

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 23.05.2018
Pronounced on: 29.05.2018

+ W.P.(C) 5372/2018 & CM APPL. 20895-20896/2018

M/S METRRO WASTE HANDLING Petitioner
Through : Mr. Manmeet Arora, Mr. Sarad K. Sunny
and Mr. Arjun Singh, Advocates.

versus

DELHI JAL BOARD Respondent
Through : Mr. Sumeet Pushkarana, Standing Counsel
and Mr. Devanshu Lahiry, Advocate with Mr. Bhupesh
Kumar (S.E.), Mr. V.K.Grover (E.E.) and Mr. Ravi Kumar
for DJB.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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“There is no 'as far as possible' on the question of un-touchability. If it is to go, it must go in its entirety....”

Mahatma Gandhi

1. Long ago, when the Indian Constitution was inaugurated, B.R. Ambedkar prophetically observed “*we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one-man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value.*” In this writ petition, a challenge is mounted to eligibility conditions and the system of preferences indicated by the public agency, the Delhi Jal Board (“DJB” hereafter), in a tender, for mechanized sewer cleaning and its transportation. The petitioner attacks the conditions as arbitrary; DJB defends them stating that they constitute a first attempt at rehabilitating the curse of

manual scavenging and its stigmatic effect on those who have been forced to practice the profession, by dictates of the entrenched caste system.

2. The petitioner is aggrieved by a few conditions in the tender (hereafter “NIT”) issued by the respondent (the Delhi Jal Board, hereafter “DJB”) inviting bids for mechanized cleaning of sewers in the city of Delhi. The NIT was issued on 23.03.2018 and later a corrigendum was issued on 21.05.2018. The Petitioner is a Delhi based 2004 incorporated company under Indian law. It provides solid waste management services. It has also diversified in the work of mechanical road sweeping, sewer cleaning, transportation and processing of construction and demolition of waste. It presently provides solid waste management services to the East Delhi Municipal Corporation, and North Delhi Municipal Corporation; it also provides mechanical road sweeping to South Delhi Municipal Corporation. The petitioner, through its various commercial activities provides employment to approximately 600 (Six Hundred) individuals. It presently provides mechanized sewer cleaning services to DJB, a corporation created by law by the Delhi Assembly in 1998. DJB is responsible for supply of potable water to the National Capital Territory, NDMC (New Delhi Municipal Council) and Cantonment areas. It also collects sewage from these areas, for treatment and disposal. Therefore, DJB is responsible for treatment and disposal of waste-water which it does through an efficient network of about 7000Km of sewage lines across Delhi.

3. It is claimed that the petitioner has in the past carried out sewer cleaning work for the DHB and possesses the requisite experience to carry such works, which are the subject matter of the NIT. It claims that it has the capacity and wherewithal to meet the financial and technical criteria specified under the NIT. In one such tender due to the capabilities of the Petitioner to carry out the work of sewer cleaning on a large scale, DJB awarded the work order for five vehicles for the purpose of sewer cleaning. The petitioner claims that a tender condition, capping award of one machine to one bidder is said to be an unreasonable restriction, not premised on any basis. It is highlighted that such a condition was introduced by DJB for the first time; the petitioner relies on previous tender conditions to bring home the point. The petitioner complains that having

acquired expertise and even provided the required infrastructure over a period of 14 years (since its inception) for performing work similar to that in the NIT, the sudden imposition of the restriction that one bidder will be awarded only one vehicle under the NIT would make redundant its acquired infrastructure and investments made; it would also impact its 600 employees (and their dependents) associated with it adversely.

4. The eligibility conditions, which the petitioner complains about and impugns, are extracted below:

"ONLYONE sewer cleaning machine will be awarded to each bidder who qualifies the technical bid (& agrees to execute the work on the rates finalised by DJB".

01. Eligibility Criteria for bidders.

1)

2) *The preference shall be given to the bidders who belong to Scheduled Caste and Schedule Tribe community who engaged in the manual scavenging and their dependent as per article 46 of the Constitution as mentioned in THE PROHIBITION OF EMPLOYMENT AS MANUAL SCAVENGERS AND THEIR REHABILITATION ACT, 2013."*

5. It is stated that the petitioner inquired from the DJB with respect to the impugned conditions in the Pre-Bid meeting held on 06.04.2018; the pre-bid queries are as follows:

"(i) Whether the survey (as required under Section 11 of The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013) to identify the persons engaged in Manual Scavenging has been undertaken?

