2018, in his reply, stated that the petitioner is not questioning the right of the Government to change the policy, but the manner in which it has been done. According to him, while issuing the impugned G.O.Ms.No.57 as well as the consequential tender notification, all the earlier safeguards framed by the Government for providing good quality eggs to beneficiaries, who are all school going children, have

been completely given a go by, which may be detrimental to their interest; further, the Government, while dealing with the State largess, cannot have the right to choose a buyer from a particular group of individual, which is against Article 14 of the Constitution of India. The learned Senior Counsel also submitted that one of the sound reasonings assigned by the Government in arriving at the earlier policy decision in 2012 is that in a single State level tender system, a firm and stable price could be fixed due to the fluctuating price of eggs, whereas, the present tender notification is a notification inviting six separate tenders, which will again bring instability in the price of eggs. Further, there was no reason assigned by the Government in the impugned G.O.Ms.No.57 as to how it seeks to achieve the object of a stable and firm price. The learned Senior Counsel further submitted that there was no rhyme or reason for speedy decision taken by the Government on the representation submitted by the Association. It is also submitted that the Government, in its press release dated 18.07.2018, has substantiated that there is no flaw in the existing State level single tender system being carried on by it, whereas, the impugned G.O.Ms.No.57 does not reveal any reason as to why the departure is being made from State level single tender to Zone-wise tender. Thus, according to the learned Senior Counsel, when a change is brought to an existing policy decision, it is the duty of the Government that such change is fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment, as otherwise, the process of decision making by the Government is subjected to judicial review and the Courts can interfere with the same.

20. Mrs.Hema Sampath, learned Senior Counsel for the petitioner in WP.No.24369 of 2018, by way of reply, submitted that the respondents have, in their counter affidavit, admitted that there were difficulties with weekly tenders, 3 months tender and monthly tenders; there were also problems with the District level tender; substandard eggs were supplied for different prices; due to these difficulties, the State-wise yearly tender was floated based on the policy decision and G.O.Ms.No.264 was issued; and the tender has been successful for the past 5 years without any complaint. The learned Senior Counsel also submitted that the other contentions put forth by the respondents are denied, as the same are after thoughts, baseless and counter claims and are invented only for the purpose of this case.

21. As a riposte, Mr.G.Masilamani, learned Senior Counsel appearing for the petitioner in W.P.Nos.25284 and 27059 of 2018 submitted that G.O.Ms.No.264 was propounded as a policy decision

for the introduction of State level tender, after much deliberation and consideration of pros and cons at several levels by the officers of the departments over a long period extending about 6 months in public interest for the welfare of the children being the objective sought to be achieved, whereas, G.O.Ms.No.57 is not a policy decision. The learned Senior Counsel further contended that the decision to introduce zonal level tender and the exclusion of egg suppliers from participation cannot be termed to be fair, just and legally valid; and the decision making process has not considered the relevant factors and the same is not justified, since the facts which ought not to be considered for arriving at the same, had been providing avenue of business to a few egg producers only. Adding further, the learned Senior Counsel submitted that contrary to the stand taken by the Government in the earlier round of litigation, the present tender has been devised for promoting egg commerce and market to the poultry owners; it has been floated for supply of eggs for 6 months only without any nexus to the object sought to be achieved viz., ensuring uninterrupted competitive one price for one year for supply of quality eggs to the children; and procurement of very large quantity of eggs from Namakkal area and transportation of the same throughout Tamil Nadu to about 1 lakh centres are the major operations in the tendered work and not production of eggs and hence, there is no added advantage or benefit to the Government to justify the modification of the methodology of having State wise tender to zone wise tender and hence, it is arbitrary and unreasonable. According to the learned Senior Counsel, there was no study or report by the higher officials to arrive at the decision of zone wise tender and in the absence of there being any concrete material that zone wise tender will benefit poultry farmers and be better than the previous policy decision, particularly excluding traders like the petitioner, the decision to have zone wise tender is an arbitrary one. He further submitted that even the egg producers themselves will not be able to supply 60% quantity on their own, without procuring from other farmers and as such, the alleged object of zone wise tender i.e., to promote competition among egg producers, is negatived by the tender conditions themselves, since, admittedly, hundreds of farmers have been prevented from participating in the present tender, due to the tender condition of Rs.10 crores turnover per annum and 1 lakh eggs production per day. Thus, the learned Senior Counsel prayed for allowing these writ petitions.

22.This Court heard the threadbare arguments advanced by the learned Senior Counsel appearing for the respective petitioners and the learned Advocate General ably assisted by the learned Additional Advocate General and the learned Special Government Pleader appearing for the respondents 1 and 2 and the

learned Senior Counsel for the impleaded respondent and also plodded through the entire documents.

Analysis:-

23. Before proceeding further, at the first instance, it would be advantageous to refer to the following judgments of the Supreme Court touching upon the scope of judicial review under Article 226 of the Constitution in the tender matters:

(a) In *Tata Cellular v. Union of India* [(1994) 6 SCC 651], having reviewed the law on award of public contracts, the Supreme Court laid down the following guiding principles:

"94. 1) The modern trend points to judicial restraint in administrative action.

2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free of arbitrariness not affected by bias or actuated by mala fides.

6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

(b) In *Air India Ltd. v. Cochin International Airport Ltd.* [(2000) 2 SCC 617], the Supreme Court observed as follows:

"7.....The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness." (Emphasis supplied)

(c) In *Jespar I. Slong v. State of Meghalaya and others* [(2004) 11 SCC 485], the Supreme Court considered grants of Government contracts awarding rights to collect tolls, weighment charges etc. and held thus:

"19. It goes without saying that the Government while entering into contracts is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. Such actions should not be arbitrary, irrational or irrelevant. The awarding of contracts by inviting tenders is considered to be one of the fair methods. If there are any reservations or restrictions then they should not be arbitrary and must be justifiable on the basis of some policy or valid principles which by themselves should be reasonable and not discriminatory. (See para 7 of *Hindustan Development case*; (1993) 3 SCC 499). The said judgment also states that any act which excluded competition from any part of the trade or commerce by forming cartels should not be permitted."

(d) In Directorate Of Education and Others vs. Educomp Datamaatics Ltd. & Ors. [(2004) 4 SCC 19], the Supreme Court held thus:

"9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India; (1994) 6 SCC 651.

(e) In State of U.P and Another. v. Johri Mal [(2004) 4 SCC 714], it was held as follows:

"It is well settled that while exercising the power of judicial review the court is more concerned with the decision-making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact-finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision-maker's opinion on facts is final. But while examining and scrutinising the decision-making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touchstone of the tests laid down by the court with

special reference to a given case. This position is well settled in the Indian administrative law. Therefore, to a limited extent of scrutinising the decision-making process, it is always open to the court to review the evaluation of facts by the decision-maker."

(f) In *Maa Binda Express Carrier v. North-East Frontier Railway* [(2014) 3 SCC 760], the Supreme Court held thus:

"8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable

right in the Court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest."

Thus, the law laid down by the Supreme Court in the aforesaid judgments is that the Courts can scrutinise the award of the contracts by the Government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favoritism. Further, the Supreme Court indicated that interference in the contractual matters is permissible, if decision-making process is illegal, irrational, arbitrary and procedural impropriety and it must meet the test of reasons and relevance.

23. After recollecting the correct approach under Article 226 of the Constitution while dealing with tender matters, this Court now, proceeds to examine the rival contentions made by the respective parties. At the outset, it would be pertinent to refer to the contents of the impugned G.O.Ms.No.57, which run thus:

"1...

2...

3...

4. In the meantime, the President, Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society, Namakkal District in his representation 5th read above, has stated that the poultry farmers/stake holder of poultry industry are not able to participate in the present State Level Annual Tender System for the supply of eggs and suggested that a District Level or Zonal / Regional level tender system would benefit both the poultry farmers and the Government. Therefore, he has requested to modify the existing tender system for procurement of eggs to Noon Meal Scheme and Integrated Child Development Services Scheme to District Wise or Regional / Zone wise Tender System so as to procure the eggs directly from poultry farmers/stake holders and thereby support the poultry industry.

5...

6.A meeting was convened in this regard by the Hon'ble Minister (SW and NMP) with the Chief Secretary to Government, the Additional Chief Secretary (Finance), the Principal Secretary (Social Welfare and Nutritious Meal Programme), the Commissioner of Social Welfare and the Director of Integrated Child Development Services Scheme, on 14.08.2018 to discuss the representation of the Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society, Namakkal dated 06.08.2018 and the remarks received from the Commissioner of Social Welfare and the Director of Integrated Child Development Services Scheme and arrived at the decisions as per the minutes of the meeting 9th read above.

7.The Government after careful examination of the representation of the President, Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society, remarks of the Commissioner of Social Welfare and the Director-cum-Mission Director of Integrated Child Development Services Scheme and the decisions taken during the meeting held on 14.08.2018 by the Hon'ble Minister (SW and NMP) in the reference 9th read above has decided to accept the same and in order to bring healthy competition among the eggs suppliers and to support the egg producers of the State to participate directly in tender process issue the following orders:-

i. The tender for procurement of eggs already floated and scheduled to be opened on 24.08.2018 shall be cancelled.

ii. State Level Zone -wise tender system (six zones) to procure eggs from the egg producers (hen) in Tamil Nadu for a period of six months shall be floated.

iii. As the present extended supply contract expires on 31.08.2018, a short tender (15 days) shall be floated and finalized to procure eggs at the earliest.

iv. The existing procedure of constitution of Tender Committees namely Tender Inviting

Authority / Tender Scrutiny Committee / Tender Accepting Authority Committee, procurement of AGMARK quality eggs, allocation of funds, maintenance of accounts and settlement of bills, constitution of District/ Block Level Monitoring Committee etc., as in the Government order 1st read above shall be continued.

v. The six zones shall be decided by the Tender Inviting Authority for the smooth implementation of the programme and the State Level Zone -wise Tender (six zones) shall be floated by the Tender Inviting Authority at the State Level by following Tamil Nadu Transparency in Tenders Act, 1998 & Rules, 2000.

vi. The Tender scrutiny committee shall decide the eligibility criteria in respect of the Technical Capabilities and other related basic requirements needed to participate in the tender, by following Tenders Act, 1998 & Rules, 2000 and the Government Order first read above.

