
(2009) 01 DEL CK 0029

In the Delhi High Court

Case No : Writ Petition (C) No. 4095 of 2008

Aggarwal and Modi Enterprises (Cinema Project) Private Ltd.	APPELLANT
Vs	
New Delhi Municipal Corporation	RESPONDENT

Date of Decision : 09-01-2009

Acts Referred:

Citation : (2009) 01 DEL CK 0029

Hon'ble Judges : Mukul Mudgal, J; Manmohan, J

Bench : Division Bench

Advocate : Harish Malhotra and Namita Choudhary and Tanuj Khurana, Soli Sorabji and Anand Misra and Ajay Goyal, for the Appellant;

Final Decision : Dismissed

Judgement

Manmohan, J.—The Petitioner has filed the present writ petition under Article 226 of the Constitution of India seeking quashing of the Request for Qualification (RFQ) and Request for Proposal (RFP) documents floated by NDMC with regard to plot measuring 2 acres in Chanakyapuri, popularly known as Chanakya Cinema Complex and for issuance of a Writ of Mandamus directing New Delhi Municipal Council (hereinafter referred to as "NDMC") to adhere to the mandate of Section 141(2) of the New Delhi Municipal Council Act (hereinafter referred to as the "NDMC Act") by publicly auctioning the said plot. The Petitioner has also prayed for a further direction to allow the Petitioner to take part in the open public auction to be held by NDMC.

2. It is pertinent to mention that the Petitioner is an erstwhile licensee of the Chanakyapuri Cinema Complex (hereinafter referred to as the "said Cinema Complex"). In fact, the Petitioner had challenged, by way of a writ petition, the order dated 13th November, 2001 cancelling its license to run the said Cinema Complex. The said writ petition was dismissed by a learned Single Judge of this Court vide his judgment and order dated 8th August, 2003. The relevant portion of the said judgment is reproduced hereinbelow for ready reference:

(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.....

5. The principal question involved in this writ petition is whether a party has been issued a licence/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 alia on its plea that it was entitled to renewal in the year 2000.....

27. In so far as the public interest is concerned, I have already found that the public tender for the purpose of generating larger revenue is obviously inherent 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 the public interest....

3. In a Letters Patent Appeal, a Division Bench of this Court initially passed the following order on 5th February, 2004:

Learned Counsel appearing on behalf of the NDMC submits that the NDMC is not interested in negotiating any terms of licence fee with the appellant. Learned Counsel further submits that the NDMC would like to auction the premises in question and the NDMC has no objection in appellant's participating in the auction. Learned Counsel appearing on behalf of appellant prays for a short adjournment to prepare the case.

List this matter for hearing as last item in the category of "After Notice Miscellaneous Matters" on 3rd March, 2004.

4. Subsequently, the Division Bench vide its judgment and order dated 30th August, 2005 dismissed the said appeal. The relevant portion of the Division Bench's judgment is reproduced hereinbelow for ready reference:

24. On the other issue of the NDMC action being arbitrary and discriminatory, Mr. Mohan contended that the NDMC was within its competence to frame a policy of holding a public auction with a view to fetch a better revenue of its assets/properties to subserve the public interest. The corporation was only adhering to the mandate of Section 141 and its action which was in conformity with law could not be termed as arbitrary and discriminatory. He submitted that the NDMC had made a beginning of holding public auction to earn maximum revenue and it could not be prevented from dealing with its properties through a method which was in public interest. He sought to justify the order dated 13th November, 2001

passed by the NDMC.

37. The mandate of Sub-section (2) of Section 141 is that any immovable property belonging to the NDMC is to be sold, leased or otherwise transferred on consideration which is not to be less than the value at which such immovable property could be sold, leased or otherwise transferred in 'normal and fair competition'.

Thus the NDMC is obligated to adopt a procedure by which it can get maximum possible return/consideration for such an immovable property. The procedure prescribed is 'normal and fair competition'. Indubitably, the methodology which can be adopted for receiving maximum consideration in a normal and fair competition, would be the public auction- a well recognised process/procedure to achieve this end. That is even otherwise the fundamental principle for disposing of a Government property. Public auction not only ensures fair price and maximum return, it also militates against any allegation of favoritism on the part of the Government authorities while giving grant for disposing of public property. In *Ramrao Jankiram Kadam v. State of Bombay* AIR 963 SC 827 an auction has been described as the proceeding at which people are invited to compete for the purchase of property by successive offers of advancing sums and a sale by auction is a means of ascertaining what the thing is worth, viz. its fair market price.