(ii) Whether the provisional list of persons found to be working as manual scavengers has been published for general information of the public and further whether objections to such provisional list has been invited from General Public?

(iii) Further with regard to the intended preference to individuals belonging to the Scheduled Caste and Scheduled Tribe Category the Petitioner put forth its concern that the same amounts to 100% reservation and not permissible under The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013 (hereinafter referred to as "said Act"). The Petitioner further put forward its concern that this intended preference sought to be given in effect prevents the Petitioner

and other similarly placed bidders from participating in the tender process.

(iv) As far as the stipulation of only one (1) sewer cleaning machine would be awarded to each bidder is concerned in the said Tender, the Petitioner put forward its concern that the Petitioner is being prevented from bidding in the said tender at an equal footing. It was further brought to the notice of the Respondent that the Petitioner has the Constitutional Right to carry out its occupation.”

6. On 01.05.2018 DJB replied to the petitioner's queries. The petitioner states that it is evident from a perusal of DJB's reply that it is vague and evasive. Furthermore, *rationale* for the one machine one bidder rule, has not been given. The petitioner argues that in absence of the contemplated survey under Section 11 of the Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013 (hereafter, also "the Act") wherein those engaged or employed in manual scavenging are to be identified, it is obvious that the NIT(with one of the impugned conditions that preference shall be given to the members of Scheduled Caste and Scheduled Tribe community) who are engaged in Manual Scavenging) would be abused and further the entire process of selection of bidders would be opaque. The petitioner states that it attempted to view this list of Manual Scavengers as mandated under the Act; however it is unavailable on the website of the three Municipal Corporations or that of DJB.

7. The petition also refers to contents of a News Article dated 19.09.2017 published in The Indian Express (Newspaper)(which relates to W.P. (C) 5232/2007 titled as "*National Campaign for Dignity & Rights of Sewerage Allied Workers vs. M.C.D Ors.*") where DJB stated that no manual scavengers were engaged by it. Moreover, all the Municipal Corporations of Delhi in unison claimed that there were no Manual Scavengers in Delhi and took an identical position. The petitioner points out that the NIT requires bidders to furnish an Earnest Money Deposit of ₹ 4.91 Lakhs per vehicle (which is not exempt for schedule caste/schedule tribe bidders). It also requires that the bidders will engage one Driver-Cum-Operator along-with two Beldars/Helpers for operation and maintenance of each machine; also the eligibility criteria for bidders, Clause 3, requires that the bidder must possess a certificate as trained on "*operation and safety mechanized cleaning*". In this background it is submitted that it is unlikely that a manual scavenger

would be able to satisfy the terms and conditions of the said tender. Accordingly, it is stated that the NIT is not intended for welfare of weaker section of the society and is susceptible to abuse. At the same time, the impugned conditions exclude *bonafide* bidders like Petitioner from taking part in the bid on an equal footing.

8. It is also pointed out by Ms. Manmeet Arora, learned counsel for the petitioner that a corrigendum was issued on 21.05.2018, to the NIT, which does not in any manner grant relief to the petitioners; it only factors a hierarchy of preferences, under which those who are neither dependents of deceased manual scavengers, or performing such tasks now (or who had done so in the past) or who belong to SC/SC communities would be considered last. It is submitted that such condition also prescribes an indirect cent percent reservation, leaving little or no opportunity to the “others”. The corrigendum is extracted below:

*“CORRIGENDUM
(PRESS NIT NO.22 (2017-2018))*

In continuation to the terms & conditions of Tender document for the above mentioned NIT, the preference for Selection of bidders would turn out to be as given hereunder:-

- i) Family dependent of the deceased of the Manual Scavengers.*
- ii) Manual Scavengers themselves (after due verification of the certificates).*
- iii) SC/STs as per Article 15(4) and 46 of the Indian Constitution.*
- iv) Others.*

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9. The petition alleges that there is a dichotomy in the NIT evident from the fact that in the 3rd (Third) Paragraph, the DJB stated that the contractual opportunity under the said Tender is for the benefit of labourers engaged in scavenging activities and the benefits would be given to them and preference shall be given to the deceased person’s family who died while carrying out manual scavenging whereas on the other hand, Clause 2 (of the Eligibility Criteria for bidders) it mentions that preference shall be solely

given to scheduled caste and scheduled tribe community engaged in manual scavenging and their dependents. The condition of preference stipulated in the NIT is characterized as untenable as it extends to SC/ ST bidders engaged in manual scavenging throughout India and the same is not limited to Delhi alone.