8..."

From a reading of the contents of the aforesaid Government Order, it becomes apparent that since the technical bids submitted by the six firms pursuant to the tender notification floated on 11.07.2018, were found to be technically not qualified, a fresh tender was notified on 24.07.2018 for procurement of eggs for the year 2018-19, the technical bid of which was scheduled to be opened on 24.08.2018. In the mean time, based on the representation dated 06.08.2018, received from the President, Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society, Namakkal District, to the effect that as the poultry farmers/stake holder of poultry are unable to participate in the State level Annual tender system, they suggested to modify the existing system into a District Level or zonal/Regional level tender system, remarks were called for from the Commissioner of Social Welfare and the Director of Integrated Child Development Services Scheme. After obtaining remarks from the said authorities, a meeting was convened by the concerned Minister (SW and NMP) with the Chief Secretary to Government, the Additional Chief Secretary (Finance), the Principal Secretary (Social Welfare and Nutritious Meal Programme), the Commissioner of Social Welfare and the Director of Integrated Child Development Services Scheme on 14.08.2018 and ultimately, a decision was arrived at to accept the said representation, in order to bring a healthy competition among the egg suppliers and to support the egg producers of the State

enabling them to participate directly in the tender process and accordingly, the impugned G.O.Ms.No.57 came to be passed. Thus, it is evident that the only reason pointed out for passing the said G.O., is to consider the claim of the Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society.

24. In this batch of writ petitions, while some of the petitioners challenge the validity of G.O.Ms.No.57, a few of the petitioners also question the rejection of their technical bid to the tender notice dated 20.08.2018 floated pursuant to the said G.O. Since the grounds of attack by each of the petitioners is no different, but one and the same, this Court does not propose to delve into the grounds of each of the petitioners separately and it would suffice to discuss the following aspects.

25.1 The main ground of attack made by the petitioners is that the impugned decision made in G.O.Ms.No.57 excluding the egg suppliers from participation in the tender called for the procurement of eggs to the beneficiaries in Tamil Nadu under Nutritious Meal Programme and Integrated Child Development Services Scheme, is violative of Articles 19(1)(g), 301, 303 and 304 of the Constitution. The petitioners further alleged that the said decision is also violative of Article 14 of the Constitution. According to them, the classification made by the respondent authorities between the producers and suppliers of the eggs with regard to the object of the Scheme, is totally unreasonable, irrational, arbitrary and discriminative in nature; the decision to move away from a centralized State level tender to zone wise tender is also arbitrary, unfair and violative of the fundamental rights guaranteed under the Constitution. The learned Senior Counsel for the petitioners further submitted that the executive powers of the State are co-extensive with the legislative powers and the respondents cannot pass an executive order, which creates an artificial restriction on Inter-State Trade and Commerce; such an arbitrary and unreasonable restriction has been held to be unconstitutional in the judgment rendered by the Supreme Court in *Jindal Stainsteel Ltd v. State of Haryana* [(2017) 12 SCC 1]. Therefore, the impugned G.O and consequential tender notice, preventing the petitioners and others belonging to other States from participating in the tender process, amount to hostility, arbitrariness and discrimination and the same are liable to be quashed.

25.2 Adding further, the learned Senior Counsel contended that the embargo on the egg producers outside the State in participation has no rationale to the object sought to be achieved; if there is an egg producer from another State, who can give good quality eggs at efficient prices, they should not be estopped from doing so by making unreasonable classification; and preventing the other State producers from continuing to sell

eggs in Tamil Nadu, would create trade barrier; however, the respondents have passed the impugned G.O, which is certainly a outcome of total non-application of mind to the prevailing facts and circumstances and directly hits Article 14; hence, the decision taken by the respondents in eliminating the egg suppliers from directly participating in the tender and estopping the egg producers from outside the State are absolutely unreasonable, unfair, arbitrary and discriminative in nature. In support of the same, the learned Senior Counsel heavily relied on the following decisions:

(i) Budhan Choudhary v. State of Bihar [AIR 1955 SC 191]:

"5. The provisions of Article 14 of the Constitution have come up for discussion before this Court in a number of cases., namely, Chiranjit Lal Chowdhuri v. The Union of India, [1950] S.C.R. 869, The State of Bombay v. F. N. Balsara, [1951] S.C.R. 682, The State of West Bengal v. Anwar Ali Sarkar, [1952] S.C.R. 284, Kathi Raning Rawat v. The State of Saurashtra, [1952] 3 SCR 435, Lachmandas Kewalram Ahuja v. The State of Bombay [1952] 3 SCR 710 and Qasim Razvi v. The State of Hyderabad AIR 1953 SC 156 and Habeeb Mohamad v. The State of Hyderabad, [1953] 4 SCR 661. It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure. The contention now put forward as to the invalidity of the trial of the appellants has, therefore to be tested in the light of the

principles so laid down in the decisions of this Court."

(ii) The Supreme Court in *EP Royappa v. State of Tamil Nadu*, [AIR 1974 SC 555], held that Article 14 embodies a guarantee against arbitrariness.

(iii) In *AL Kalra v. P&E Corporation of India*, [AIR 1984 SC 1361], the Supreme Court held that Article 14 strikes at arbitrariness in executive/administrative action, because any action that is arbitrary must necessarily involve the negation of equality; one need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment; an action per se arbitrary itself denies equal of protection by law.

(iv) *Union of India and another v. International Trading Company and another* [(2003) 5 SCC 437]:

14. It is trite law that Article 14 of the Constitution applies also to matters of Governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily on by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and

obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

16. Where a particular mode is prescribed for doing an act and there is not impediment in adopting the procedure, the deviation to act in different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary.

17. The courts as observed in G.B. Mahajan v. Jalgaon Municipal Council (1991) 3 SCC 91: AIR 1991 SC 1153 are kept out of lush field of administrative policy except where policy is inconsistent with the express or implied provision of a statute which creates the power to which the policy relates or where a decision made in purported exercise of power is such that a repository of the power acting reasonably and in good faith could not have made it. But there has to be a word of caution. Something overwhelming must appear before the Court will intervene. That is and ought to be a difficult onus for an applicant to discharge. The courts are not very good at formulating or evaluating policy. Sometimes when the Courts have intervened on policy grounds the Court's view of the range of policies open under the statute or of what is unreasonable policy has not got public acceptance. On the contrary, curial views of policy have been subjected to stringent criticism.

18. As Professor Wade points out (in Administrative Law by H.W.R. Wade 6th Edition), there is ample room within the legal boundaries for radical differences of opinion in which neither side is unreasonable. The reasonableness in administrative law must, therefore, distinguish between proper course and improper abuse of power. Nor is the test Court's own standard of reasonableness as it might conceive it in a given situation. The point to note is that the thing is not unreasonable in the legal

sense merely because the Court thinks it to be unwise.

19. In *Union of India v. Hindustan Development Corporation*, (1993) 3 SCC 499 : AIR 1994 SC 988, it was observed that decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest where the doctrine of legitimate expectation can be applied. If it is a question of policy, even by ways of change of old policy, the Courts cannot intervene with the decision. In a given case whether there are such facts and circumstance giving rise to legitimate expectation, would primarily be a question of fact.

(v) In *Re: Natural Resources Allocation*, Special Reference No.1 of 2012 [(2012) 10 SCC 1], at para 105, it was held as follows:

"105. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as McDowell's case (supra) has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, nondiscriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India."

(vi) The Supreme Court in *Union of India v. Dinesh Engineering*, [(2001) 8 SCC 491] observed as follows:

"12....There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to a policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons

concerned and courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record....."

"16. But then as has been held by this Court in the very same judgment that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law especially Article 14 of the Constitution. In the instant case, we have noticed that apart from rejecting the offer of the writ petitioner arbitrarily, the writ petitioner has now been virtually debarred from competing with the EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992, and during all this while we are told the Railways are making purchases without any tender on a proprietary basis only from the EDC which, in our opinion, is in flagrant violation of the constitutional mandate of Article 14. We are also of the opinion that the so-called policy of the Board creating monopoly of EDC suffers from the vice of non-application of mind, hence, it has to be quashed as has been done by the High Court."

