

(2003) 08 DEL CK 0067

In the Delhi High Court

Case No : C.W.P. No. 773 of 2002

Aggarwal and Modi Enterprises (Cinema Project) Private
Limited and Another

APPELLANT

Vs

New Delhi Municipal Council

RESPONDENT

Date of Decision : 08-08-2003

Acts Referred:

Constitution of India, 1950 — Article 14

New Delhi Municipal Council Act, 1994 — Section 140, 141, 141(2)

Citation : (2003) 6 AD 1 : (2003) 106 DLT 113

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : R.K. Anand, Harish Malhotra and Vishnu Mehra, for the Appellant;
Arun Mohan, Senior Advocate and Hima Kohli Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—This writ petition seeks the setting aside of the order dated 13th November, 2001, passed by respondent New Delhi Municipal Council (hereinafter referred to as 'N. D. M. C. '), holding the petitioner to be unauthorized occupant of the premises in dispute namely that of Chanakya Cinema Complex situated in Diplomatic Enclave, New Delhi (hereinafter referred to as the complex). Directions have also been sought to set aside the letter dated 22nd January, 2002 issued by the respondent NDMC seeking the vacant and peaceful possession of the aforesaid complex. The writ also partly impugns the Resolution dated 28th August, 2001 to the extent it allows the petitioner to continue in possession from 1st October, 2000 to 30th September, 2003 only. A further prayer is made for renewal of the lease/license of the petitioner with the usual option for renewing the lease deed on appropriate terms and conditions.

2. The crux of the dispute leading to the writ petition arises from the following pleas averred by the petitioner:

(a) On 14th November, 1965, pursuant to the advertisement by the respondent/

NDMC for tenders of lease of 1000 seats capacity cinema with attended restaurant and shops, the petitioner partnership firm (later on converted into a private limited company), successfully tendered and secured on lease the said complex. The said lease was executed on 3rd October, 1967. The said lease of 3rd October, 1967 was a subject matter of Civil Suit No. 242 of 1969 and eventually a settlement was arrived at by which license fee was enhanced by Rs. 50,000/- per annum. This also led to execution of lease/license agreement between the petitioner and the respondent on 16th September, 1970. The relevant clause of the settlement which contained terms for renewal i. e. Clause 1 read as follows:-

"That in consideration of the license money and the licensee's agreeing to the covenants hereto, reserved and contained, the said licensors have agreed to grant to the licensee to use the said building with all the fittings fixtures for a term of ten years. The licensee shall, however, have an option to get their license renewed for another ten years on the terms and conditions to be mutually agreed between the licensor and the licensee at the time of the renewal. "

(b)That against an investment of Rs. 18,00,000/- of the respondent , the petitioner has initially invested Rs. 7,00,000/- and that as per the aforesaid renewal clause, the petitioner exercised the option of renewal on 11th January, 1980 and accordingly the lease was renewed on 23rd September, 1980 for a period of ten years from 1st October, 1980 to 30th September, 1990. In the said lease deed dated 23rd September, 1980, the renewal clause read as follows:

"That in consideration of the license money and the licensees agreeing to the covenants hereto referred and contained, the said licensor has agreed to grant the license to use the said building with all the fittings, fixtures for a term of ten years. The licensees shall, however, have an option to get their license renewed for another ten years on the terms and conditions to be mutually agreed between the licensor and the licensee at the time of the renewal. "

(c)Reliance was placed upon the resolution dated 25th March, 1981 passed by the respondent/NDMC in respect of renewal of lease/license which provided for increase of rent by minimum of 10% and maximum of 30% in every renewal. The petitioner has relied upon the fact that thereafter on 18th June, 1985, the enhancement was reduced from 30% to 15%. On 3rd September, 1990 the petitioner had again exercised the option for renewal vide letter addressed to the NDMC. Then on 14th September, 1990 instead of renewing the license/lease for a period of ten years, the respondent NDMC sought to cancel the license of the petitioner contrary to the order passed by this Court in CR No. 206/1985 which order read as follows:

"That the plaintiff will be entitled to status quo regarding possession and will carry on the business in Chanakya cinema on payment of additional 30 per cent license fee till the disposal of the suit by the Sub-Judge. The C. R. Is allowed with no order to cost. "

(d) Thereafter a sub committee was constituted by the respondent to examine the various problems of Chanakya Theatre pursuant to the representation of the petitioner made on 12th November, 1990. By the letter dated 2nd December, 1991, the respondent by relying on the sub-committee's report, communicated their decision to the petitioner's representation for mutual settlement. By the said communication the lease/license fee for the period 1st October, 1980 to 30th September, 1990 was redetermined and that for the period 1st October, 1990 to 30th September, 2000 was determined.

(e) On 5th December, 1991 the petitioner communicated its consent to the respondent's communication dated 2nd December, 1991. The petitioner's case is that the communication dated 2nd December, 1991 sent by the respondent NDMC contained the following stipulation:

"Next renewal due in the year 2000 will be decided between the licensor and the licensees on mutually settled terms and conditions at that time. "

(f) In 1992, CWP No. 3244/1992 was filed seeking renewal of the lease/license of the petitioner from 1st October, 1990 to 30th September, 2000 and for framing just, fair and reasonable policy for determining the lease/license fee for each renewal for the Chanakya Cinema Complex. On 10th February, 1993 Rule DB was issued in the aforesaid writ petition and the interim order made on 21st September, 1992 was confirmed with liberty to the respondent to seek variation of the order upon completion of pleadings. On 21st May, 1993, CM No. 5571/1993 filed by the respondent for variation of the said order was dismissed on the ground that the pleadings were not complete. Accordingly another CM No. 1044/2001 was filed by the respondent and by an order dated 25th May, 2001, the Division Bench vacated the interim order dated 21st September, 1992 and further observed as follows:

". This order will not prevent the NDMC from considering the proposals of the petitioner dated 5th April, 2000 and 15th March, 2001. The application is accordingly disposed of. "

(g) Consequently, as per the above observation made by this Court on 25th May, 2001, the respondent/NDMC passed a resolution on 28th August, 2001 extending the lease of the petitioner for a period of three years from 1st October, 2000 to 30th September, 2003 pending final decision on the proposal of the petitioner to redevelop the complex as a Multiplex-cum-commercial centre. An order dated 13th November, 2001 was purportedly passed by the Chairman of the respondent and not by the council to the effect that the license of the petitioner expired on 30th September, 2000 and the petitioner was thereafter wrongly termed as an unauthorized occupant. The petitioner replied to the said letter dated 13th November, 2001 by its letter dated 21st November, 2001. The petitioner was asked to vacate the complex by 28th February, 2002. It is the order dated 13th November, 2001 terming and treating the petitioner as an unauthorised occupant beyond 30th September, 2001 which has led to the challenge formulated in

the present writ petition.

3. The learned senior counsel for the petitioner, Shri R. K. Anand has challenged the legality of the said order on the following grounds:

(a) That the grant made to the petitioner was a lease and not a license as wrongly termed by the respondent/NDMC. The renewal in 2000 was to be effected from 1st October, 2000 on mutually agreed terms. The petitioner Cinema complex cannot be treated differently from other letting out of the premises/shops where renewal has been taking place after expiry of the term of each of the lease/license even on mutually agreed terms or as per the applicable policy resolution of NDMC. The respondent has always been vindictive towards the petitioner leading to successive successful litigations.

(b) Even by the resolution dated 18th March, 1999, the right to renew was recognized in the case of Chanakya cinema and even though the cinemas and hotels were kept in a different category yet the renewal of the license/lease was not denied. The only difference in such category of hotels and cinemas was that the increase was not to be a percentage increase but was to be determined mutually.

(c) The respondent have not taken a stand in other types of renewals that there is no right of renewal.

(d) The picking out the petitioner for hostile discrimination by resolution dated 30th August, 2000 clearly indicates that the petitioner was picked out for such hostile treatment against the mandate of Section 141(2) of the NDMC Act. The plea that Section 141(2) applies only in case of new projects indicates a confusion and contradiction in the resolution dated 30th August, 2000. The resolution dated 30th August, 2000 was motivated so as to disallow the renewal of the petitioner's lease due on 1st October, 2000. The hostile discrimination is evident from the fact that even though hotels and cinema occurred together in the resolution and the lease for hotels was for 99 years, the petitioner's lease has been constricted to 3 years.

(e). The right of renewal granted to the petitioner while according acceptance of the tenders of the petitioner cannot be denied to the petitioner, particularly in the light of the settled norms and policies of the respondent. The resolution dated 28th August, 2001 extended the lease of the petitioner at least up to 30th September, 2003 and thereafter the order dated 13th November, 2001, totally lost sight of the said resolution dated 28th August, 2001 by ignoring the fact that the fact that the lease of the petitioner stood extended up to 30th September, 2003. The plea of the respondent that Section 141 (2) of the Act bars the renewal is wholly unsustainable. The discrimination against the petitioner is writ large on account of the fact that in all other cases, the respondent is not taking recourse to Section 141 but in the petitioner's case alone Section 141(2) has been resorted to. This clearly violates Article 14 of the Constitution of India. The petitioner further submitted that the right of renewal was inherent in the

acceptance of the petitioner's tender in 1967.

(f). Even according to the respondent's own interpretation, the provision of Section 141(2) are applicable for first lease or new lease and not in the case of a renewal. Thus there is no reason or authority vested with the respondent to discriminate the petitioner or single out the case of the petitioner from the others. Reliance has been placed by the petitioner on the following judgments.

i) AIR 1974 SC 55, more particularly para 85.

ii) Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, .

iii) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others,

(g) The respondent being a State cannot behave like private landlords and are bound to act for a public purpose and cannot seek to enhance the rent for the purpose of profit making. The respondent cannot unduly enhance the rent as private landlords are wont to do. Extension cannot be denied only on the ground that somebody else may give higher amount. For this reliance has been placed on Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, .

(h) The resolution dated 28th August, 2001 though purporting to consider the proposal of multiplex project, in effect is mala fide and proceeds on imaginary figures of enhancement. The purpose and intent of lease to the petitioner was in perpetuity for at least 99 years as in the case of hotels. Cinemas have been classified with the hotels and cannot be differentiated in terms of the grant of the period of the lease.

4. The respondent's case pleaded by the learned Senior Counsel, Shri Arun Mohan is as under:

(a) That the initial grant by the NDMC in 1967-70 was for a period of 10 years with a 10 years renewal and not a perpetual license or a lease in perpetuity for a premium. Since the licensee has no interest or estate in the property, the possession of the property is not juridical but only an occupation. In order to plead that the grant in question was a license and not lease, the respondent has placed reliance on the following judgments:

1. Sultana Begum Vs. Prem Chand Jain,

2. Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani (Smt) and Others,

3. Sohan Lal Naraindas Vs. Laxmidas Raghunath Gadit,

4. B. Alamelu Vs. State of Tamil Nadu and others,

5. (1994) 107 (2) PLR 427 (SC)

6. Capt. B. V. D. Souza's case: 1980 3 SCC 574

7. Vayallakath Muhammodkutty Vs. Illickal Moosakutty,

8. Liberty Sales Services vs. Jakki Mull & Sons, 1997 (66) D L T 506

9. Jagjit Cotton Textiles vs. Col. A. L. Malhotra, 1995 (35) DRJ 17.

(b) In any event whether the grant is a lease or license is irrelevant because once the lease is not in perpetuity and is claimed for a fixed period it will fall in the category of 4 leases i. e. (i) lease in perpetuity (ii) lease with a perpetual renewal term (iii) lease for a fixed term and (iv) lease for a month to month term. The petitioner's case at best is a lease for a fixed term. Reliance for sustaining this plea has been placed on the decision of Hon'ble the Supreme Court in R.V. Bhupal Prasad Vs. State of Andhra Pradesh and others,

Reliance has also been placed by Shri Arun Mohan on the following decisions:

M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property,

Maneksha Ardeshir Irani and Another Vs. Manekji Edulji Mistry and Others,

Bhawanji Lakhamshi and Others Vs. Himatlal Jamnadas Dani and Others, and

Kewal Chand Mimani vs. S. K. Sen reported as AIR 2001 SC 2589.