10. Ms. Arora challenges as a cent percent reservation, the system of preferences built into the NIT and its consideration. She relies on the decision of the Supreme Court in *M.R. Balaji v State of Mysore* AIR 1963 SC 649. *Balaji (supra)* ruled that the an executive action which provides for reservation of 68% seats is inconsistent with the concept of the special provision authorized by Article 15 (4). It is stated that the Supreme Court did not attempt to lay down definitely and in an inflexible manner as to what should be the proper percentage for reservation. Reliance was placed by her on the observation that:

“Reservation should and must be adopted to advance the prospects of weaker sections of society, but while doing so, care should be taken not to exclude admission to higher educational centres of deserving and qualified candidates of other communities. Reservations under Arts. 15 (4) and 16 (4) must be within reasonable limits. The interests of weaker sections of society, which are a first charge on the States and the Centre, have to be adjusted with the interests of the community as a whole. Speaking generally and in a broad way, a special provision should be less than 50%. The actual percentage must depend upon the relevant prevailing circumstances in each case. The object of Art 15 (4) is to advance the interests of the society as a whole by looking after the interests of the weaker elements in society. If a provision under Art. 15 (4) ignores the interests of society, that is clearly outside the scope of Art. 15 (4) it is extremely unreasonable to assume that in enacting Art. 15 (4), Parliament intended to provide that where the advancement of the backward classes or the Scheduled Castes and Tribes were concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored. Considerations of national interest and the interests of the community and the society as a whole have already to be kept in mind.”

11. Ms. Arora also relied on *Post Graduate Institute Of Medical Education and Research v Faculty Association* 1998 (4) SCC 1, to urge that hundred percent reservation of any facility is impermissible. It was further pointed out that even in the case of SC/ST candidates, the NIT conditions to the extent they permitted all classes of bidders, - who

might claim to belong to such communities on the basis of certificates issued by other states, cannot be countenanced. In this context, she relied on the full Bench decision of this court in *Deepak Kumar v District and Sessions Judge*, 192 (2012) DLT 602 (FB) for the proposition that for reservation benefits under Article 15 (4), only those who belong to communities declared as ST/SC and are residents of the Union Territory of Delhi are entitled.

12. DJB, which appeared on advance notice and opposed the writ petition, also furnished the original files during the hearing of the petition. It also filed written submissions. Mr. Sumeet Pushkarna, learned counsel for DJB argued that the NIT is an attempt by the State and DJB to empanel and assist in self-employment of those who hitherto were carrying out manual scavenging in Delhi and nearby areas. It, claims DJB is a pioneering effort in the National Capital to get rid of the scourge of the risky task of manual cleaning of sewers and drains in Delhi by the disorganized individual sector employing risky manual means. The empanelment through the NIT attempts to rehabilitate this deprived class who had been doing the risky work of cleaning sewers and drains in Delhi manually and to turn them into a force of small entrepreneurs working under the umbrella of a single cover unit to be made by the operators of these units. It is stated that the machines and units proposed to be employed will also cater to the specific needs of narrow lanes and by-lanes of Delhi for its scavenging needs for sewers and drains in a more modern mechanized manner and by providing employment to the underprivileged class at a micro level. DJB challenges the petitioners', *locus standi* to challenge the NIT, because its big machines are not required under the scheme of the tender empanelment, which proposes use of new hybrid model machines, tailor made for the specific needs of narrow streets of Delhi.

13. Dealing with the number of applications by a person/unit being limited to one machine, it is argued by DJB that the petitioner cannot question this policy to try and employ the largest number of people in small units. The DJB states that the petitioner cannot stop the welfare activities of the State citing his alleged commercial interests. Each machine under the tender supports upto 4 to 5 people directly and would mean self employment for about 800 to 1000 families with 200 machines currently proposed for

employment. The petitioner cannot citing its commercial interest deprive the self-employment opportunity of so many other families of the lower class than him.