25.3 Stoutly denying the submissions so made by the petitioners, the respondents stated that the State has the freedom of contract and right to decide the conditions of eligibility; the decision to procure eggs from the egg producers of the State cannot be termed as prejudicial to the producers of eggs from other States; as the Government owes a responsibility towards the welfare of poultry farmers, it has been decided to procure

eggs from the egg producers in Tamil Nadu only, who otherwise may be exploited by middlemen; the Tender Scrutiny Committee has designed the tender conditions, wherein, fair opportunities have been given to egg producers of the State to participate directly in the tender process, in order to bring healthy competition among the egg suppliers; in terms of Clause (6) of Article 19, which empowers the State to impose reasonable restrictions on the said right in the interest of general public, the decision taken by the first respondent prohibiting the egg suppliers from participation in the tender in question is a reasonable classification. The respondents further stated that there is no prohibition or restriction on the petitioners for selling the eggs in Tamil Nadu, if they are the producers from neighbouring States; there are thousands of poultry farmers in Tamil Nadu producing around 3.5 to 4 crores eggs per day, whereas, under the scheme in question, the average daily requirement of eggs is around 50 lakhs only and hence, it is certainly open to the petitioners to bring eggs from neighbouring States and sell the same in the open market; thus, the eligibility condition in the tender that the petitioners should be the egg producers from Tamil Nadu, in no manner, affects the right of the egg producers from other States to sell eggs in Tamil Nadu and the same does not violate Articles 301, 303 and 304 of the Constitution. In support of the said submission, the learned Advocate General placed strong reliance on the following decisions:

(i) The Allahabad High Court in *International Data Management Ltd (supra)*, at paras 15 and 17, held thus:

"15. Now, we come to the contention based upon Art.14 of the Constitution. It's principle has been well illustrated by several decisions of the Supreme Court, in particular *Ramana Dayaram Shetty v. The International Airport Authority of India*, (1979) 3 SCC 489: AIR 1979 SC 1628, *Kasturi Lal Lakshmi Reddy v. The State of Jammu & Kashmir* (1980) 4 SCC 1: AIR 1980 SC 1992. This aspect is also illustrated and emphasised by the decision of the Supreme Court in *Erusian Equipment and Chemicals Ltd v. State of West Bengal*, (1975) 1 SCC 70: AIR 1975 SC 266. In short the principal is this. While purchasing goods for meeting its requirement, the State (as defined in Art.12, which would include public sector corporations, local authorities and Government companies owned and controlled by a Government) should not discriminate between a citizen and citizen. It must give equal opportunity to all to sell their goods or for that matter to enter into contract/agreements for sale of goods with the Government. It cannot prefer one over other unless public interest so demands. The Government no doubt has a discretion in this matter,

but it is not unlimited or arbitrary. It must be exercised in public interest. It would be sufficient if we refer the following observation in Ramana Dayaram Shetty v. The International Airport Authority of India, (1979) 3 SCC 489 : AIR 1979 SC 1628:

The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will or on such terms as it chooses in its absolute discretion. There are two limitations imposed by law, which structure and control the discretion of the Government in this behalf. The first is in regard to the terms on which largess may be granted and the other in regard to the persons who may be recipients of such largess.

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."

17. We shall now deal with the argument based on Art. 301. We must say at the very outset that we are unable to see any relevance of Art. 301 in the facts and circumstances of this case. Article 301 declares that subject to the other provisions of Part 13 (the Article occurs in part 13) trade, commerce and intercourse throughout the territory of India shall be free. We are unable to see, how this right, or guarantee as may be called, is defeated or restricted by the Government of UP in refusing to purchase the products of the petitioners. The guarantee no doubt extends not only to trade, commerce and intercourse with a State but also within the State but it is difficult to say that this guarantee takes in or confers upon the petitioners a right to sell their goods to the Government. In Ibrahim's case (1970) 1 SCC 386: AIR 1970SC 1275) (supra), Art. 301 was attracted because the respondents therein, who were licensees under the Andhra Pradesh Control Order and recognized dealers within the meaning of Central Order were totally excluded from their business, namely to

deal in sugar by an executive order. Similarly in Mannalal Jain's case, AIR 1962 SC 386 (supra), the petitioner could not carry on business in food grains except under license and that was denied to him on the ground that the Government wishes to confine the said licenses only to co-operate societies. The relevant statutory order did not provide for creation of such a monopoly. No such deprivation or exclusion is present in this case. The petitioners are free to sell their goods not only throughout the country but also in the State of UP. The total market of electronic goods in the UP is Rs.16 crores out of which the purchase by the Government is only Rs.3 crores. The petitioners business does not consist only in selling to the Government nor is it a case where they cannot carry on their trade or business unless they are permitted to sell to the Government. We must say with all due respect at our command that the decision of Andhra Pradesh High Court in Mahindera & Mahindra, AIR 1986 Andh Pra 332 (supra), is not correct in so far as it holds that Art. 301 was violated by the impugned order in that case. The said conclusion was arrived at by the said Court purporting to apply the ratio of Ibrahim's case (1970) 1 SCC 386 : AIR 1970 SC 1275, but as we have explained above, the facts in Ibrahim's case are entirely different and can have no application to a case like the present one.

(ii) In (1997) 9 SCC 495, Krishnan Kakkanth v. Government of Kerala and others, it has been held as follows:

"14. Mr. K.N. Bhat, learned Additional Solicitor General appearing for the State of Kerala, has however disputed the contentions of Mr. Venugopal. He has submitted that no action has been taken by the Government to regulate or control the business of dealership of pump sets etc. in the State of Kerala. Hence question of violating the fundamental right guaranteed under Article 19 (i) (g) of the Constitution does not arise. Mr. Bhat has submitted that unless any action has a direct impact on the right to carry on any trade or business, such action cannot be held to be violative of fundamental right guaranteed under Article 19(i) (g). If the action of the executive only indirectly creates some prejudice in carrying on any trade or business such action per se does not offend Article 19(i) (g). In support of such contention, Mr Bhat has referred to the decision of this Court in Viklad Coal Merchant Patiala

versus Union of India (1984 (1) SCR 657 (682)). In the said case, the Coal Merchant challenged the vires of Section 27A of the Indian Railways Act and circular issued thereunder relating to preferential Traffic Schedule providing for priorities for movement of different goods. A circular was issued by the Ministry of Railways in connection with movement of some goods including coal. The petitioners who were coal merchants, alleged that sum total of various restrictions imposed by giving abbreviation GX against all way side stations in the coal belt and restricting loading of coal in wagons from the stations categorised as GX and introducing preferential Traffic Schedule, in their cumulative effect resulted in total ban on transport of coal by Railways at their instance and such actions were violative of Articles 14 and 19(1) (g) of the Constitution. Repelling such contention, it has been held by this Court that whenever the court is called upon to examine the complaint that restrictions imposed on the freedom to carry on trade are unreasonable, it is necessary to find out what is the trade and business of the complainant-petitioner and to what extent the restriction, if any, is imposed upon the freedom to carry on trade or business and then to determine whether the restriction is 'reasonable or not. It is the direct impact of the restriction on the freedom to carry on trade that has to be kept in view and not the ancillary or incidental effects of the governmental action on the freedom to carry on trade.

(Emphasis supplied) It has also been indicated that prima facie it appears that petitioners business or trade as coal merchants is in no way interfered with by the Railways by not being able to provide transport facilities. Railway is not the only means of transport. There are other means of transport by which coal can be transported by the petitioners to their respective place of business. Even assuming that the direct impact of the policy laid down by the Railway administration pursuant to the orders of the Central

Government under Section 27A results in denial of the allotment of wagon to the petitioners, the restriction will none-the-less be

reasonable because petitioners are not wholly denied the allotment of wagons. (Emphasis Supplied)

27. The reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of general public and not from the standpoint of the interests of the persons upon whom the restriction are imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly and even if the persons affected be petty traders (AIR 1958 SC 73- Hanif Versus State of Bihar). In determining the infringement of the right guaranteed under Article 19(1), the nature of right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, enter into judicial verdict (AIR 1981 SC 673 Laxmi) versus State of U.P.; AIR 1968 SC 1323 Treveli Versus State of Gujarat and Herekchand vs. Union of India. India. AIR 1970 SC 1453).

28. Under Clause (1) (g) of Article 19, every citizen has a freedom and right to choose his own employment or take up any trade or calling subject only to the limits as may be imposed by the State in the interests of public welfare and the other grounds mentioned in clause (6) of Article 19. But it may be emphasised that the Constitution does not recognise franchise or rights to business which are dependent on grants by the State or business affected by public interest Saghir vs. State of U.P. 1955 (1) SCR 707).

29. It may be indicated that where a right is conferred on a particular individual or group of individuals to the exclusion of others, the reasonableness of restrictions has to be determined with reference to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of specified individual has been held reasonable by this Court where vital interests of the community are concerned or when the business

affects the economy of the country (P.T.C.S Vs. R.T.A. AIR 1960 SC 801: Meenakshi Mills Vs. Union of India, AIR 1979 SC 366 and Lala Harichand Seroa Vs. Mizo District Council and Anr, 1967(1) SCR 1012).

32.It may be indicated that although a citizen has a fundamental right to carry on a trade or business, he has no fundamental right to insist upon the Government or any other individual for doing business with him. Any government or an individual has got a right to enter into contract with a particular person or to determine person or person with whom he or it will deal.

34.It has already been indicated that in Vikalad's case (supra), it has been held by this Court that infringement of fundamental right under Article 19(1) (g) must have a direct impact on the restriction on the freedom to carry on trade and not ancillary or incidental effects on such freedom to trade and not ancillary or incidental effects on such freedom to trade arising out of any governmental action. It has also been held in that case that unless the trader or merchant is not wholly denied to carry on his trade, the restriction imposed in denying the allotment of wagon in favour of such trader or merchant to transport coal for carrying put trading activities does not offend Article 19(1) (g) of the Constitution. No restriction has been imposed on the trading activity of dealers in pump sets in the State of Kerala including northern region comprising eight districts. Even in such area, a dealer is free to carry on his business. Such dealer, even in the absence of the said circular, cannot claim as a matter of fundamental right guaranteed under Article 19(1) (g) that a farmer or agriculturist must enter into a business deal with such trader in the matter of purchase of pump sets. Similarly, such trader also cannot claim that the Government should also accept him as an approved dealer of the Government. The trading activity in dealership of pump sheets has not been stopped or even controlled or regulated generally. The dealer can deal with purchasers of pump sets without any control imposed on it to carry on such business. The

obligation to purchase from approved dealer has been fastened only to such farmer or agriculturist who has volunteered to accept financial assistance under the scheme on various terms and conditions.

(iii) The Supreme Court in *Bannari Amman Sugars v. Commercial Tax Officer and others* in 2005 (1) SCC 625, observed as follows:

"17. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interest of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved the nature of the right alleged to have been taken infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time enter into judicial verdict, the reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. (See *Parbhani Transport Co-operative Society Ltd. v. Regional Transport Authority, Aurangabad and Others*, AIR (1960) SC 901; *Shree Meenakshi Mills Ltd. v. Union of India*, AIR (1974) SC 365; *Hari Chand Sarda v. Mizo District Council and Another*, AIR (1967) SC 829; *Krishnan Kakkanth v. Government of Kerala and Others*, AIR (1997) SC 128 and *Union of India and Another v. International Trading Co. and Another*, [2003] 5 SCC 437."