38. Courts have also, time and again, emphasized upon the public auction as a transparent mean of disposal of government property... .

40. The principles which can be culled out from the aforesaid decisions are the following:

(a) The demarcated approach for disposal of public property, in contradiction to the disposal of private property is that it should be for public purpose and in public interest.

(b) Disposal of public property partakes the character of a trust.

(c) Public purpose would be served only by getting best price for such property so that larger revenue coming into the coffers of the State administration can be utilized for beneficent activities to sub-serve public purpose, namely, the welfare State.

(d) For getting the best price, the public property should be put to public auction or by inviting tender with open participation i.e. ensure maximum public participation and a reserve price. This also ensures transparency and such an auction would be free from bias or discrimination and thus beyond reproach.

(e) Private negotiations should always be avoided as it cannot withstand public gaze and cast reflection on the Government or its official and is also against social and public interest.

(f) In exceptional cases, the authorities may depart from public auction or tender

process and even dispose of the property at lower price than the market price or even for a token price. However, resort to this process can be taken only to achieve some defined constitutionally recognized public purpose, one such being to achieve the goal set out under Part-IV of the Constitution of India... .

5. While the matter was pending in the Hon"ble Supreme Court, NDMC accepted its Consultant's recommendation with regard to re-development of the said Cinema Complex into a Mall-cum-Multiplex with high end retail on BOT basis. The Consultant's project report which was placed on record in the Hon"ble Supreme Court recommended that NDMC should adopt a two stage bid process, that means first the RFQ document should be floated to be followed by a RFP document.

6. On 31st August, 2007, the civil appeal filed by the Petitioner was dismissed and the Petitioner was directed to vacate the said Cinema Complex by 31st December, 2007. The relevant observations of the Hon"ble Supreme Court in its judgment are reproduced hereinbelow for ready reference:

7. The appellants had themselves suggested that they should be permitted to develop the property on the basis of the consultant's report. NDMC owns various properties but the complex in question is the only cinema hall it has...

14. What in essence the appellants are seeking for is specific performance of the purported contract without filing a suit. Admittedly, there is no renewal since long and in any event if appellants' case is accepted there is no agreement after 2003. In that sense, the auction would be the first time exercise. Undisputedly, NDMC is proposing to have multiplexes whereas the present arrangement is one of uni-plex. The reason as to why NDMC wanted to have resort to public auction is spelt out in the resolution dated 30th August, 2000. Para 2 of the resolution reads as follows:

During the period of Asian Games, Ministry of Urban Development transferred some plots of land to NDMC for construction and commissioning of Hotels on certain terms and conditions and later on NDMC licensed these premises for above purposes to eminent companies for long periods of 99 years subject to renewal of license fees after every 30 years. Likewise, there are other establishments, like cinema in Chankya Complex where the land was transferred long back by the Ministry of Urban Development to NDMC for developing multiplex buildings. The premises have been transferred on license for particular periods. Above premises had been licensed before the enactment of NDMC Act 1994... .

22. The mandate of Section 141(2) is that any immovable property belonging to NDMC is to be sold, leased, licensed or transferred on consideration which is not to be less than the value at which such immovable property could be sold, leased, or transferred in fair competition. The crucial expression is "normal and fair competition". In other words, NDMC is obligated to adopt the procedure by which it can get maximum possible return/consideration for such immovable

property. The methodology which can be adopted for receiving maximum consideration in a normal and fair competition would be the public auction which is expected to be fair and transparent. Public auction not only ensures fair price and maximum return it also militates against any allegation of favouritism on the part of the Government authorities while giving grant for disposing of public property. The courts have accepted public auction as a transparent mean of disposal of public property. (See State of Uttar Pradesh Vs. Shiv Charan Sharma and Others, , Ram and Shyam Company v. State of Haryana 1985 (3) 267, Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, , Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, , Committee of Management of Pachaiyappa's Trust Vs. Official Trustee of Madras and Another, , Chairman and Managing Director, SIPCOT, and Madras and others Vs. Contromix Pvt. Ltd. by its Director (Finance) Seetharaman, Madras and another, , New India Public School and other etc. Vs. HUDA and others etc., , State of Kerala and others Vs. M. Bhaskaran Pillai and another, and Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, .