(c) That there are 4 types of renewal such as (i) perpetual renewal (ii) renewal for one two terms (iii) renewal on increase in rent and (iv) renewal on mutually agreed terms for whole or part. Whether or not two renewals took place in 1980-99, is now totally academic because the period covered by such alleged renewals is almost over. In any event there can be no renewal beyond 2000 particularly when no mutually agreed terms even suggested by the petitioner were arrived at.

(d) It is clear that the period subsequent to 30th September 2000 is governed by the documentation between the parties and the petitioner being well advised by counsel cannot seek to wriggle out by the terms of the said document. It is obvious that the licenses granted by the NDMC was not one for premium and cannot in any event operate in perpetuity. Since the lease deed itself specified the renewal for specific period of 10 years the inference of a second renewal cannot be ordinarily assumed. Insofar as the Resolution dated 28th August 2001 is concerned, it was neither communicated to the petitioner nor was it confirmed and no legal obligation came into force as there was no acceptance. Reliance in this regard has been placed on the decisions of the Hon'ble Supreme Court in State of West Bengal etc. Vs. M.R. Mondal and Another, and Badrilal Vs. Municipal Corporation of Indore, and Jiwan Dass vs. LIC 1994 Sup 3 SCC 894. The petitioner cannot be permitted to plead that the resolution is acceptable insofar as the grant of a license for a particular period but not accept its terms and the license fee stipulated therein.

(e) That the petitioner cannot be equated for the purpose of Article 14 of the Constitution with small shops as as to plead discrimination. The concept of equality is a positive concept and cannot be enforced in a negative manner. The public interest demonstrates that greater revenue can be garnered by putting up

the complex to public auction by wide publicity and such larger revenue can be used for the benefit of the citizens of New Delhi rather than going towards the profit of entrepreneurs like the petitioner.

(f) The reliance on the resolution dated 30th May 2002 issued by the Ministry of Urban Development, by the petitioner is unjustified for as the petitioner cannot come within the meaning of genuine tenant as no lease was subsisting in its favor.

(g) The desire of NDMC to seek possession for itself for re development either by itself or by inviting tenders for higher public revenue cannot be construed as a violation of Article 14. A public auction of the licencing rights of the existing structure would fetch several times more revenue than what the petitioner was offering to pay. A redevelopment of the project as a multiplex would yield an income of almost rupees three crores per year. There is thus no substitute for competitive bidding in open auction and the petitioner is free to make a bid in the said public auction. Reliance has been placed on a judgment of this Court in CW 1066 of 1988 in M/s Benett Coleman & Co. Ltd. & Another vs. Prasar Bharti & Others to contend that open tendering in favor of the highest bidder is in public interest. The petitioner having enjoyed a much larger period as compared to the period for which the license was granted and must be asked to vacate the premises forthwith. The writ petition accordingly warrants dismissal.

5. The principal question involved in this writ petition is whether a party who has been issued a license/lease and has consequently enjoyed a long tenure in this complex can insist as a matter of law and legal right that the NDMC should not auction the same but must re-allot it to the petitioner as the petitioner was the original allottee inter alias on its plea that it was entitled to renewal in the year 2000.

6. The NDMC has relied upon its resolution dated 30th August, 2000 to contend that there is no discrimination against the petitioner. The said resolution of NDMC dated 30th August, 2000 reads as follows:-

"On the expiry of the present term of licenses of hotels/cinemas and other similar commercial complexes, the licenses shall not be renewed. The fresh license shall be as per provisions of Section 141(2) of the NDMC Act, 1994. In respect of shopping/parking and other similar portions in these complexes, on an application made in this behalf, the Chairperson may, permit sub-licensing of these portions, on such terms and conditions and on payment of such additional license fee, as he may, from time to time be decided. "

7. The petitioner has also relied upon what according to it was an effective resolution of NDMC dated 28th August, 2001. Though the NDMC has refuted the validity and efficacy of this resolution dated 28th August, 2001 the relevant portion of the said resolution may be noticed and reads as under:-

"Pending Council's approval of the proposal to develop this building as a

multiplex, and examination of all issues connected therewith which will undoubtedly take considerable time, it is suggested, the present occupier may be allowed to continue for a period of three years from 1. 10. 2000 to 30. 09. 2003 through a fresh license deed, making it clear that whatever be the decision of the Council i. e. to opt for a multiplex alternatively a commercial complex or thirdly to retain it as it is, the license beyond 01. 10. 2003 shall be a fresh license through a competitive bid. In office complexes the Council had been granting license for a period of five years and the fee was being increased by 50 to 60% after every 5 years. In the case of this building, it was given for 10 years at 65% increase. As per Rent Act, 1995, increases are permissible at 10% each year. The increase over 1. 10. 1990, at 10% compounded per year gives an increase of 159%. It is proposed that the license fee from 1. 10. 2000 be increased by 160% i. e. to Rs. 39. 39 lacs per annum, from 01. 10. 2001 by 10% over 01. 10. 2000 to Rs. 43,32,900/- and from 01. 10. 2000 by 10% over 01. 10. 2000 to Rs. 47,66,190/- lacs per annum. "