25.4 This Court considered the rival submissions. Now, it is required to be noted here that Article 19(1)(g) provides a citizen a right to practise any profession or to carry on any occupation, trade or business. At the same time, Article 304(b)

empowers the State Government to impose such reasonable restrictions on the freedom of trade, commerce or intercourse, with or within that State, as may be required in the public interest, but, a bill for this purpose has to be introduced or moved in the Legislature only with the previous sanction of the President. Such being the legal position, the classification made by the respondent authorities between the producers and suppliers of eggs is certainly unreasonable. Similarly, the embargo on the egg producers from outside Tamil Nadu is absolutely unfair, arbitrary and also discriminatory. Further, there was no rational nexus between the differentia made and the object to be achieved. That apart, the decisions relied on by the respondents, cannot be applicable to the facts of the present case, as the same stand in a different footing. In such view of the matter, applying the ratio laid down by the Supreme Court that the Executive should only adopt rational means while entering into contracts and if rationality is not present, the Courts can intervene, this Court comes to the conclusion that the classification made in the impugned G.O is violative of Articles 19(1)(g), 301, 304 and 305 of the Constitution and it also infringes Article 14 of the Constitution.

26.1 The next ground of attack made by the petitioners is that the impugned G.O.Ms.No.57 has been passed in complete haste without giving an opportunity of hearing to various stake holders, including the petitioners. According to the petitioners, the impugned G.O.Ms.No.57 has been passed only based on the representation made by the Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society, within a short period of 6 working days and there is no plausible reason/explanation given for taking such a decision quickly, that too, without providing an opportunity of hearing to all the stakeholders/poultry farmers and the reason stated therein is only vague in nature.

26.2 The aforesaid submission was seriously refuted by the learned Advocate General appearing for the respondents. According to him, there is no undue haste in passing G.O.Ms.No.57, which is actually complementing/supplementing G.O.Ms.No.264; based on the representation of the President, Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society as well as the remarks of the Commissioner of Social Welfare and the Director of Integrated Child Development Services Scheme and also after convening a meeting, the said G.O.Ms.No.57 has been passed, with an object to bring healthy competition among the eggs suppliers and to support the egg producers of the State to directly participate in the tender process, for the procurement of eggs under the Noon Meal Programme; even otherwise, judicial review is not warranted in the case of undue haste on the part of the respondents in taking such a decision. To substantiate

the same, the learned Advocate General relied on the judgement of the Supreme Court in Chairman and MD, BPL Ltd case, wherein, at para 34, it has been pointed out as under:

"34.Undue haste also is a matter, which by itself would not have been a ground for exercise of the power of judicial review, unless it is held to be mala fide. What is necessary in such matters is not the time taken for allotment but the manner in which the action had been taken. The Court, it is trite, is not concerned with the merit of the decision, but the decision-making process. In the absence of any finding that any legal malice was committed, the impugned allotment of land could not have been interfered with. What was only necessary to be seen was as to whether there had been fair play in action."

26.3 This Court finds some bona fides in the contention made on the side of the petitioners, in regard to the pace at which the Government has travelled to process the said representation, the dates and event of which, for better appreciation, are narrated hereunder:

06.08.2018 - Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing

Society made a representation requesting to call for tenders District/Zone/Region wise to help poultry farmers.

07.08.2018 - The Commissioner, Social Welfare Department gave his remarks on the said representation.

09.08.2018 - The Director, Integrated Child Development Services Scheme gave his remarks on the said representation.

14.08.2018 - The Minister for Social Welfare and Noon Meal Programme chaired a meeting with the concerned authorities to discuss the representation given a week earlier and decided to implement the same.

20.08.2018 - Impugned G.O. Came to be passed cancelling the earlier tender called at state level and directing zonal tenders for six months.

20.08.2018 - On the same day, tender notification came to be published.

Though the learned Advocate General appearing for the respondents submitted that this is an era of technical advancement and hence, nothing is impossible, this Court finds it difficult to accept the pace at which the respondents have travelled to consider the claim made in the said representation. The Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society made its representation on 06.08.2018; the Government called for remarks from the authorities concerned on 07.08.2018; while the Commissioner gave his remarks on the same day itself, the Director gave his remarks on 09.08.2018; meeting was convened on 14.08.2018; the impugned G.O.Ms.No.57 came to be passed on 20.08.2018; and tender notice also came to be issued on the same day itself. Thus, it could safely be inferred that the action so taken, on the representation of the said Marketing Society, without even providing an opportunity to all other stakeholders/poultry farmers, would clearly show the mala fide act on the part of the respondents to favour someone.

26.4 At this juncture, the submission of Mr.K.M.Vijayan, learned Senior Counsel for the petitioner in WP.No.22956 of 2018 that the interest of the agriculturist has been purposefully ignored and there is no relief to the petitioner, who made representation for floating block level tender in the year 2013 itself, even though their grievances were promised to be addressed by the Government, is to be recollected. No doubt, taking into consideration the larger public interest, the attempt of the respondent authorities to travel at a great speed is laudable. However, it should not be forgotten by them that at times, travelling at such a breakneck speed, amounts to driving in a rash and negligent manner, leading to unforeseen accidents. Hence, this Court is of the opinion that the impugned G.O.Ms.No.57 has been passed in a complete hasty manner and hence, the same is liable to be quashed.

27.1 The next plank of ground made by the petitioners is that the impugned G.O.Ms.No.57 is to create cartel and monopoly. According to the petitioners, the impugned G.O and consequential tender notice create two classes of poultry farmers -one, who is able to bid under the tender notification and another is meant to be kept out of the purview of the tender notification intentionally, with a view to help the upper segment of poultry farmers, for the reasons best known to the respondents; though it is the stand of the respondents that the tender has been floated with a view to safeguard and support the egg producers of the State, in reality, it is just against the small egg producers like those of the petitioners, who are simply left at the mercy of the large players and are eagerly awaiting the decision of the State to encompass within its fold by framing

appropriate tender conditions, in order to enable the petitioners to participate in the tender. The learned Senior Counsel for the petitioners further contended that the reservation or restriction, if any, based on some policy or principle, should be formed by the respondent authorities with the object of prohibiting monopolistic tendency and encouraging healthy competition with reasonableness and non-arbitrariness, whereas, the qualifying condition prescribed in the tender notice with regard to eligibility of tenderers, is nothing but arbitrary and unreasonable, as it would only give way for monopolising the business, which would otherwise be against the public interest. In *Union of India v. Hindustan Development Corporation*, (1993) 3 SCC 499, the Supreme Court held thus:

"11. Therefore, the avowed policy of the Government particularly from the point of view of public interest is to prohibit concentration of economic power and to control monopolies so that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and to ensure that while promoting industrial growth there is reduction in concentration of wealth and that the economic power is brought about to secure social and economic justice."

27.2 On the contrary, the respondents heavily rebutted the submissions so made by the petitioners. According to them, G.O.Ms.No.57 has been passed only to prohibit the cartel or monopoly and encourage canalization of trade and business in respect of the individuals or group of individuals. To substantiate the same, the respondents cited the following judgments:

(i) In *Krishnan Kakkanth v. Government of Kerala and others*, [(1997) 9 SCC 495] it was held as follows:

"14. Mr. K.N. Bhat, learned Additional Solicitor General appearing for the State of Kerala, has however disputed the contentions of Mr. Venugopal. He has submitted that no action has been taken by the Government to regulate or control the business of dealership of pump sets etc. in the State of Kerala. Hence question of violating the fundamental right guaranteed under Article 19 (i) (g) of the Constitution does not arise. Mr. Bhat has submitted that unless any action has a direct impact on the right to carry on any trade or business, such action cannot be held to be violative of

fundamental right guaranteed under Article 19(i) (g). If the action of the executive only indirectly creates some prejudice in carrying on any trade or business such action per se does not offend Article 19(i) (g). In support of such contention, Mr Bhat has referred to the decision of this Court in *Viklad Coal Merchant Patiala versus Union of India* (1984 (1) SCR 657 (682)). In the said case, the Coal Merchant challenged the vires of Section 27A of the Indian Railways Act and circular issued thereunder relating to preferential Traffic Schedule providing for priorities for movement of different goods. A circular was issued by the Ministry of Railways in connection with movement of some goods including coal. The petitioners who were coal merchants, alleged that sum total of various restrictions imposed by giving abbreviation GX against all way side stations in the coal belt and restricting loading of coal in wagons from the stations categorised as GX and introducing preferential Traffic Schedule, in their cumulative effect resulted in total ban on transport of coal by Railways at their instance and such actions were violative of Articles 14 and 19(1) (g) of the Constitution. Repelling such contention, it has been held by this Court that whenever the court is called upon to examine the complaint that restrictions imposed on the freedom to carry on trade are unreasonable, it is necessary to find out what is the trade and business of the complainant-petitioner and to what extent the restriction, if any, is imposed upon the freedom to carry on trade or business and then to determine whether the restriction is 'reasonable or not. It is the direct impact of the restriction on the freedom to carry on trade that has to be kept in view and not the ancillary or incidental effects of the governmental action on the freedom to carry on trade.

(Emphasis supplied) It has also been indicated that prima facie it appears that petitioners business or trade as coal merchants is in no way interfered with by the Railways by not being able to provide transport facilities. Railway is not the only means of transport. There are other means of transport by which coal can be transported by the petitioners to their respective place of business. Even assuming that

the direct impact of the policy laid down by the Railway administration pursuant to the orders of the Central Government under Section 27A results in denial of the allotment of wagon to the petitioners, the restriction will none-the-less be reasonable because petitioners are not wholly denied the allotment of wagons. (Emphasis Supplied)

27. The reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of general public and not from the standpoint of the interests of the persons upon whom the restriction are imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly and even if the persons affected be petty traders (AIR 1958 SC 73- Hanif Versus State of Bihar). In determining the infringement of the right guaranteed under Article 19(1), the nature of right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, enter into judicial verdict (AIR 1981 SC 673 Laxmi) versus State of U.P.; AIR 1968 SC 1323 Treveli Versus State of Gujarat and Herekchand vs. Union of India. AIR 1970 SC 1453).