14. DJB opposes the petition as it challenges the policy decision of a state instrumentality in granting self employment to a class of people who cannot be compared with the petitioner. The work is also of a different class of narrower lanes. The petitioner it is pointed out in any case, is free to apply under the present tender empanelment for a machine unit. The policy of restricting application to one machine is with a view of employing about 800 to 1000 families of this working class of people it cannot be faulted by the petitioner. Moreover, the essence of the tender empanelment is to empower the small groups of people who had been manually scavenging the areas to now get help from the government/banks to finance their own small tailor made mechanized units for which the work shall be provided by the Board to enable them to raise revenue to pay off their loans so raised. This is an experiment for Delhi based on a similar lines experiment done in Hyderabad though with different type of machines. It is most respectfully submitted, that any attempt by the petitioner to tinker with the model of this scheme and tender will set a bad precedent in law. The argument of the petitioner regarding hundred percent reservation is also bad on facts and ill informed, as set out in detail hereinafter. The petition deserves to be dismissed at the outset.

15. According to the scheme on which the NIT is based, explains DJB, 200 mechanised custom tailored machines for peculiar needs of Delhi to clean the sewers and drains of the smaller and narrower roads are to be procured. These machines are tailored made and fabricated, suited to clean sewers located in narrow streets/ lanes where big machines cannot enter. These are specially designed machines and are first of a kind, to be used in the National Capital Territory, Delhi. The machines are equipped with jetting, grabbing and roding system for cleaning of sewer lines in narrow streets/ lanes. The above mentioned work/project consists of 200 number of sewer cleaning machines. The deployment of only one sewer cleaning machine will be awarded to each bidder who qualifies the technical bid. The proposed period for deployment of these sewer-cleaning machines is for seven years and period for procurement and supply of sewer cleaning machine is four months. It is further clarified that since the cleaning machines are to cater

to narrow streets, the selection of vehicles would be based upon their minimum turning radius- as far as possible - and their ability to erect the equipment in a manner to ensure dynamic stability and work efficiency.

16. DJB also submits that the said tender is only empanelment, for the purpose of getting a batch of people ready to meet the objective of the Act. In this context, it is stated that this court also is supervising the speedy replacement of the manual scavenging which done even in any unauthorized sector in Delhi, be it organized or disorganized and has also placed emphasis on speedy rehabilitation of the multitude of such cleaning work force, so that there is minimal or no financial temptation to do work unauthorized or in a risky manner. The tender is a step towards safer working conditions and eventual eradication of manual scavenging from the city. The project of deploying these tailored machines for cleaning the sewer line is an initiative from the side of the answering respondent to try and achieve the same objective and to comply with the spirit of the orders of this very Hon'ble Court, which have been passed from time to time in this regard and which will lead to the rehabilitation of the *safai karmacharis* and subsequently would uplift their social status and would help them in joining the mainstream as small entrepreneurs. DJB also states that a similar scheme, successfully in operation in Hyderabad, was closely observed and based on their observations, a resolution (No. 471 dated 29.09.2017) was passed.

17. DJB contests the petitioners' argument that the sequence of preference indicated in the NIT (and the corrigendum) as regards 100 percent reservation. It clarifies that the hierarchy of the preference for selection of the bidders would turn out to be as follows:

- i) Family dependent of the deceased of the Manual Scavengers
- ii) Manual Scavengers themselves (after due verification of the certificates)
- iii) SC/STs as per Article 15 (4) and 46 of the Indian Constitution
- iv) Others

The preference has been given to the Safai Karmacharis, individuals performing scavenging tasks and their dependents with the objective of enabling them to lead a dignified life and raise their social and economic status by encouraging them to join the

main stream of the society. It also justifies the one bidder one machine condition, stating that it was introduced to promote competition for better execution of the work and to promote the Scavengers, *safai karmacharis* to come in big numbers. It would lead to overall lowering of the cost of the work/ project. It would also eliminate or at least minimize exploitation by big firms. Furthermore, successful bidders have to constitute a Group Management Mechanism to facilitate efficient execution of the work and would have uniformity in various aspects such as vehicle colour/logo/Dress code etc to have single window mechanism to operate and maintain the sewer cleaning machines for such period of 7 years. Other issue like keeping the inventory of essential spares to meet out the breakdown in sewer cleaning machines, provide repair facility, along with backup arrangements from manufacturer of the equipment etc. would also be ensured by the Group Management Mechanism, as set out in the tender.