23. Disposal of public property partakes the character of trust and there is distinct demarcated approach for disposal of public property in contradiction to the disposal of private property i.e. it should be for public purpose and in public interest. Invitation for participation in public auction ensures transparency and it would be free from bias or discrimination and beyond reproach.

24. Above being the position, the judgments of learned Single Judge as affirmed by the Division Bench do not suffer from any infirmity to warrant interference. The appeal is sans merit, deserves dismissal which we direct. However, considering the long period of occupation, which is presently without legal sanction, the appellants are granted time till 31st December, 2007 to deliver vacant possession to the respondent-NDMC.

25. We have not expressed any opinion on the aspect relating to dues of the appellants to the NDMC, as they are stated to be pending adjudication in other disputes....

7. On 14th December, 2007 even a review petition filed by the Petitioner was dismissed by the Hon"ble Supreme Court.

8. On 19th December, 2007, NDMC issued an advertisement in five leading newspapers inviting RFQ from reputed real estate developers to develop a modern state of the art multiplex cum commercial facility on design, build, operate and transfer basis. A copy of the said advertisement published in one of the leading newspapers is reproduced hereinbelow for ready reference:

Multiplex Development at Yashwant Place

Community Centre, New Delhi-NDMC Invitation

NDMC invites Request for Qualification from reputed Real Estate Developers to develop a modern and state-of-the-art multiplex cum commercial facility on

Design-Build-Operate-Transfer (DBOT)

Project Brief

New Delhi Municipal Council (NDMC) envisages development of a multiplex with at least 1000 seats in minimum 3 screens and a suitable mix of permitted commercial activities.

The proposed Project with plot area of approx. 2 acres is in the Yashwant Place Community Centre, New Delhi and houses the existing Cinema Building. It is located on Vinay Marg near the city's embassy enclave, Chanakyapuri, which is one of the most up market and prime locations in New Delhi, India.

BROAD ROLE OF SELECTED BIDDER

The selected bidder will be broadly responsible for demolishing the existing cinema building, developing, financing, planning & designing, sub licensing, constructing, marketing and operating & maintaining the proposed Project facility.

The plot will be offered to the selected bidder on as is where is basis for a concession period of 30 years. NDMC aims to make this landmark facility operational by Commonwealth Games to be held in New Delhi in 2010.

NDMC has appointed IL&FS Infrastructure Development Corporation (IIDC) as its Project Development Advisor.

BIDDING PROCESS

A selected company/bidder shall be identified through an open, transparent and competitive bidding process. A Company (as defined under Companies Act 1956) or a Consortium of Companies can apply for the project. Lead Member must be identified/named within the Consortium of Companies. A Special Purpose Company (SPC) will need to be incorporated for the Project in case of Consortium. Bidding will be completed in the following two-stage process:

* First stage: Invitation to companies to submit Request for Qualification (RFQ). The RFQ must be submitted as per the instructions laid down in the document titled "RFQ for Multiplex development at Yashwant development at Yashwant Place Community Centre Project". RFQ document can be produced as per directions given ahead. Bidders will be shortlisted in Stage 1 on the basis of Technical and Financial Eligibility criteria as specified in the RFQ document and in accordance with the bidding process.

* Second stage : Shortlisted company/ bidder shall be issued a Request for Proposal (RFP) document. Based on the Proposals submitted by bidder/ companies complying with the bidding process including the RFP and RFQ released in the first stage, a bidder shall be selected. PROCUREMENT OF RFQ DOCUMENT

The RFQ can be purchased from the given address upon payment by way of a crossed Demand Draft (non-refundable) drawn in favour of "Secretary, New Delhi

Municipal Corporation" payable at any Scheduled Bank in New Delhi. Purchase can be undertaken on all working days (Monday to Friday) between 1000 hrs to 1700 hrs IST as per the following:

Purchased from the given address or downloaded Indian Rupees (INR) 2500.00
Procured vide Post/Courier Within India INR 2700

Outside India USD 120 Sale of RFQ commences on Last date of Sale 19th December 2007

Last date of Sale 7th January 2008. The RFQ is also available on the internet and can be downloaded from the following websites : www.ndmc.gov.in and www.ilfsindia.com. Downloading of document must be followed by intimation to this effect at the given address in writing with the Applicants full address of communication, telephone, fax and email.