28. Under Clause (1) (g) of Article 19, every citizen has a freedom and right to choose his own employment or take up any trade or calling subject only to the limits as may be imposed by the State in the interests of public welfare and the other grounds mentioned in clause (6) of Article 19. But it may be emphasised that the Constitution does not recognise franchise or rights to business which are dependent on grants by the State or business affected by public interest Saghir vs. State of U.P. 1955 (1) SCR 707).

29. It may be indicated that where a right is conferred on a particular individual or group of individuals to the exclusion of others, the reasonableness of restrictions has to be determined with reference to the circumstances

relating to the trade or business in question. Canalisation of a particular business in favour of specified individual has been held reasonable by this Court where vital interests of the community are concerned or when the business affects the economy of the country (P.T.C.S Vs. R.T.A. AIR 1960 SC 801: Meenakshi Mills Vs. Union of India, AIR 1979 SC 366 and Lala Harichand Seroa Vs. Mizo District Council and Anr, 1967(1) SCR 1012).

32.It may be indicated that although a citizen has a fundamental right to carry on a trade or business, he has no fundamental right to insist upon the Government or any other individual for doing business with him. Any government or an individual has got a right to enter into contract with a particular person or to determine person or person with whom he or it will deal.

34.It has already been indicated that in Vikalad's case (supra), it has been held by this Court that infringement of fundamental right under Article 19(1) (g) must have a direct impact on the restriction on the freedom to carry on trade and not ancillary or incidental effects on such freedom to trade and not ancillary or incidental effects on such freedom to trade arising out of any governmental action. It has also been held in that case that unless the trader or merchant is not wholly denied to carry on his trade, the restriction imposed in denying the allotment of wagon in favour of such trader or merchant to transport coal for carrying put trading activities does not offend Article 19(1) (g) of the Constitution. No restriction has been imposed on the trading activity of dealers in pump sets in the State of Kerala including northern region comprising eight districts. Even in such area, a dealer is free to carry on his business. Such dealer, even in the absence of the said circular, cannot claim as a matter of fundamental right guaranteed under Article 19(1) (g) that a farmer or agriculturist must enter into a business deal with such trader in the matter of purchase of pump sets. Similarly, such trader also cannot claim that the Government should also accept him as an approved dealer of the Government. The

trading activity in dealership of pump sheets has not been stopped or even controlled or regulated generally. The dealer can deal with purchasers of pump sets without any control imposed on it to carry on such business. The obligation to purchase from approved dealer has been fastened only to such farmer or agriculturist who has volunteered to accept financial assistance under the scheme on various terms and conditions."

(ii) The Supreme Court in *Bannari Amman Sugars v. Commercial Tax Officer and others* [2005 (1) SCC 625], observed as follows:

"17. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interest of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time enter into judicial verdict, the reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. (See *Parbhani Transport Co-operative Society Ltd. v. Regional Transport Authority, Aurangabad and Others*, AIR (1960) SC 901; *Shree Meenakshi Mills Ltd. v. Union of India*, AIR (1974) SC 365; *Hari Chand Sarda v. Mizo District Council and Another*, AIR (1967) SC 829; *Krishnan Kakkanth v. Government of Kerala and Others*, AIR (1997) SC 128 and *Union of India and Another v. International Trading Co. and Another*, [2003] 5 SCC 437."

27.3 This Court considered the rival submissions. It is settled law that the Government is not free to act as it likes in granting largess; 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 otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touch-stone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.

27.4 Contrary to the aforesaid principle, the respondent authorities by G.O.Ms.No.57, made irrational and unreasonable classification among the egg producers and egg suppliers and from and out of the Tamil Nadu for supplying eggs to the Noon Meal Programme, which would automatically create cartel or monopoly in trade and business of the procurement of eggs. The Supreme Court, time and again, held that any act, which excluded competition from any part of the trade or commerce by forming cartels, should not be permitted. As such, this Court has no hesitation to hold that the tender condition has resulted in eliminating a wider participation and keeping out suppliers, who are otherwise eligible and the same formed a cartel or monopoly in trade and business of the procurement of eggs. On this ground as well, the impugned G.O.Ms.No.57 as well as the tender notice is liable to be set aside.

28.1 The next ground of attack is that there are various procedural defects, such as, non-publication in Indian Trade Journal and All India News Papers by the respondents. The petitioners stated that the respondents have violated the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 (for short, "the Act") and Tenders Rules, 2000 (for short, "the Rules"). According to them, as per Rule 11 of the Rules, the Tender Inviting Authority shall have the notice inviting tenders published in the Indian Trade Journal in all cases where the value of the procurement exceeds Rs.50 crores; and the provisions of Rule 11 is also supported by the provisions of Section 9(3) of the Act. They further submitted that the respondents have also violated Rule 20 of the Rules by not providing 30 days time for the submission of the tenders between

the date of publication of notice inviting tenders and the last date for submission of tenders. Placing reliance on the decision of this Court in Sri Venkatram Spinners Pvt. Ltd v. State of Tamil Nadu and others (W.P.Nos.17261, 18987 and 18988 of 2017), the petitioners stated that when Rule 20(2) of the Rules is not followed, then the tender is liable to be quashed and it is not open for the respondents to claim that the conditions are in the frame of policy making and hence, the tender notification dated 20.08.2018 is liable to be quashed. The learned Senior Counsel for the petitioners further contended that the impugned G.O.Ms.No.57 contemplates the supply of eggs and the tender is for a period of six months only and therefore, the respondent authorities have to advertise and follow the procedure for the tendering process every six months, which is going to cost enormous expenditure to the State exchequer, which was sought to be avoided in the centralized system, as per the statement of the respondent authorities in the earlier writ petitions. It is also submitted that Clause 2(13) specifies that eggs should be delivered directly to the Anganwadi/Noon Meal Centres; each zone has nearly 15,000 centres (approx.) and totally one lakh centres located all over the State, to which a minimum of 250-500 eggs (approx.) will have to be supplied twice a week; as such, ensuring prompt supply of the requisite quantity of eggs requires a central delivery system involving sufficient manpower and skilfully planned logistic support, which can be efficiently executed by a supplier of goods, who has that as a predominant activity, rather than a poultry farmer whose primary occupation is rearing layer hens; therefore, the tender condition for the alleged reason of benefiting poultry farmers has seriously compromised and jeopardized the main object of supplying quality eggs to the Noon Meal Centres for the benefit of children.

28.2 On the contrary, the respondent authorities have stated in their counter affidavit that they have not violated any of the provisions of the Act and Rules and they have framed tender conditions for the benefit of the beneficiaries and to foster healthy competition among the egg suppliers and support the egg producers of the State, strictly following all the provisions of the Act and Rules as well as the various Government Orders. They have further stated that Rule 11(3) will not be attracted to the facts and circumstances of the present case, since the tenders have been issued on zonal basis and the total requirement for each zone does not exceed Rs.75 crores. It is further averred in the counter affidavit that there is no vagueness in the tender conditions and the terms and conditions of the tender are transparent. Hence, they strongly refuted the allegations so made against the respondent authorities.

28.3 Before going into the rival submissions, it is to be noted that the Act was enacted with the object of (a) eliminating irregularities and corrupt practices in the tender processes, (b) to provide for fair and equitable treatment to all, and (c) to make the whole process transparent. Therefore, the tripod on which the Act stands, comprises (i) fairness, (ii) equitable treatment of all, and (iii) transparency. Admittedly, the tender notification was not published in the Newspapers and in the All India Trade Journal. As per the provisions of Section 9(3) of the Act, the Tender Inviting Authority shall also publish the notice inviting tenders in Indian Trade Journal and in daily Newspapers having wide circulation depending upon the value of the procurement prescribed. As per Rule 11 (1) of the Rules, the Tender Inviting Authority shall have the notice inviting tenders published in the Indian Trade Journal in all cases where the value of procurement exceeds Rs.50 crores. Therefore, as per Section 9(3) of the Act and Rule 11 (1) of the Rules, if the value of the tender is more than Rs.50 crores, the tender notice should be published in the Indian Trade Journal. Under the Act, the aforesaid objects are sought to be achieved by looking at the whole tender process in a three dimensional setting. All the provisions of the Act and the Rules are aimed at taking care of (i) the best interests of the procuring entity (for whose benefit the tender is floated), (ii) the perspective of those who eventually lose in the race, and (iii) the perception of the public about the manner in which the whole exercise was undertaken. Once these underlying principles behind the Act and the Rules are violated, then, this Court has to exercise its power under Article 226 of the Constitution to interfere with the same. Rule 11(3) states that the tender ought to be published in an All India Newspaper, the reason being that Act and Rules visualize participation from all over the country, since the object of the Act and Rules is for wider participation so as to make the tender process more competitive. As such, this Court is of the view that the provisions of Section 9(3) and Rule 11(1) are mandatory and the said provisions cannot be given a go-by, by the respondent authorities and the failure to adhere to the same, vitiates the tender process.