18. DJB states that various state agencies particularly National Safai Karamchari Finance and Development Commission (NSKFDC), as an apex corporation for the all round socio- economic up-liftment of the *Safai Karamcharies*, scavengers and their dependents throughout India are financing the bidders through various loan and funding schemes. Also NSKFDC is playing a vital role in elimination of manual scavenging- the body has been designated as the nodal agency for implementation of the central sector self employment schemes for rehabilitation of manual scavengers. It is submitted that the NSKFDC is taking keen interest in this tender and have also participated during pre-bid meeting and also pursuing with the DJB on various issues of the scavengers/*safai karmacharis*, for encouraging their participation. Further Stand-up India schemes facilitate bank loans between ₹ 10 lakhs to ₹ 1 crore to at least one SC/ ST borrower and at least one woman borrower per bank (branch). The Prime Minister launched this scheme in April 2016 to Support entrepreneurship among women and members of the SC/ST community. It is also stated that the cost of the project would be low in comparison to the existing technology which is available in the city, as these tailor made sewer cleaning machine are first of their kind by the current estimate would cost maximum if ₹ 8000 per day for minimum fixed quantum of work, whereas the existing

machines such as the ones which is there with the petitioner costs about ₹ 56000/- per day. Hence there is no comparison and petitioner has no locus to stall the present tender.

19. The DJB states that the petitioner falls into the category of “others” and can apply; therefore, there is no question of 100% reservation. The hierarchy of preference having been set out above, even the SC/ST reservation would only rank third. Therefore, the petition is liable to be rejected on this ground also. As regards to the survey (under the Act), DJB states that the appropriate Government is responsible for conducting the same, but on account of that, it cannot delay a vital pilot project like this, given that it is in public interest, and in compliance of the orders of this Court. Further, the DJB is ensuring that those performing scavenging tasks /Safai Karmacharis and their dependents who apply for the NIT are duly identified under the National Scheme for Liberation and Rehabilitation of Scavengers (NSIRS). Such individuals have to produce a certificate from local revenue officer/ local municipal officer or any other official having not less than a rank of a Gazetted Officer. DJB also submits that there is an exemption clause is for depositing of Earnest Money, which is as follows:“*Earnest Money Deposit (EMD) shall be exempted only for those bidders having registered with MicroSmall and Medium Sector Enterprises subject to submission of Udyog Adhar Certificate issued from the office of Ministry of MSME.*”

20. This court thus, is called upon to decide whether the two conditions challenged by the petitioner are arbitrary and discriminatory. As far as the first condition, i.e., that only one machine can be bid for by each tenderer, this court is of the opinion that merely because in the past, the public agency, i.e. the DJB had not capped the number of vehicles which could be offered by a potential contractor, in no manner created any actionable reasonable or legitimate expectation. The limitation, (or restriction as the petitioner prefers to characterize it) is a bidding condition applicable to all. There is nothing on record to suggest that the condition impugned *per se* was designed with an “evil eye and an unequal hand” i.e. to *target* the petitioner or a particular class of bidders. The impact no doubt is directly felt; however, mere adverse impact by way of diminished business or commercial possibilities does not render the impugned conditions discriminatory. The right to trade or carry on business is subject to the conditions in

which such trade or commercial activity, are regulated. Here, it is not as if the right of the petitioners to deploy more than one vehicle is anywhere impacted *generally*. They are free to enter into any number of contracts, deploying any number of vehicles and personnel; all that the tender condition states is that each bidder can offer only one vehicle. The decision in *All India Bank Employees v National Tribunal* AIR 1962 SC 171 is an authority for the proposition of law that a right to freedom under Article 19 (1), like under Article 19 (1)(c) does not entitle the citizen or individual or group forming the association *a concomitant right to claim that the objects for which the association is formed too is part of the larger fundamental right to form association*. Therefore, the petitioner cannot insist that as it used to enter its bid in accordance with conditions, which were not restrictive, the introduction of the one bid one vehicle limitation is an unreasonable restriction. Furthermore, all that Article 19 (1) (g) of the Constitution of India guarantees in such situations is the right to bid; the petitioner has not been barred in any manner whatsoever.