In case the RFQ document is downloaded, the amount payable as per instructions above should be enclosed along with the Application. RFQ SUBMISSION & CLARIFICATION

The RFQ must be submitted at the following address before 1600 hours (IST) latest by 14th January, 2008. Any bidder/company seeking clarification/ query or assistance in case of difficulty during downloading the RFQ may address a request in writing to:

The Director (Projects), NDMC

C/o IL&FS Infrastructure Development Corporation Ltd.

UG Floor, Mahindra Towers, 2A, Bhikaji Cama Place, New Delhi - 66,

Ph; 26709210; Fax 011-2610386

NDMC reserves the right, without any obligation or liability, to accept or reject any or all the RFQs at any stage of the process, to cancel or modify the process or any part thereof or to vary any of the terms and conditions at any time, without assigning any reason whatsoever.

Sd/-

Director (Projects), NDMC.

9. The RFQ document not only set out the project in detail but the technical and financial eligibility criteria to be met by the bidders was also mentioned. Each bidder had to meet the technical and financial eligibility criteria before being considered for the second RFP stage. The relevant terms of the RFQ document are set out hereinbelow for ready reference:

NDMC has appointed IL&FS Infrastructure Development Corporation Limited (IIDC) as advisors for project structuring and selection of a suitable applicant bidder/company for the project. The bidding process shall be carried out in two

stages:

? The first stage involves invitation to interested Bidders by way of Request for Qualification (RFQ) document. Based on the documents received from the Companies or Consortia of Companies, bidders will be shortlisted as per the criteria listed in this RFQ document.

? In the second stage, short-listed Bidders will be issued a Request for Proposal (RFP) document, comprising detailed Project specifications and draft license agreement. A preferred bidder/company would be selected through an open, competitive and transparent bidding process amongst the short-listed Bidders.....

ELIGIBILITY CRITERIA FOR RFQ EVALUATION

The applicant bidders/companies should meet all the following eligibility criteria:

1. The bidder must be a Company incorporated and registered in India under Companies Act, 1956 or a consortium of companies, each of which is a company incorporated and registered in India under Companies Act, 1956. An international Company, if interested, can participate through its subsidiary incorporated and registered in India under the Companies Act, 1956.

Technical Experience Criteria

1. The Company, or in case of a Consortium of Companies the Lead Member, must have developed at least one Shopping Mall cum Multiplex of minimum built-up area of 1,00,000 (one lakh) sq. ft. in the last 5 years.

2. A Bidder/member of a consortium is allowed to rely upon for technical experience only and submit the qualifications of:

(a) its majority (largest) shareholder company and/or

(b) holding companies and/or subsidiaries (as defined in the Companies Act, 1956) and/or

(c) companies with which it has a common promoter (whether individual or a corporate entity) for being considered while determining compliance with the technical eligibility criteria and/or

(d) Indian companies can also claim the technical experience only from its international parent companies subject to meeting any of the above (a) to (c) criteria. However, it is clarified that, unlike the technical experience criteria, any Indian subsidiary would not be allowed to aggregate the net worth of their international parent/subsidiary Company(s) in meeting the net worth criteria.

Provided that in such circumstances:

(i) the Bidder has to clearly indicate, with supporting documentation, the relationship between the Bidder and the entity/promoter whose technical

experience it is seeking to rely upon, and

(ii) the relevant entity/promoter whose technical experience the Bidder is seeking to rely upon, must also submit a Letter of Commitment in the format specified in Exhibit II a.

Financial Strength Criteria

1. The applicant Company or the members within the Consortium of Companies taken together must have an aggregate, tangible Net-Worth of at least Indian Rupees Eighty Six crores as per the audited annual accounts of the last completed financial year. Net worth shall be calculated as per the following formula: [Paid Up Share Capital + Reserves and Surplus - (Revaluation Reserves, goodwill, miscellaneous expenses not written off and other intangible assets)], and must be certified by an independent, practising, chartered accountant/firm of Chartered accountants registered with the Institute of Chartered Accountants of India (ICAI).

2. In case applicant is a consortium of companies, the Lead member of the Consortium, singularly, must have tangible net-worth as Rs. 27.00 crore or more.

3. In case of a consortium, it is clarified that Net worth shall be aggregated only of the members in the Consortium, who have submitted documentation that are in accordance with the RFQ. Each of the consortium members must submit duly filled Exhibit III of this RFQ.