8. In my view the controversy whether the grant was a license or lease has become academic because even according to the petitioner's own showing the period stipulated originally in the lease/license had come to an end and it is not necessary for this Court to determine whether the grant was a lease or license. Even otherwise the terms of acceptance of the tender in 1967 do not indicate any renewal beyond 2000. Therefore, in effect the right which was available to the petitioner on or before 30th September 2000 including a right of renewal is the crucial question involved in this writ petition. The other important plea which is required to be determined is whether the petitioner can sustain the challenge raised on the basis of the hostile discrimination towards it, it is being denied a renewal in 2000 qua hotels and small shops where renewals are granted on the basis of policy decisions giving fixed increments annually and as a matter of fact as a routine. While determining this question it is necessary to determine the renewals which are available to the petitioner on the basis of the initial grant and the terms of the renewal clauses in the parent and subsequent deeds. If a public authority were to allot an estate by inviting public tender then the very fact that more revenue was likely to be generated was clearly indicative of the public interest as was laid down by a Division bench of this Court in CW 1066 of 1998 decided on 29th May 1998. The relevant portion of the Division Bench judgment dated 29th May, 1998 reads as follows:-

"It is indisputable that an open tender in the present circumstances would fetch a much higher revenue and this itself is sufficiently indicative and demonstrative of the public interest if the license is granted to the highest bidder.

. and public interest would be subserved if there is healthy competition amongst broadcasters. This would undoubtedly will be in public interest because not only would it benefit the revenue by higher tender amounts but competition amongst broadcasters would also lead to better programmes and wider choice to the listeners which would also be in public interest. "

Thus in view of the above position of law which according to the counsel for the respondent was affirmed by the dismissal of the SLP by the Hon'ble Supreme Court against the said judgment dated 29th May, 1998 in CW 1066/98, at least this part of the dispute of public interest being subserved by a public tender is no longer open to question. What this Court, Therefore, must determine is whether there was hostile discrimination against the petitioner and whether the petitioner had any right of the renewal of the lease/license after 30th September 2000. This is so because even if the petitioner's claim that it was further granted renewal of license/lease by resolution dated 28th August 2001 up to 30th September 2003 is accepted, by efflux of time even that period has almost expired. Insofar as the hostile discrimination is concerned, there are two facets involved. The first is that insofar as the shops in various markets owned by the NDMC is concerned, the leases are renewed periodically upon giving a particular increment on every renewal. The petitioner has sought a similar relief. In my view the plea that the lease/license of a cinema site and the renewal of a lease of a shop cannot be equated is logical. The learned counsel for the respondent contended and in my view rightly, that most of the shops in the NDMC area are allotted to small shopkeepers many of whom were displaced persons from West Pakistan or were displaced and uprooted from Baba Khark Singh Marg and Panchkuain Road respectively and led to the development of Mohan Singh Place and Palika Bazaar. These small shopkeepers in various markets cannot be compared to the lessee/licensee of a cinema complex. Admittedly, the lease/license in the petitioner's case and its renewal except the last one was for a fixed period of 10 years. The lease of the shops was for a period of 8 years & the renewals were for similar terms. The petitioner cannot now after 30th September, 2000 be termed either as a tenant if his plea as to the grant being a lease is accepted, or a licensee, since the period has expired & the petitioner is, Therefore, at best a tenant at sufferance holding over. Hence this plea is also not sustainable. The challenge of discrimination qua the shops in various markets and their renewal on fixed increments cannot, Therefore, be sustained in view of the above discussion and Article 14 can only be pressed into service among equals.

9. In so far as hotels are concerned, it is submitted by the petitioner that since the hotels and cinemas are classified together, the term should be for 99 years as in the case of hotels. The petitioner has sought renewal based on this plea alleging hostile discrimination qua the hotels. This plea is being raised only after the petitioner has enjoyed almost the entire period of the grant and its renewals of 10 years each. This plea of discrimination against the petitioner qua hotels also cannot be entertained on this ground and the petitioner having enjoyed the entire terms is estopped from now pleading discrimination qua hotels at this stage. Even otherwise hotels and cinema complexes though figuring together in classification cannot be equated for the purpose of Article 14. Inherently the business of hotels and cinemas are different and thus there is no discrimination, hostile or otherwise.

10. In any event a perusal of the resolution dated 30th August, 2000 extracted hereinbefore clearly indicates that the respondent/NDMC has taken a decision not to renew the leases of hotels/cinemas after their present terms came to an end. The resolution also states that fresh licenses shall be as per Section 141 of the Act. Since the respondent has taken a policy decision to uniformly follow a course of non-renewal of leases of hotels and leases, the petitioner cannot complain of discrimination where no other instance of renewal of a hotel/cinema license/lease after 30th August, 2000 has been given. The petitioner has sought to castigate the resolution dated 30th August, 2000 as being framed solely with a view to oust the petitioner as it was done just prior to the expiry of the petitioner's term. As it stands the resolution dated 30th August, 2000 in adopting a uniform yardstick of the expiry of existing leases of hotels/cinemas is perfectly valid and reasonable. Merely because the resolution was passed shortly before the term of the petitioner's lease/license came to an end cannot make it vulnerable as being arbitrary and discriminatory and hence it is valid and does not violate Article 14. If NDMC takes recourse to Section 141(2) for generating higher revenue from its resources, such policy decision cannot be questioned unless it is unconstitutional. In *BALCO Employees Union (Regd.) Vs. Union of India and Others*, , while dealing with the issue of diesel investment by the Government, the Hon"ble Supreme Court has held:

". In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. An such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered by the court. . . . "