21. The main question is whether the system of preferences (or the hierarchy of preference) indicated by DJB in the NIT (and later modified in the corrigendum) is discriminatory. The petitioner likens the system to reservations and complains that it is devised to almost *exclude altogether* categories of bidders who are neither dependents of those who were performing manual scavenging duties or tasks; those who are performing such duties (regardless of their community) and for members of SC/ST communities.

22. It appears from the DJB's submission that the tender and its system of preferences aims at improving the status and living condition of all those who have hitherto been vocationally stigmatized because of the caste roles they have been consigned into. Invisible and forgotten, those who have performed manual scavenging tasks have worked day in and day out for a society, which has studiously turned away its face from them and denied their very existence. It is this class of citizens – more than anyone else, who deserves the fulfillment of the promise of dignity and equality. It is for such sections of society that the Constitution makers enacted Article 15 (4) and hoped that the state (and all its departments and agencies) would make “special provisions”. That provision

“enables” the State (a comprehensive term, including all wings of the Union and State government and its legislatures) to take action in the interests of disadvantaged classes. Once made, such provisions are legally enforceable. Article 14 – the equality clause permits reasonable classification based on intelligible differentia (*State of West Bengal v Anwar Ali Sarkar* 1952 SCR 284). The Supreme Court of India ruled that the “classification” in any given instance would be valid if it is “(i) founded on an intelligible differentia which distinguished those that are grouped together from others, and (ii) that differentia must have a rational relation to the object sought to be achieved”. Articles 15(3), 15(4) and 16(4), are the specific provisions, that enable the State to make “special provisions” for certain, classes in the interest of securing equality amongst the people. Article 15 (4) was in fact introduced through a Constitutional Amendment, to overrule a Supreme Court interpretation in *State of Madras v Champakam Dorairajan* AIR 1951 SC 226. That these affirmative action clauses were merely emphatic statements of a power the State already possessed under Article 14, was first expressed in a dissenting opinion in *T. Devadasan v Union Of India* AIR 1964 SC 179. The dissent was accepted in *State of Kerala v. N.M. Thomas* 1976 (1) SCR 906 - the Supreme Court recognizing that Arts. 16 and 15 were actually extensions of Art. 14.

23. Such affirmative action enabling provisions in constitutions are not unique to India alone: South Africa’s Constitution explicitly recognizes affirmative action (Ref. Section 9(2) : *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.* Constitution of the Republic of South Africa 1966) According to the South African Constitutional Court, affirmative action enables equality rather than being an exception to it. (“*In the assessment of fairness or otherwise a flexible but ‘situation-sensitive’ approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.*” Ref: *Minister of Finance and Another v. Van Heerden* 2004 (6) SA 121 (CC) 26-7 (South Africa)). The International Covenant on Economic, Social and Cultural Rights (ICESCR) (International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, 6

I.L.M. 360, art. 2(1)) too instructs State Parties to, for progressive and full “*realization of the rights recognized in the present Covenant by all appropriate means, including particularly, the adoption of legislative measures*” take affirmative action. Affirmative action measures also find place in Article 1(4) of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) (660 U.N.T.S. 195) which states that “*special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination...*”

24. The petitioner’s argument – based on the assumption that the preferences indicated in the NIT, are *quotas* in the opinion of the court, is misplaced. There are observations – no doubt, in *Balaji (supra)* and later iterated and affirmed in *Indira Sawhney v. Union of India* AIR 1993 SC 477 which ruled that reservations cannot exceed 50% and that the “creamy layer” amongst the advanced OBCs to be kept out of preferential treatment. This was also explained in *Ashoka Thakur v Union of India* (2008) 6 SCC 1. In the context of Indian courts’ jurisprudence, quotas have meant *exclusive set apart, which can be filled up from the favored group*. The “reservation” jurisprudence, if one may so characterize this case-law has exclusively focused on access to public employment, or public institutions, such as government or government aided colleges.