10. Though initially the last date of submission of RFQ document was 14th January, 2008, it was subsequently extended to 21st January, 2008. Twenty five bidders submitted their applications in response to the RFQ. It is pertinent to mention that the Petitioner did not file its bid in response to the RFQ document issued by the NDMC.

11. On 11th March, 2008, the Petitioner's curative petition was also dismissed by the Hon'ble Supreme Court. NDMC in the first week of April, 2008 shortlisted fourteen bidders for participation in the second stage of bidding that means the RFP/ price bid stage. The last date for submission of the RFP was 16th May, 2008.

12. On coming to know that RFP was being issued, the Petitioner sent a legal notice dated 14th May, 2008 to NDMC challenging the very basis of the tender dated 19th December, 2007 being floated by it and further requested for issuance of a RFP document so as to enable the Petitioner to file a price bid. As the Petitioner had not filed a response to the RFQ document, NDMC did not supply the RFP document to the Petitioner.

13. On 20th May, 2008, the present writ petition was filed by the Petitioner. While the proceedings were pending in this Court, a letter of intent dated 16th June, 2008 was issued to the highest bidder, namely, M/s DLF Commercial Developers. In terms of the letter of intent, M/s DLF Commercial Developers paid the first instalment of Rs. 51,90,20,000/- (Rs. Fifty One Crores Ninety Lakhs

Twenty Thousand only) on 30th June, 2008 as well as the second and final instalment of Rs. 34,12,80,000/- (Rs. Thirty Four Crores Twelve Lakhs Eighty Thousand only) on 18th August, 2008. A Concession Agreement with regard to the said Cinema Complex was also executed between NDMC and M/s DLF Commercial Developers on 18th July, 2008.

14. On 26th August, 2008 upon an oral prayer being made by the Petitioner, M/s DLF Commercial Developers was impleaded as a proper and necessary party. In October, 2008, M/s DLF Commercial Developers filed a counter affidavit placing on record various activities undertaken by them after incurring considerable expenditure with regard to the said Cinema Complex.

15. Mr. Harish Malhotra, learned Senior Counsel for the Petitioner submitted that the Two Envelope Bid System adopted by NDMC was intended to disqualify and oust genuine investors, like the Petitioner. According to Mr. Malhotra, NDMC with mala fide intention had imposed very harsh and onerous techno-financial eligibility conditions so that very few persons could participate in the bid.

16. Mr. Malhotra further submitted that NDMC has neither a right to deprive the Petitioner to take part in the tender nor could it restrict the Petitioner's right to take part in an open public auction, which NDMC was bound in law to hold. In fact, according to him, Petitioner was entitled straightaway to proceed to RFP stage irrespective of any eligibility condition prescribed in the RFQ document. In this connection, Mr. Malhotra relied upon this Court's Division Bench order dated 5th February 2004, reproduced hereinabove.

17. He further submitted that the bid system adopted by NDMC was contrary to the mandate provided in Section 141(2) of the NDMC Act as interpreted by the Hon'ble Supreme Court in the Petitioner's own case. Mr. Malhotra submitted that state owned properties are required to be sold/disposed of by public auction alone so that the highest possible price could be attained by the State authorities.

18. Mr. Rakesh Kumar Khanna, learned Senior Counsel appearing for NDMC submitted that Petitioner did not have the locus standi to maintain the present petition as the Petitioner had neither purchased the RFQ document nor filed its response to the same. Mr. Khanna pointed out that admittedly the Petitioner did not even fulfill the minimum eligibility criteria and, therefore, did not have a legally enforceable right to file the present petition.

19. Mr. Khanna further submitted that the Petitioner was estopped in law and by its conduct from challenging the RFQ document or the bidding process as the Petitioner had failed to challenge the bidding process in its curative petition.

20. Mr. Khanna also pointed out that in the present case the bid documents had been prepared by NDMC with the help of a consultant based on the guidelines dated 30th November, 2007 issued by the Ministry of Finance, Government of India for PPP Projects. He stated that the said guidelines are required to be followed by all statutory entities under the control of the Central Government like

NDMC qua projects to be implemented through public-private partnership, as in the present case.

21. Mr. Khanna submitted that the bidding process adopted by the NDMC was not only in accord with the mandate of Section 141(2) of the NDMC Act but was also in public interest as the entire bidding process was in accordance with the Government's guidelines and consultant's report. Mr. Khanna referred to the judgment of the Hon'ble Supreme Court in the Petitioner's case and submitted that the same did not direct NDMC to transfer the property or implement the project only through public auction, as averred by the Petitioner.