11. While referring to the earlier judgment of Hon"ble Supreme Court in the *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, to the effect that self limitation can be seen to be the path to judicial wisdom and institutional prestige and stability, the Hon"ble Supreme Court in *Balco's case (supra)* also held as under:-

"What we said in that case in regard to legislation relating to economic matters must apply equally in regard to executive action in the field of economic activities, though the executive decision may not be placed on as high a pedestal as legislative judgment insofar as judicial deference is concerned. We must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call 'trial and error method' and, Therefore, its validity cannot be tested on any rigid 'a priori' considerations or on the application of any strait-jacket formula. The Court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or 'play in the joints' to the executive. 'The problem of Government' as pointed out by the Supreme Court of the United States in *Metropolis Theater Co. v. State of Chicago* 57 L Ed 730 :

(1912) 228 US 61 are practical ones and may justify, if they do not require, rough accommodation, illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void"

The Government, as was said in *Permian Basin Area Rate cases* 20 L Ed 2nd 312 : (1968) 390 US 747, is entitled to make pragmatic adjustments which may called for by particular circumstances. The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide. It is against the background of these observations and keeping them in mind that we must now proceed to deal with the contention of the petitioners based on Article 14 of the Constitution. "

Thus what was said in respect of legislative action was held to apply equally to executive action in the field of economic activities as in the present case, though the Hon"ble Supreme Court did accord lesser weight to an executive action as compared to legislative action.

12. Thus the position of law is settled by the Hon"ble Supreme Court that it is not for the court to consider whether a different policy should have been followed on the ground that other policy would have been fairer or wiser or more scientific or more logical. Consequently notwithstanding the merits of the alternate suggestions given by the petitioner, if a fairness of an action, adopted by the NDMC is found, it cannot be faulted merely on the ground that the petitioner"s suggestion was a better and a more effective one.

13. Similar view has also been taken by the Hon"ble Supreme Court in *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others*, wherein it was held :

"We certainly agree that judicial interference with the administration cannot be meticulous in our Montesquien system of separation of powers. The Court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the directorate of a government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super-auditor, take the board of directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration. "

In my view the most relevant observation which will be directly applicable in the present case was made in *G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others*, . The relevant portion of the said judgment reads as follows:

" With the expansion of the State's presence in the field of trade and commerce and of the range of economic and commercial enterprises of government and its instrumentalities there is an increasing dimension to governmental concern for stimulating efficiency, keeping costs down, improved management methods, prevention of time and cost overruns in projects, balancing of costs against timescales, quality control, cost-benefit ratios etc. In search of these values it might become necessary to adopt appropriate techniques of management of projects with concomitant economic expediences. These are essentially matters of economic policy which lack adjudicative disposition, unless they violate constitutional or legal limits on power or have demonstrable pejorative environmental implications or amount to clear abuse of power. This again is the judicial recognition of administrator's right to trial and error, as long as both trial and error are bona fide and within the limits of authority. "

Similar position of law has also been laid by the Hon"ble Supreme Court in Peerless General Finance and Investment Co. Limited and Another Vs. Reserve Bank of India, , Premium Granites and Another Vs. State of Tamil Nadu and Others, , Delhi Science Form vs. Union of India, 1998(2) SCC 405, R.K. Garg and Others Vs. Union of India (UOI) and Others, , M.P. Oil Extraction and Another Vs. State of M.P. and Others, , State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc., and Bhavesh D. Parish and Others Vs. Union of India and Another, .

14. Section 141 of the New Delhi Municipal Council Act reads as under:

"141. Disposal of immovable property:

(1) The Chairperson may, with the sanction of the Council, lease, let out on hire or otherwise transfer any immovable property belonging to the Council.

(2) The consideration for which any immovable property may be sold, leased or otherwise transferred shall not be less than the value at which such immovable property could be sold, leased or otherwise transferred in normal and fair competition.

(3) The sanction of Council u/s 140 or this section may be given either generally for any class of cases or specially for any particular case.

(4) Subject to any conditions or limitation that may be specified in any other provisions of this Act the foregoing provisions of section 140 and this section shall apply to every disposal of property belonging to the Council made under, or for any purpose of this Act.

(5) Every case of disposal of property under sub-section (1) of section 140 shall be reported by the Chairperson without delay to the Council.

15. The petitioner has also submitted that Section 141(2) does not apply as the present case is a renewal of an existing lease, and Section 141(2) applies only to fresh leases. It has also been submitted by placing reliance on Mohinder Singh

Gill's case AIR 1978 SC 251 that the respondent cannot travel beyond the reasons given in the impugned order dated 13th November, 2001 by relying on other grounds taken in the affidavits filed in response to the writ petition. The order dated 13th November, 2001 inter alia stated that

(a) license given to the petitioner finally expired on 30th September, 2000;

(b) In a Meeting of NDMC on 30th August, 2000 it has been decided that the existing licenses of hotels/cinemas shall not be renewed on the expiry of the present term and fresh licenses shall be as per provisions of Section 141(2) of the NDMC Act;

(c) extension of license in favor of petitioner would amount to conferring benefit on a party which is a defaulter from day one;

(d) since the company's status since 1st October, 2000 is that of an unauthorized occupant the petitioner must vacate and hand over possession to NDMC by 28th February, 2002 and pay damages at 15. 15 lacs per annum to NDMC.

(e) If the aforesaid 3 conditions are not complied with the petitioner would become liable to vacate the complex forthwith.

16. It has also been submitted by the petitioner that the offer dated 2nd December, 1991 given by the respondent recognized the right of renewal of the petitioner's license. It is, Therefore, necessary to extract the terms of the letter dated 2nd December, 1991 relied upon by the petitioner which reads as follows:-

"Please refer to your memorandum of Appeal for actual settlement dated 9. 4. 1991, addressed to the Administrator, NDMC in connection with the above.