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29.1 The next bone of contention made by the petitioners is that G.O.Ms.No.57 is not a policy decision; under the garb of policy decision, the Government cannot avert judicial scrutiny of a perfunctory executive order sans any policy; on the other hand, G.O.Ms.No.264 was propounded as a policy decision for the introduction of State Level Tender, after much deliberation and consideration of pros and cons at several levels by the officers and departments over a long period extending about 6 months in

public interest for the welfare of the children, being the objective sought to be achieved. The learned Senior Counsel appearing for the petitioners submitted that G.O.Ms.No.57 has been issued, not to achieve public interest, but for extraneous reasons i.e., the same was brought about within 6 working days; the decision to introduce Zonal level tender and the exclusion of egg suppliers from participation cannot be termed to be fair, just and legally valid; the decision making process has not considered the relevant factors and it is not justified, as to why such a decision was arrived at; the qualifying conditions for deciding the eligible tenderers and other stipulations mentioned in the consequential tender notification dated 20.08.2018 issued pursuant to G.O.Ms.No.57 are neither in furtherance or supportive of the alleged reasoning viz., benefiting poultry farmers nor have any nexus to the object of the Nutritious Meal Scheme viz., ensuring uninterrupted supply of quality eggs at a competitive same price for the whole year to the children; and the tender conditions were formulated in such a way that the successful poultry farmers are going to do the same work as the egg traders and suppliers in the single state level tender, but by excluding them; as such, the terms and conditions of the tender excluding the egg traders and suppliers are veritably colourable exercise of power and violative of the fundamental rights guaranteed under the Constitution.

29.2 The respondents have strenuously refuted the submissions so made by the petitioners. According to them, the impugned G.O.Ms.No.57 is only complementing/supplementing the earlier G.O.Ms.No.264; even assuming that the contention raised by the petitioners to be true, the scope of interference of the Court in the policy decision of the Government is very limited. The learned Advocate General for the respondents submitted that the Court cannot embark upon wisdom of policy choices and it is for the Government to look into the impact, if any, of its policy on the public. To substantiate his stand, the learned Advocate General cited the following decisions. (i) In P.T.R. Exports v. Union of India [1996(5) SCC 268], it was held by the Supreme Court thus:

"3. In the light of the above policy question emerges whether the Government is bound by the previous policy or whether it can revise its policy in view of the changed potential foreign markets and the need for earning foreign exchange? It is true that in a given set of facts, the Government may in the appropriate case be bound by the doctrine of promissory

estoppel evolved in Union of India Vs. Indo-Afghan Agencies [(1968) 2 SCR 366]. But the question revolves upon the validity of the withdrawal of the previous policy and introduction of the new policy. The doctrine of legitimate expectations again requires to be angulated thus: whether it was revised by a policy in the public interest or the decision is based upon any abuse of the power? The power to lay policy by executive decision or by legislation includes power to withdraw the same unless in the former case, it is by malafide exercise of power or the decision or action taken is in abuse of power. The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The Court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is a settled law that the Court gives the large leeway to the executive and the legislature. Granting licences for import or export is by executive or legislative policy. Government would take diverse factors for formulating the policy for import or export of the goods granting relatively greater priorities to various items in the overall larger interest of the economy of the country. It is, therefore, by exercise of the power given to the executive or as the case may be, the legislature is at liberty to evolve such policies.

5. It would, therefore, be clear that grant of licence depends upon the policy prevailing as on the date of the grant of the licence. The Court, therefore, would not bind the Government with a policy which was existing on the date of application as per previous policy. A prior decision would not bind the Government for all times to come. When the Government are satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The Court, therefore, would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same. Equally, the Government is left free to determine priorities in the matters of allocations or allotments or utilisation of its

finances in the public interest. It is equally entitled, therefore, to issue or withdraw or modify the export or import policy in accordance with the scheme evolved. We, therefore, hold that the petitioners have no vested or accrued right for the issuance of permits on the MEE or NQE, nor the Government is bound by its previous policy. It would be open to the Government to evolve the new schemes and the petitioners would get their legitimate expectations accomplished in accordance with either of the two schemes subject to their satisfying the conditions required in the scheme. The High Court, therefore, was right in its conclusion that the Government are not barred by the promises or legitimate expectations from evolving new policy in the impugned notification."

(ii) In *Union of India v. Kannadapara Sangatanda*, [2002 (10) SCC 226], the proposition of law laid down is as under:

"There is no basis for the High Court coming to the conclusion that the decision of the Union Cabinet was vitiated on account of legal mala fides. Merely because an administrative decision has been taken to locate the headquarters at Bangalore, which decision is subsequently altered by the same authority, namely, the Union Cabinet, cannot lead one to the conclusion that there has been legal mala fides. Why the headquarters should be at Hubli and not at Bangalore, is not for the court to decide. There are various factors, which have to be taken into consideration when a decision like this has to be arrived at. Assuming that the decision so taken is a political one, it cannot possibly give rise to a challenge on the ground of legal mala fides. A political decision, if taken by a competent authority in accordance with law, cannot per se regarded as mala fide. In any case, there is nothing on the record to show that the present decision was motivated by political consideration. The observation of the High Court that there has been a change in the decision, because there was a change of the Governments and a different political part had come into power, is not supported by any basis."

29.3 On a careful scrutiny of the impugned G.O.Ms.No.57, it is manifest that the tenders will be floated separately for each zone and bids will be invited for the respective zones. It is pertinent to point out here that the only reason given for changing the existing methodology of floating state level tender to zone-wise tender is the representation dated 06.08.2018 given by Tamil Nadu Muttai Kozhi Pannaiyalargal Marketing Society. Pursuant to the said G.O, the tender notification dated 20.08.2018 came to be issued, which is neither in furtherance or supportive of the alleged reasoning viz, benefitting poultry farmers, nor has any nexus to the object of the nutritious meal scheme viz., ensuring uninterrupted supply of quality eggs to the children. Further, the said G.O does not state that the methodology has also been changed either for overcoming the difficulties or problems faced in the execution of the contracts in the previous methodology or the methodology is changed on account of it being a more efficient and safer way of ensuring uninterrupted quality eggs. It may not be out of place to point out at this juncture that the very same respondent authorities had filed a detailed counter affidavit in support of their earlier decision to have a State-wise tender to overcome the difficulties of having District-wise tenders, which has been accepted by the Division Bench of this Court for the reason of State-wise tenders being in larger public interest and the welfare of the children, who are the beneficiaries of the nutritious noon meal scheme. Such being the case, the issuance of G.O.Ms.No.57 changing its policy decision, excluding the egg suppliers and creating embargo on the egg producers from outside the State is a colourable exercise of power and infringes the rights guaranteed under the Constitution.

30.1 Yet another ground made by the petitioners is that the earlier G.O.Ms.No.264 has been elaborately and extensively dealt with by the Division Bench of this Court vide order dated 25.04.2014 in WA Nos.574 and 776 of 2013 along with WP.No.13320 of 2013 and has also been affirmed by the Supreme Court vide order dated 13.04.2015 in Special Leave to Appeal (C) No.6375 of 2015 and hence, the impugned G.O.Ms.No.57, subsequently issued, is unwarranted and hence, the same is liable to be quashed, whereas, it is the stand of the respondents that G.O.Ms.No.57 is only supplement/complement of the earlier G.O.Ms.No.264 and the averments made in the counter affidavit in the earlier round of litigation cannot be taken into consideration for testing the validity of the present G.O.Ms.No.57. In support of the same, the learned Advocate General placed reliance on the decision of the Supreme Court in V.Lavanya v. State of Tamil Nadu, [2017(1) SCC 322], wherein, it was observed as under:

"27. In the earlier round of litigation (in Writ Petition No. 30425 of 2012 and Writ Petition No.22407 of 2013), Government of Tamil Nadu took a categorical stand that they would not compromise on the quality of the teachers. After referring to the said stand of the State Government in its counter affidavit before the Division Bench, in paras (38) to (40) of the judgment, Madurai Bench observed that the State Government is not justified in retracting from its earlier stand. The Madurai Bench further observed that the impugned Government Order G.O.(Ms.) No. 25 dated 06.02.2014 is not based upon any statistics and therefore granting relaxation to advance social justice "... is nothing but a myth and is not based on facts and figures". On behalf of the appellants much reliance was placed upon the earlier stand of the Government to contend that when the Government had earlier taken the stand that it would not grant relaxation of marks for TET pass and dilute the standards of education, the Government cannot approbate and reprobate at the same time by changing its stand. It was further submitted that the teachers are responsible for moulding the younger minds and any dilution of standards of TET would be detrimental to the standards of education.

28. We are unable to persuade ourselves to accept the view of Madurai Bench quashing the impugned G.O. on the ground of alleged change in the stand of the Government. Considering the representation from various quarters, it was a policy decision taken by the Government to relax marks for TET pass for specified and under-privileged communities. It is a matter of State policy to frame and prescribe selection norms with regard to services and posts connected with the affairs of the State. It is well-settled that courts cannot interfere with the policy decisions of the State especially when the policy decision is taken in public interest to further the advancement of reserved categories. A policy decision taken by the State in exercise of its jurisdiction under Article 162 of the Constitution of India is subservient only to the mandate of the constitutional provisions and the recruitment rules framed by the State itself, either in terms of a legislative act or an executive order. The relaxation provided by the State Government and

criteria of selection laid down vide impugned government orders are in exercise of the powers provided under the proviso to Article 309 of the Constitution of India and being a policy decision in terms of its extant reservation policy cannot be impeached on the ground that the relaxation has been given to suit some specific class of individuals."

30.2 To appreciate the rival submissions, it is but appropriate to traverse into the questions raised, discussions made and conclusion arrived at by the Division Bench of this Court, in detail, which are profitably reproduced hereunder. The Division Bench, at para 28 of its judgment, raised the following questions for determination:

(i) Whether G.O.Ms.No.264, Social Welfare and Nutritious Meal Programme (NMP-3) Department, dated 17.10.2012, has been issued on a proper consideration of relevant aspects and due application of mind.

(ii) Whether the conditions prescribed in the impugned tender notification dated 18.2.2013, are unreasonable, irrational and open to challenge?

(iii) Whether the amendment of prayer sought for by the appellants, can be allowed?

(iv) Whether W.P.No.13320/2013 is maintainable?