25. What is in issue, however, in this case is the attempt of the state, uniquely to ensure that the livelihood and lives of sewage workers performing manual scavenging tasks are meaningfully uplifted. The system of preference is *not reservation, in any sense of the term*. The court recollects what was held in *Government of Andhra Pradesh v Vijaykumar* 1995 (4) SCC 520 that the wording of Art. 15(3) enables “special provisions” is wider than Article 16(4) which enables a special provision *by way of reservations*. Article 15(3) is wider and includes “*positive action programmes in addition to reservations*”. This was recognized also by a Constitution bench in *M. Nagaraj v State of Karnataka* (2006) 8 SCC 212 when the Supreme Court held that “*Our Constitution has,*

however, incorporated the word 'reservation' in Article 16 (4) which word is not there in Article 15 (4). Therefore, the word 'reservation' as a subject of Article 16 (4) is different from the word 'reservation' as a general concept.” Explaining that affirmative action programmes’ objectives are not merely to reserve, the court expanded on the concept in the following observations:

“Equality of opportunity has two different and distinct concepts. There is a conceptual distinction between a non-discrimination principle and affirmative action under which the State is obliged to provide level-playing field to the oppressed classes. Affirmative action in the above sense seeks to move beyond the concept of non-discrimination towards equalizing results with respect to various groups. Both the conceptions constitute "equality of opportunity".

Equality has two facets "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the Rule of Law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.”

26. Later, repelling the charge to “excessive” reservation, of chairpersons and vice chairpersons’ posts in local bodies, under provisions in the Constitutions, amended through the 73 and 74 Amendment Acts, which set apart seats for SC/ST and women candidates, in the context of the argument that such reservations worked out 100% set aparts in the concerned seats or municipal corporations, the Supreme Court, in a Constitution Bench decision, in *Dr. K. Krishnamurthy v Union of India* 2010 (7) SCC 202 held as follows:

“In this case, we are dealing with an affirmative action measure and hence the test of proportionality is a far more appropriate standard for exercising judicial review. It cannot be denied that the reservation of chairperson posts in favour of candidates belonging to the Scheduled Castes, Scheduled Tribes and women does restrict the rights of political participation of persons from the unreserved categories to a certain extent. However, we feel that the test of reasonable classification is met in view of the legitimate governmental objective of safeguarding the interests

of weaker sections by ensuring their adequate representation as well as empowerment in local self-government institutions.”

Earlier, the court had stressed on the participatory role of every section of the society, which such programs enable:

“The offices of chairpersons in Panchayats and Municipalities are reserved as a measure of protective discrimination, so as to enable the weaker sections to assert their voice against entrenched interests at the local level. The patterns of disadvantage and discrimination faced by persons belonging to the weaker sections are more pervasive at the local level. Unlike elected representatives in the Lok Sabha and the Vidhan Sabha who can fall back on the support of mainstream political parties as well as media scrutiny as a safeguard against marginalization and unjust discrimination, elected representatives from the disadvantaged sections may have no such support-structures at the local level. In this respect, the Union Parliament thought it fit to enable reservations of Chairperson positions in order to ensure that not only are the weaker sections adequately represented in the domain of local self-government, but that they also get a chance to play leadership roles.”

27. Seen from the context of the decisions quoted previously, the NIT conditions are not meant to exclude the “general” class of citizens. They afford an opportunity to an utterly marginalized section a “step up” (or to use the expression in *Nagaraj (supra)*, “catch up”) with the other citizens. The object of such preference is plainly to *enable the meaningful participation of the most marginalized section, i.e. workers involved in manual scavenging, and scheduled caste/scheduled tribe communities* (who are so chosen, having regard to what the Constitution framers stated as “*a backward section of the Hindu community who were handicapped by the practice of untouchability*”). The state, i.e., DJB, in our opinion, had a compelling interest in promoting the welfare of these class of citizens, while conceiving and implementing this system of preferences, in the impugned NIT.