In order to explain your request a Sub-Committee was constituted under the Chairmanship of Secretary, NDMC consisting of Financial Adviser, Chief Engineer (Civil), Chief Engineer (Elect.), Chief Architect, Director (Estate), and Law Officer. After detailed discussions and due deliberations during the meeting held in this context, the Sub-Committee made its recommendation, which has been approved by the Administrator. The following decision have been arrived at:-

1. The license fee for the term w. e. f. 1. 10. 1980 to 30. 9. 1990 has been re-determined, retrospectively The revised license fee has been increased at 66. 6 percent over the license fee of Rs. 5,51,111/- per annum. A rebate of 8 percent per annum will be allowed to you towards all maintenance of the Cinema Complex, which shall be adjusted in September every year during the tenure of license. This will be subject to execution of a supplemental agreement.

2. The term of license will be renewed for another period of 10 year effective from 1. 10. 1990 subject to payment enhancement in the license fee at 65 percent over and above the license fee payable in the preceding term of license. During the term of license, you will also be allowed a rebate of 8 percent per annum (adjustable in September every year) for maintenance. In other words the licensees will be responsible for all major and minor maintenance of the

premises. A license Deed will have to be executed incorporation the present day terms and conditions of allotment.

3. M/s. Aggarwal & Modi Enterprises (Cinema Project) Pvt. Ltd. will withdraw court cases pending before any judicial authority Along with singed of supplemental listed at para No. 1 of this letter.

4. The arrears of license fee arriving as a result of the above revises rates of license fee will be payable within a period of one month from the date of NDMC has preferred its claim with you, failing you will be liable to pay interest at the rate of 20 percent per annum.

You are accordingly requested to furnish your consent to the foregoing three days of the date of issue of this letter. "

In my view the above offer made by NDMC to the petitioner only refers to only renewal of license for 10 years with effect from 1st October, 1990 and there is no reference or implied term about the renewal of the above license beyond 2000. The term in paragraph 2 above that the license deed will incorporate the present day terms and conditions of allotment could not be construed to include the right of renewal, as contended by the learned counsel for the petitioner. Consequently, the letter of 2nd December, 1991 by the respondent/NDMC cannot be relied upon by the petitioner to seek a renewal beyond 2000.

17. In so far as reliance on grounds other than those stated in the impugned order dated 13th November, 2001 contrary to Mohinder singh Gill's judgment (surpa), the ground of fresh renewals being governed by Section 141(2) is clearly stated in the said order dated 13th November, 2001 and can, Therefore, be relied upon by the respondent/NDMC.

18. The above section 141 deals with the lease, let out on hire or transfer otherwise of any immovable property belonging to the Council. Section 141(2) clearly indicates that sale, lease or transfer of such property should not be less than the value at which such property could be sold , leased or otherwise transferred in normal and fair competition. Thus, it is evident that the transfers should be at the market rate when any property of the Council is sold, leased or otherwise transferred. It is submitted by the learned counsel for the petitioner that the exclusion of the petitioner alone on the basis of 30th August 2000 resolution on the ground that renewal cannot be done on mutually acceptable terms as it would violate section 141(2) of the Act, has been done with the sole motive of hostile discrimination against the petitioner. I have already held that there was no discrimination against the petitioner. I have also held that merely because the resolution dated 30th August 2000 was passed just prior to the expiry of the term of the petitioner's erstwhile lease/license, cannot on that ground make such a resolution vocative of Article 14 unless and until the petitioner shows that other hotels and cinema complexes have not been dealt under resolution dated 30th August 2000 in the manner in which the petitioner has been dealt with.

19. I have also held that (a) cinema complex does not stand on the same footing as the other shops, and (b) in so far as the petitioner is concerned, its lease had already expired and it has been found to be at best a tenant at sufferance who is holding over. Accordingly, the petitioner cannot claim that Section 141(2) cannot be applied to it and the respondent's reliance on section 141(2) is, Therefore, justified.

20. In fact the position of the petitioner on the assumption that it held a lease which entitled it to a renewal in Chanakya Complex would be governed by the following position of law laid down by the Hon'ble Supreme Court in R. V. Bhupal Prasad's case (supra):-

" Tenant at sufferance is one who comes into possession of land by lawful title, but who holds it by wrong after the termination of the term or expiry of the lease by efflux of time. The tenant at sufferance is, Therefore, one who wrongfully continues in possession after the extinction of a lawful title. There is little difference between him and a trespasser. In Mulla's Transfer of Property Act (7th Edn) at page 633, the position of tenancy at sufferance has been stated thus: A tenancy at sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It has been described as the least and lowest interest which can subsist in reality. It, Therefore, cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has been determined, without the consent of the person entitled. A tenancy at sufferance does not create the relationship of landlord and tenant. At page 769, it is stated regarding the right of a tenant holding over thus: The act of holding over after the expiration of the term does not necessarily create a tenancy of any kind. If the lessee remaining in possession after the determination of the term, the common law rule is that he is a tenant on sufferance. The expression "holding over" is used in the sense of retaining possession. A distinction should be drawn between a tenant continuing in possession after the determination of the lease, without the consent of the landlord and a tenant doing so with the land-lord's consent. The former is called a tenant by sufferance in the language of English law and the latter class of tenants is called a tenant holding over or a tenant at will. The lessee holding over with the consent of the Lesser is in a better position than a mere tenant at will. The tenancy on sufferance is converted into a tenancy at will by the assent of the landlord, but the relationship of the landlord and tenant is not established until the rent was paid and accepted. The assent of the landlord to the continuance of the tenancy after the determination of the tenancy would create a new tenancy. The possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy, his possession is juridical.