30.3 Thereafter, the Division Bench, at para 29(i) to 29(v) of its judgment, elaborately considered the reasons and circumstances under which, the earlier G.O.Ms.No.264 came to be passed and its pros and cons, which run thus:

"29(i) QUESTION No.(i):-

29(i) The first respondent has written a letter dated 14.5.2012, to the Director of Social Welfare regarding restructuring of tender and sought to clarify the following points:

"1) Egg prices show huge monthly or weekly variations. Hence better price discounting is possible only through monthly tenders and not quarterly or weekly tenders.

2) The possibility of cartelization is much higher in State level tender than district tenders as in the later, relatively smaller players who have the capacity to supply to one or few districts can also participate.

3) A district wide tender can factor in transportation costs better than a Zone based tender.

4) It is always better that the procuring authority and the quality enforcement authority is the same.

5) There is no guarantee that the State level tender will not end in prices higher than NECC rates.

6) The present system is working well. In the absence of any clear advantage from a different system there is no need to disturb a well functioning system.

7) State level half yearly tender is neither feasible nor advisable because of

I. Wide fluctuation in prices

II. Already the prices go up at the start of the month due to our monthly tender. If it is a half yearly tender, then there is every probability of a rate raise and the quantity being contracted at that price for a six months period.

8) Hence a State level quarterly tender is the only option available, which also does not seem to offer any concrete advantages over the existing system.

9) If State level tender is resorted to it can be done as trial in one Zone of five to six districts, and the advantages over existing system may be compared and then if advantageous, it may be expanded to the rest of the State.

10) Villupuram or Thiruvannamalai are having problems in procurement. In that case monthly tender or Zonal base as indicated above may be

implemented in the Zone covering these two contiguous districts. The periodicity of the tenders may be at least monthly, given the frequent price fluctuations."

29(ii) Thereafter, G.O.Ms.No.264 Social Welfare and Nutritious Meal Programme (NMP-3) Department, dated 17.10.2012, was issued by the first respondent and in reference No.13, the above said letter dated 14.5.2012, has also been referred. In paragraph No.4 of the above said Government Order, it has been stated that the Director of Social Welfare, who was consulted in the matter, has stated that the State Level Tender System has both advantageous and disadvantageous and the advantageous are that cartel formation by the contractors may be avoided, expenditure on advertisement and staff cost at district level may be reduced and more organisations will participate in the tender and disadvantageous are that separate arrangement has to be made to monitor the supply and quality of egg and if any court case is filed for any reason in State Level Tender, the distribution of eggs in all districts will be affected. In paragraph No.5 of the said Government Order, the Principal Secretary/Special Commissioner, ICDS Scheme, has stated that the centralized tender system will bring savings in advertisement cost and saves time for calling and finalizing the tender at all district levels and cartelization can be avoided in the system and the system has disadvantageous also like creation of monopoly in egg trade due to huge production capacity and the cost and this will eliminate small and medium poultry farmers. In paragraph No.6 of the Government Order, all the above mentioned issues among others, were discussed by the Chief Secretary with the Principal Secretaries, Finance Department, Social Welfare and Nutritious Meal Programme Department and Special Commissioner for ICDS on 30.8.2012, and data collected, were critically analyzed and based on detailed deliberation, decisions were arrived. The Division Bench at para 29 of its judgement, extensively stated the contents of the said G.O. It would be profitable to extract the said paragraph, which reads as under:

29(iii) A perusal of the Government Order would disclose that pros and cons in the floating of State Level Tender have been analyzed and discussed in detail and in depth and the Government has decided to accept

the proposal/recommendation of State level tender system and ordered as follows:

8....

I. State Level Single tender system which was in vogue prior to 2006 shall be introduced and the Principal Secretary/Special Commissioner, Integrated Child Development Services Scheme may make procurement of eggs by following the provisions of Rule 31 of Tamil Nadu TIT Act 1998 and Rules 2000.

II. With a view to procure good quality eggs, appropriate Indian standards with numbers may be incorporated in the technical specifications of product so as to comply with the provisions of Rule 13 (2) (d) of TIT Act, 1998 and Rules, 2000. The procurement of quality eggs should be ensured by specifying procurement of only 'AGMARK' Quality eggs in the technical specifications of tender document.

III. The contract period shall be fixed for one year by strictly complying with the following conditions:-

a. Suppliers should be asked to indicate a single and firm price valid for entire period of one year duration. This method of price fixation will absorb month to month fluctuation in the market price of the egg and at the same time it will also counter year to year increase in the price of eggs.

b. The quotation through open tender system should be compared with the average National Egg Co-ordination Committee rates and reasonableness of the rate quoted should be decided.

IV. In view of the special provision available for Integrated Child Development Services scheme under Rule-31 of the Tamil Nadu Transparency Act in Tenders 1998 and Rules 2000, Principal Secretary/Special Commissioner of Integrated Child Development Services scheme shall be the Tender Inviting Authority as per section 7(1) of the Act.

V. A Committee shall be constituted under the Chairmanship of the Special Commissioner Integrated Child Development Services Scheme which shall act as Tender Accepting Authority as per section 7(2) of the Act.

This committee will have following composition:-

The Principal Secretary/ Special Commissioner of Integrated Child Development Services Scheme Chairman The Director of Social Welfare Member Joint/Deputy Secretary, Finance Department Member Joint Director/Deputy Director, Animal Husbandry Department, Chennai Region Member Chief Accounts Officer, o/o Integrated Child Development Services Scheme Member VI. In order to satisfy the requirement of Rule-24 of the Tamil Nadu Transparency in Tender Rules 2000, Special Commissioner of Integrated Child Development Services scheme may constitute a Tender scrutiny Committee within the Department so as to act as per rule-24(1) and rule 24(2).

VII. The matters such as allocation of funds, maintenance of accounts and coordination of various aspects of the scheme and its field level monitoring will vest with the Director of Social Welfare.

VIII. The Principal Secretary/Special Commissioner, Integrated Child Development Services scheme should work out the detailed tender conditions with due regards to pre qualifications, technical specifications, technical capabilities, financial conditions, experience and production capacities, penal provision and all other relevant details through tender scrutiny committee.

IX. The District Collectors concerned will be monitoring the supply and quality of eggs. They will be assisted by a District Level Monitoring Committee and Block level Committee as contemplated in G.O (Ms) No.95, dated 16-06-2004. These Block level and District level committees shall continue to monitor the supply and quality of Eggs with minor modifications. The composition of District level committee will be as follows:-

(a) District Level Committee District Collector Chairman PA to Collector (Nutritious Meal Programme) Member District Programme Officer, Integrated Child Development Services Scheme Member Deputy Director/Assistant Director (Animal Husbandry) Member The District Collector shall invite a MLA and a Panchayat President on rotation basis to be a part of the monitoring committee.

(b) Block Level Committee Assistant Director (Panchayat) Chairman Block Development Officer (BP) Member-Secretary Child Development Project Officer (ICDS) Member A representative of Panchayat Presidents/ Councilors may be invited on rotation basis to serve in the Block level committee.

(c) The following issues should be taken care of by the monitoring committees:-

i) In order to avoid rotten or spoiled eggs, the quality of eggs should be checked at the supply point itself.

ii) The arrival of eggs to the centres should be monitored and deficiencies, if any, should be intimated to the collectors concerned immediately.

iii) The committee should also ensure that good quality eggs are given to the students and children regularly as per the schedule fixed by the Government.

iv) These should take all other precautionary vigil for better implementation of this scheme.

X. The District Collectors concerned shall take immediate necessary action for deficiencies pointed out. The quality lapses should be viewed seriously and appropriate penal provision including penal deduction shall be recommended to the Director of social welfare. In case of repeated and serious lapses, blacklisting of such supplier should be resorted to.

XI. The Government further direct that the procedures and guidelines already fixed in the above read and other Government orders should be followed scrupulously in order to secure continuous and uninterrupted supply of egg to the students and children.

9. This order issues with the concurrence of the Finance Department vide its U.O.No. 58024/SW/2012, Dated : 16.10.2012. 29(iv) After passing of the said Government Order, the Department of Integrated Child Development Services Scheme has floated Tender document in Tender No.Roc.3566/NMP/2012 for procurement of 60,00,000 eggs (hen) per day as per AGMARK specification for a period of one year to the beneficiaries all over Tamil Nadu under Puratchi Thalaivar Dr. M.G.R. Nutritious Meal Programme and

under Integrated Child Development Services Scheme. The contents of the said tender document read that there are 24 references and Annexures I to X have to be filled up by the intending bidders. The issuance of tender is governed by the Tamil Nadu Transparency in Tenders Act, 1998, and the Rules framed thereunder and in case of any conflict between the terms and conditions in the tender document and the above said statute, the statute shall prevail. Clause 2 speaks about the qualifying conditions and as per Clause 2(i), the tenderer should be producer or supplier of eggs (hen) as per AGMARK specifications and should have been supplying eggs (hen) or any other food materials (any date before the publication of tender) and the tenderer should possess AGMARK specification for eggs (hen) at any date before the publication of tender and the tenderer should have been certified by the competent authority (i.e. certificate of grading issued by Directorate of Marketing & Inspection as per Agricultural Produce (Grading & Marking) Act & Rules in proof of their technical capabilities for supply of eggs (hen) of at least 60% of tender quantity as per AGMARK specification). Sub-clause 4 of Clause 2 stipulates that the tenderer should have satisfactorily executed a contract with any Department of Government, for having supplied Eggs (hen) or any other food materials as per specifications for a value not less than Rs.90 Crore in a single contract. Sub-clause 6 of Clause 2 stipulates that the tenderer should have satisfactorily executed a contract with any Department of Government, for having delivered Eggs (hen) or any other food materials for a minimum number of 200 delivery points every month during the preceding three years. Sub-clause 8(a) of Clause 2 stipulates that the annual turnover of Eggs (hen) or any other food materials should not be less than Rs.75 Crore per annum, during the preceding three completed financial years and duly certified by the Chartered Accountant. The tender document also stipulates that to prove quality control competency, the tenderer should have supplied Eggs (hen) or any other food material to any Department of Government under the Technical Project Consultancy Arrangement entered with any Government Food Research Laboratory during the preceding three years and the Project Consultancy Arrangement entered with any Government Food Research Laboratory for supply of Eggs (hen) or any other food material, should be valid as on date. The tenderer should also have experience in Hazard Analysis Critical Control Point (HACCP) Practices for egg (hen) or any other food

material during the preceding three years and it should possess a valid HACCP certificate for the supply of Eggs (hen) or any other food material as per AGMARK Specification issued by any National Accreditation Board for Certification Bodies (NABCB) and to prove hygiene practices, the tenderer should also have valid BIS product license at least during the preceding three years for egg (hen) or any other food material as per IS 2491-1998 Standards.