28. The last limb of the petitioners’ challenge to the impugned tender conditions is that the government of NCT has not declared a list of persons engaged in manual scavenging and consequently, giving them preference is unjustified. This court is of the opinion that the submission is wholly insubstantial. The Govt. of NCT or any other appropriate agency might dither or fall behind in its obligations to conduct a proper

survey in accordance with the 2013 Act and draw up a list of such individuals. However, their existence is undeniable. The DJB employs a large number of sewage cleaners, directly or indirectly; other corporations and local bodies have in the writ proceedings pending before this court (referred to by the petitioner and noticed earlier) conceded that a large number of such sewage workers (approximately above 14,000) are engaged in such activity. That the authorities are fighting shy to *officially declare* the exact number of manual scavenging workers should not however constrain the DJB from recognizing for this reality and ensuring through adequate mechanisms that the benefit of the NIT goes to them. Further, the court is also of the opinion that the reference to *Deepak Kumar (supra)*, by the petitioners, to say that only those SC/ST applicants, who belong to Delhi, should be permitted benefits, is wholly meritless. That judgment, like *Balaji* and *Indira Sawhney (supra)* were in the context of employment and state institutions' access benefits. Here, the court is concerned with award of public contracts. If the petitioners' argument were to be accepted, any bidder who is not incorporated anywhere but in Delhi, should be debarred. Plainly, that is contrary to the mandate of Article 15 (1), which forbids discrimination on the basis of *place of birth*; it is also contrary to Articles 19 (1) (g) and 301, which guarantee to all the right to carry on any business, trade, occupation or vocation, *throughout the territory of India*.

29. This court is again mindful of the constraints and limitations that judicial review considerations impose upon it; in judicial review the court, under Article 226 of the Constitution reviews the decision making process, its legality and procedural regularity and never its merits. The principal decision maker is the public agency- here, the DJB. That courts might view tender conditions- or a particular stipulation differently (from the public agency) is insufficient reason for interference. *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr.* 2016 (16) SCC 818 is clear on this aspect; it instructs that courts are to defer to executive decisions, largely unless manifest *mala fides* or procedural irregularity or illegality is established. Similarly, the Supreme Court, in *Montecarlo Ltd v National Thermal Power Corporation Ltd* 2016 (15) SCC 272 stated that:

“Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

In *JSW Infrastructure Ltd v Kakinada Seaports Ltd* 2017 (4) SCC 170 and *Central Coalfields Ltd v SLL-SML (JV Consortium)* 2016 (8) SCC 622, similarly, it was held that tender documents and stipulations are to be construed in the context of their background and that no condition is to be treated as redundant or superfluous. Most recently in *Municipal Corporation Ujjain v BVG Ltd & Ors* 2018 SCC Online 278, the court emphasized the general “off limits” nature of writ jurisdiction, and stressed the need to defer to executive decision makers, in the following words:

“In arriving at a commercial decision, the considerations which are of paramount importance are commercial considerations. These would include, inter alia, the price at which the party is willing to work; whether the goods or services offered are of the requisite specifications; and whether the person tendering the bid has the ability to deliver the goods or services as per the specifications. It is also by now well settled that the authorities/State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. The State, its corporations, instrumentalities and agencies have a public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise them only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere.”

30. For all the above reasons, this court is of opinion that there is no merit in the petitioners' contention. Unseen and forgotten for generations, our society has marginalized manual scavengers to its darkest corners. They are trapped in an eternal caste embrace, with no voice in the society or in any meaningful participation; their children are doomed to the same stereotypical roles assigned to them. The promise of equality, dignity and egalitarianism has eluded them altogether in the march and progress witnessed by the rest of our citizens. The present project, through the DJB's impugned tender, promises a positive tomorrow to a significant number of these individuals; the Central Government's funding of this project, is an important move- away from largely reservation dominated affirmative policy paradigm witnessed so far. One hopes that this move is part of a string of other plans and programs aimed at achieving the objective of elimination of untouchability and the practice of human manual scavenging; it can well become a significant brick in the building of a strong edifice of substantive equality and to recall Ambedkar's phrase, hopefully bring about "*the principle of one man one value*" to all. In view of the discussion and reasoning, the writ petition is dismissed as meritless, but without order on costs.

**S. RAVINDRA BHAT
(JUDGE)**

**A.K. CHAWLA
(JUDGE)**

MAY 29, 2018