13. In view of the settled possession of law, the possession of the appellant is as tenant at sufferance and is liable to ejectment in due course of law. But his possession is not legal nor lawful. In other words, his possession of the theatre is

unlawful or litigious possession. The appellant may remain in possession until he is ejected in due course in execution of the decree in the suit filed by the respondent. His possession cannot be considered to be settled possession. He is akin to a trespasser, though initially he had lawful entry. "

21. The position of law in respect of a tenant/licensee in possession after the expiration of the lease is as follows:-

a)It has been held in *Maneksha Ardeshir Irani and Another Vs. Manekji Edulji Mistry and Others*, that a tenant remaining in possession after the termination of the tenancy without the consent of the Lesser is a tenant on sufferance and where the landlord did not given consent to hold over the tenant is only a trespasser.

b)In *Bhawanji Lakhamshi and Others Vs. Himatlal Jamnadas Dani and Others*, , it has been held that act of holding over after the expiration of the term does not create a tenancy of any kind. It was further held that if a tenant remains in possession after the determination of the lease, the common law rule is that he is tenant at sufferance.

c)In *M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property*, , it has been held that on the expiry of the lease an erstwhile tenant who continues in possession, and because of the law of the land, the original landlord cannot physically throw out such tenant by force, is a tenant at sufferance akin to a trespasser having no independent right to continue in possession. Right of such an erstwhile tenant is to be treated as tenant at sufferance.

In the light of the above position of law merely by mere continuance in possession after September, 2000, the petitioner did not acquire rights sought to be canvassed by the learned counsel for the petitioner which entitled him to renewal of the lease/license, as the petitioner was at best a tenant on sufferance having no independent right to continue in possession.

22. The petitioner came into possession of the complex lawfully but thereafter has continued in possession after the expiry of its lease and at best a tenant at sufferance. Therefore, even if the petitioner were to secure any allotment it would not be a renewal but only a fresh allotment and consequently reliance upon Section 141(2) by the respondent is fully justified.

23. The only issue now left to determine is whether the term of the lease permit the renewal beyond 30th September 2003 as contended by the petitioner.

(a)The petitioner has placed reliance upon *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, and in particular on paragraph 15, which reads as under:

"15. This Court in *Baburao Shantaram More Vs. The Bombay Housing Board and Another*, had to consider Section 4 of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947, and so far as material for our present purposes

explained the basis of exemption u/s 4 as that the Govt. or local authority or the Board would not be actuated by any profit making motive so as to unduly enhance the rents or eject the tenants from their respective properties as private landlords are or are likely to be. In other words, this Court recognized that the basis of differentiation in favor of the public authorities like the respondent was on the ground that they would not act for their own purpose as private landlords do, but must act for public purpose.

(b) In my view in paragraph 23 is also relevant where it has also been held as follows:

"23. The contractual privileges are made immune from the protection of the Rent Act for the respondent because of the public position occupied by the respondent authority. Hence, its actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason not whimsically for any ulterior purpose. Where any special right or privilege is granted to any public or statutory body on the presumption that it must act in certain manner, such bodies must make good such presumption while acting by virtue of such privileges. Judicial review to oversee if such bodies are so acting is permissible.

(c) Another relevant paragraph in the above judgment is para 31 which reads as follows:

". It is not within the purview of a court to substitute decision taken by a constituted authority simply because the decision sought to be substituted is a better one. Learned Addl. Solicitor General in our opinion, is Therefore right in contending that the appellant should not be allowed to contend that the decision of the Bombay Port Trust to allot the plot to the major holder is not one of the feasible means of achieving the objectives of development. It was not open to the appellant to contend that the Bombay Port Trust could have framed a better policy in a way in which both the goals, development and non eviction of existing tenants, could have achieved. "

24. In so far as profit-making motive and its non-availability as a ground for eviction qua a public authority is concerned, the observation was made in Dwarkadas's case (supra) in the context of the tenant to which the Rent Act applies and the observation in the above decision cannot apply to a cinema complex where the period of lease had expired and the tenant was continuing at sufferance. Furthermore, in the present case the terms of removal were to be mutually agreed upon. There was no such condition about mutual agreement of terms of renewal in Dwarkadas's (supra) case. Further it has also been laid down in the above judgment that it is not open to a court to substitute its own views as a better view. It has also been held that the judicial review is available to the extent that it must be ensured that that State must act for a discernible reason and not for a whimsical reason for achieving an ulterior purpose. In the present case the discernible and indeed the expressly stated reason for a public auction/tender is the generation of larger revenue from a public asset. This is

eminently in the public interest and the Court cannot substitute its own view or the view of the petitioner as a better option.

25. The learned counsel for the petitioner has also relied upon *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , in particular paras 20 and 21.

"20. . . . Now, obvious where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes its sweet will but its action must be in conformity with some principle which meets the test of reason and relevance. "

21. This rule also flows directly from the doctrine of equality embodied in Art. 14. It is now well settled as a result of the decisions of this Court in *E.P. Royappa Vs. State of Tamil Nadu and Another*, and *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non discriminatory: it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non arbitrariness is projected by Article 14 and it must characterize every State action whether it be under authority of law or in exercise of executive power without making of law. The State cannot, Therefore act arbitrarily in entering into relationship, contractual or otherwise with a third party but its action must conform to some standard or norm which is rational and non discriminatory. This principle was recognized and applied by a Bench of this Court presided over by Ray, CJ in *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, where the learned Chief Justice pointed out that "the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should ply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of black listing has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of black listing - a citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling - It is

true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods". It must, Therefore, follow s a principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non discriminatory ground. "

26. Thus the position of law laid down in the aforesaid decisions of the Hon''ble Supreme Court relied upon by Shri R. K. Anand, the learned Senior Counsel for the petitioner is as follows:-

(a) all actions of a public authority (such as the respondent NDMC) must be reasonable and be guided and indeed guided and dictated by public interest. This is so even when the authority acts in the realm of a letting of its property as a landlord.