29(v) The above said Clauses would disclose that great care has been bestowed by the Government for ensuring supply of huge quantity of quality eggs on time without any hiccups as the successful tenderer has to deliver 60 lakhs eggs (hen) per day to various centres.

30.4 Ultimately, the Division Bench, at paras 33 and 34, concluded as under:

"33.This Court on a threadbare analysis and exhaustive consideration of all the rival submissions and the materials placed before it, is of the considered view that the official respondents have kept in mind the public interest and adopted fair procedure in floating State wide tender and awarded contract in favour of the respondents 5 and 6 viz. M/s.Natural Food Products and Suvarnabhoomi Enterprises Pvt. Ltd. This Court has also taken into consideration the submissions made on behalf of the official respondents that the contract awarded pursuant to the impugned tender notification dated 18.2.2013, is coming to an end on 30.4.2014, and so far no major complaints have emanated in respect of the quality of the articles supplied, and delivery schedule and is of the considered view that the writ appeals as well as the writ petition lack merit and deserve dismissal.

34.In the result, the writ appeals are dismissed confirming the orders dated 21.3.2013 and 27.3.2013, made in W.P.Nos.6896 and 7586/2013. The writ petition No.13320/2013 is also dismissed. No costs. M.P.Nos.2 and 2/2013 in W.A.Nos.574 and 776/2013 are ordered and the other connected MPs are dismissed."

Thus, the Division Bench, while dealing with the aforesaid questions raised therein, has in clear terms held that the Government had considered all the advantages and disadvantages before passing the said Government Order, apart from holding that great care has been bestowed by the Government for ensuring supply of huge quantity of quality eggs on time without any hiccups, as a successful tenderer has to deliver 50 lakhs egg per day to various centres. It was further held that the tender documents calling for tenders were also in consonance with the said Government Order and ultimately, it was held that there was no reason for it to interfere in the tender process. The Division Bench was also of the opinion that G.O.Ms.No.264 dated 17.10.2012, came to be issued by the first respondent after elaborate discussion and consideration of all relevant aspects including pros and cons of the State-wise as well as District-wise tender systems and the same, though administrative in nature, contains elaborate reasons as to the passing of the said Government Order and therefore, it cannot be treated as arbitrary or discriminatory or passed in favour of a particular person/group of persons and accordingly, the said Government Order was confirmed. Aggrieved over the said judgment, the Government preferred SLP No.6375 of 2015, which was dismissed by the Supreme Court vide order dated 13.04.2015, confirming the judgment passed by the Division Bench. In such circumstances, this Court has no hesitation to hold that when the earlier G.O.Ms.No.264 attained finality, the same cannot be subjected to modification by supplementing/complementing any clauses, as it amounts to contrary to the settled decision. On this score also, the impugned G.O.Ms.No.57 is liable to be quashed.

31. Though the learned Senior Counsel appearing for the third respondent made his submissions to support the impugned G.O.Ms.No.57 and the consequential tender notice issued by the respondent authorities and placed reliance on a catena of decisions with regard to the scope of judicial review in tender matters, the same do not inspire the confidence of this Court, as the decision making process of the respondent authorities is bristled with mala fides, arbitrariness and perversity and they have intended to favour someone and hence, this Court will have to exercise its power under Article 226 of the Constitution to interfere with the impugned G.O as well as the tender notice.

32. Several other decisions have been cited before this Court by both sides. However, whatever are relevant for the decision of this Court are referred.

Findings:-

33.1 The policy decision of the Government can always be subjected to judicial review on the grounds of unreasonableness, discrimination, arbitrariness, perversity and mala fides. The impugned G.O.Ms.No.57 modifying the State-wise tender to that of a zone-wise tender does not contain any valid and acceptable reason necessitating/warranting modification of the earlier policy decision of G.O.Ms.No.264, by which, directions were given to float State-wise tenders. The impugned G.O.Ms.No.57 does not also contain any reason to come to the conclusion that zone-wise tenders will be more beneficial to the Government than State-wise tenders, as compared to G.O.Ms.No.264 especially when G.O.Ms.No.264 was confirmed by the Division Bench of this Court, vide judgment dated 25.04.2014 in W.A.Nos.574 and 776 of 2013 accepting the stand and reasoning put forth by the Government and the same was also affirmed by the Supreme Court vide order dated 13.04.2015 in SLP No.6375 of 2015. Further, the impugned G.O.Ms.No.57 has been issued within a short span of time i.e., within six working days and there is no nexus corresponding to the object sought to be achieved and the decision to introduce Zonal level tender and the exclusion of egg suppliers from participation cannot be termed to be fair, just and legally valid. That apart, the qualifying conditions for deciding the eligible tenderers and other stipulations mentioned in the consequential tender notification dated 20.08.2018 issued pursuant to G.O.Ms.No.57, are neither supportive of the alleged reasoning i.e., benefiting poultry farmers, nor have any nexus to the object of the Nutritious Meal Scheme i.e., ensuring uninterrupted supply of quality eggs at a competitive same price for the whole year to the children. The terms and conditions framed in the tender notification dated 20.08.2018 are violative and contrary to the relevant Act and Rules. That apart, there is no basis to state that producers of eggs would be better suited persons than the egg suppliers to ensure adequate and proper uninterrupted supply of eggs to several thousand noon meal centres all over the State. Thus, this Court is of the opinion that the impugned G.O.Ms.No.57 and the tender notification have nothing to offer to the beneficiaries, who are covered under the Noon Meal programme, but it is only a lame excuse that even small producers would get benefit by the issuance of the said G.O. When the decision taken by the Government was challenged and was subsequently, approved by the Supreme Court, they are estopped from adopting different method, which was negatived in the earlier proceedings. G.O.Ms.No.57 and the subsequent tender notification are arbitrary, mala fide, bad in law and not in public interest, as the same are contrary to the judgment of the Supreme Court and it creates monopoly in favour of one party,

without affording an opportunity to others to compete. Since the same are not based on any rational or relevant principle, it is violative of Article 14 of the Constitution and also the rule of administrative law, which inhibits the arbitrary action by the State. Hence, issuance of G.O.Ms.No.57, ie., zone-wise tender and the terms of the subsequent Notification excluding the egg traders and suppliers like that of the petitioners, are colourable exercise of power and are unreasonable, arbitrary, irrational and discriminatory and also violative of Article 19 (1)(g) of the Constitution. It is nonetheless important to mention here that the public interest is paramount; there should not be any arbitrariness in the tender matters; all the participants in the tender process should be treated alike and there should not be any discrimination and unreasonableness.

33.2 In view of the aforesaid findings, the impugned G.O.Ms.No.57 is liable to be quashed. Consequently, the tender notice dated 20.08.2018 is also liable to be quashed, as a result of which, the relief sought in W.P.Nos.26732, 26890 and 27059 of 2018 questioning the rejection of their technical bids due to some discrepancies, need not to be gone into in detail by this Court.
Disposition:

34.(i)The impugned G.O.Ms.No.57 and the consequential tender notice dated 20.08.2018 are quashed and W.P.Nos.22878, 22888, 22945, 22946, 22956, 24369, 25142, 25284 and 26282 of 2018 stand allowed, as prayed for. Consequently, W.P.Nos.26732, 26890 and 27059 of 2018 stand closed.

(ii)The respondent authorities are directed to issue a fresh tender notification, in terms of G.O.Ms.No.264 and strictly in accordance with the Act and Rules.

(iii)The existing suppliers shall continue to supply the eggs at the same quantity and at the same price as originally awarded in the contract and as per their Undertaking affidavits dated 26.10.2018 filed before this Court, till the completion of the new tender process and selection of new suppliers.

No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

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To

- 1.The Principal Secretary to Government,
Social Welfare and Nutritious Meal Programme (SW.4-3) Dept.,
Fort St. George,
Chennai - 600 009.
- 2.The Director cum Mission Director,
Integrated Child Development Services,
Pammal Nallathambi Street,
Taramani, Chennai- 600 113.
- 3.Principal Secretary,
Secretariat,
Fort St. George,
Chennai - 600 009.
- 4.The Special Government Pleader, High Court, Madras.
5. The President,
Tamil Nadu Poultry Farmers Association,
663, Salem Road, Namakkal-637001.

+1cc to Mr.C.Seethapathy, Advocate SR.No.17254
+1cc to Mr.R.Meenal, Advocate SR.No.15846
+1cc to Mr.K.Sumathi, Advocate SR.No.16757
+1cc to Ms.R.Ramya, Advocate SR.No.16368
+2ccs to Mr.Arun Karthik Mohan, Advocate SR.No.16328
+3ccs to Mr.Mani Sundaragopal, Advocate SR.No.16252
+1cc to Mr.V.P.Senguttuvel, Advocate SR.No.15822
+2ccs to Government Pleader SR.No.17020,16667

W.P.Nos.22878, 22888, 22945,
22946, 22956, 24369,
25142, 25284, 26282,
26732, 26890 and
27059 of 2018

SKV (CO)
GMY (12/04/2019)

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