(b) such actions must be in public interest.

27. In so far as public interest is concerned, I have already found that the public tender for the purpose of generating larger revenue is obviously inherently in public interest. No party can, Therefore, complain that if by public auction/public tender, larger revenue is sought to be generated then this is contrary to public interest.

28. Therefore, it is now necessary to consider whether the actions of the respondent in calling for public tender of the complex is reasonable, and in accordance with Article 14 of the Constitution of India

29. In so far as the reasonableness of the action is concerned the petitioner has been in the occupation of the complex since 1967. Even if the petitioner's case is taken at the highest the lease/license cannot be beyond September, 2003. The said period is almost over. Therefore in the absence of a finding in the petitioner's favor to the effect that the lease/license or any other factor indicated that the lease was perpetual or the petitioner was entitled to any other and further renewal beyond 2000, the action impugned is reasonable and cannot be said to violate Article 14 of the Constitution.

30. In my view applying the principles of law laid down in R. D. Shetty's case (supra), it is evident that the petitioner has not been able to establish that the impugned action of public tender is irrational and discriminatory. In the present case, the NDMC has chosen not to renew its lease/license with the petitioner and the ground for such refusal cannot be termed to be irrational, discriminatory or arbitrary so as to bring it within the scope of the prohibition set out in the above

judgment.

31. When the Indian economic climate is being liberalized for the benefit of the citizens and the private sector, then the State, i. e. , NDMC also cannot be denied benefit thereof and consequently no fault can be found with the impugned action of NDMC in inviting public tenders for the cinema complex for generating higher public revenue. An effort towards generation of larger public revenues from the cinema complex owned by NDMC is inherently in the public interest. There is no bar against the petitioner from participating in the public tender. On the contrary, the petitioner is certainly better placed than the other bidders to accurately gauge the potential of the site as it has worked in the complex for decades.

32. In so far as renewal of the lease/license beyond September, 2000 is concerned, there is no substance whatever in the petitioner's plea that the last lease/license executed between the parties on 23rd September, 1980 conferred on the petitioner any right of renewal. The relevant clause in the said letter dated 23rd September, 1980 reads as follows:-

"That in consideration of the license money and the licensees agreeing to the covenants hereto referred and contained, the said licensor has agreed to grant the license to use the said building with all the fittings, fixtures for a term of ten years. The licensees shall, however, have an option to get their license renewed for another ten years on the terms and conditions to be mutually agreed between the licensor and the licensee at the time of the renewal. "

33. It is the petitioner's own case that the renewal due in 2000 was to be effective from 1st October 2000 on mutually agreed terms. It is not in dispute that mutually agreed terms have not been arrived at as both the parties have not agreed to renewal in 2000. It is indisputable that the petitioner's case is a case of lease for fixed term. The earlier two renewals are, Therefore, of no consequence. Since it has been established that license granted to the petitioner was from time to time and without premium, it cannot operate in perpetuity. This is also clear from the terms of the license itself which indicate that it was for a specific period of 10 years. Therefore, I am satisfied that the counsel for the petitioner has not been able to prove that there is right of renewal inherent or otherwise beyond the year 2000 so far as the petitioner is concerned. There being admittedly no mutual agreement between the parties, the question of renewal beyond 30th September 2000 does not arise. The petitioner has thereafter continued in possession only on the basis of interim orders.

34. In so far as the allegations raised in the additional affidavit regarding the illegal allotment of the basement of Akbar Bhawan for functioning as a restaurant is concerned, if the averments are correct then it does appear that the NDMC has much to answer for. However, since the allottee of Akbar Bhawan basement has not been impleaded as a party, it would not be fair to go into the validity of the allotment in these proceedings. Such allotment which has been questioned by the petitioner as illegal cannot, Therefore, be the basis in law for the petitioner to

sustain its claim. In Gursharan Singh and others etc. Vs. New Delhi Municipal Committee and others, the Hon''ble Supreme Court held that equality before law is a positive concept and cannot be enforced by a citizen or court in a negative manner. It was further held if an illegality or irregularity has been committed in favor of any individual or a group of individuals, others cannot invoke the jurisdiction of the High Court or of the Supreme Court that the same irregularity or illegality be committed qua the claimants. It was further held that the court neither conceives Article 14 within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. This decision was followed and the position of law was reiterated by Hon''ble the Supreme Court in State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, .

35. One other plea of the respondent/NDMC deserves to be noticed. Proceeding on the assumption that the resolution dated 28th August 2001 was effective, the NDMC has termed as irrational the petitioner's acceptance of the resolution dated 28th August 2001 to the extent it grants a license for a particular period but its non acceptance insofar as its terms and license fee is concerned. There is prima facie considerable merit in this plea of the respondent but since the effect of the resolution dated 28th August 2001 has become academic due to the expiry of the period even said to be granted by this resolution, this plea is not being gone into. I am, Therefore, not dealing with the plea of the petitioner that the resolution of the NDMC dated 28th August, 2001 granted it a renewal of 2 years up to September, 2003 as even the period said to be extended is almost over.

36. The last prayer in the writ petition for the renewal of the lease in the petitioner's favor cannot, Therefore, be granted in view of the aforesaid findings.

37. However considering the long tenure of the petitioner in the complex since 1967, the petitioner is granted time to vacate the cinema complex on or before 30th September, 2003 subject to the filing of an undertaking to vacate the complex on or before 30th September , 2003. The said undertaking, containing the usual terms be filed on affidavit within three weeks from today. In case the undertaking as directed above is filed, the interim protection granted by the Order dated 31st March, 2003 will continue up to 30th September, 2003.

38. The writ petition is accordingly dismissed with no order as to costs.