22. Mr. Soli Sorabji, learned Senior Advocate appearing for the successful tenderer M/s. DLF Commercial Developers Ltd. submitted that the public auction is one of the methodologies adopted by the state to ensure fairness and transparency in the sale of its assets. But, he submitted that public auction was not the only methodology recognised by law to achieve maximum returns for sale of a state property.

23. Before we deal with the Petitioner's submission with regard to Section 141(2) of the NDMC Act, we would like to reproduce hereinbelow the relevant portion of the said Section:

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.

24. In our view, Section 141(2) of the NDMC Act only stipulates that the consideration for which the 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. The Section does not mandate that NDMC property can be transferred only by means of an auction sale, as submitted by the Petitioner. What is contemplated by the said Section is that the property should not be sold for a price less than the market price i.e. the best price it can fetch in an open, normal and fair competition. In fact, it is settled law that modes to secure such a price can be by public auction or by inviting tenders with open and wide participation.

25. The Supreme Court in *Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others*, has held as under:

On a consideration of the relevant cases cited at the bar, the following proposition may be taken as well established. State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain percepts and principles have to be observed. Public interest is the paramount

consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders....

26. The said decision of the Supreme Court in Sachiddanand Pandey (supra) has been followed in the case of Chairman and Managing Director, SIPCOT, and Madras and others Vs. Contromix Pvt. Ltd. by its Director (Finance) Seetharaman, Madras and another, , wherein it has been held that sale by tender is valid and permissible.

27. In the case of Karnataka State Industrial Investment and Development Corporation Ltd. Vs. Cavalet India Ltd. and Others, the Hon''ble Supreme Court has held that modes of tender and negotiations can also be adopted. The relevant observations of the Hon''ble Supreme Court in the said judgment are reproduced hereinbelow:

19. From the aforesaid, the legal principles that emerge are:

(v) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold and this could be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer.

(vi) Public auction is not the only mode to secure the best price by inviting maximum public participation, tender and negotiation could also be adapted....

28. In fact, in Nagar Nigam, Meerut Vs. Al Faheem Meat Exports Pvt. Ltd and Others, , the Hon''ble Supreme Court observed as under:

The law is well-settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specifications, estimated cost, earnest money Deposit, etc. The award of Government contracts through public-auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in Government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. However, in rare and exceptional cases, for instance during natural calamities and emergencies declared by the Government; where the procurement is possible from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids offered were too low, etc., this normal rule may be departed from and such contracts may be awarded

through "private negotiations". (See Ram and Shyam Company v. State of Haryana and Ors.)

29. Consequently, in our opinion, the test to be adopted by a Court while upholding the sale or transfer of public property is to see whether the Respondent has acted in a fair, open and transparent manner and whether by adoption of such procedure, can it be said that NDMC has been able to obtain the best possible price for its property.

30. In the present instance, not only the initial advertisement by NDMC was given wide publicity but a large number of bidders also submitted their response to the same. Further, it is pertinent to mention that there is no allegation of under-valuation of the said Cinema Complex even by the Petitioner. Thus, in our view in the present instance, the mandate of Section 141(2) of the NDMC Act has been adhered to as property has been disposed of by means of a two stage tender system with open and wide participation in normal and fair competition.

31. We are also not impressed by Mr. Malhotra's argument that the Petitioner was entitled to proceed to RFP stage irrespective of the fact that it admittedly did not fulfill the essential eligibility criteria laid down in the RFQ document, as firstly, there is no ground/averment in the writ petition that the Petitioner could laterally join at stage two, namely, RFP/price bid stage. Secondly, we do not find any direction by any Court that would entitle Petitioner to file its price bid at the RFP stage without fulfilling with the essential eligibility criteria. Thirdly, the Petitioner's reliance on the interim order dated 5th February, 2004 passed by a Division Bench of this Court is of no consequence as subsequently the writ petition was dismissed and even the Division Bench's judgment had merged with the Apex Court's judgment. Fourthly, we find that all the observations of different Courts in the first round of litigation were in the context of Petitioner's grievance with regard to non-renewal of its licence. In fact, the mode and manner of disposal of the said Cinema Complex by NDMC as envisaged in the two bid system was not an issue in the said Court proceedings. In fact, the Hon'ble Supreme Court in Escorts Ltd. Vs. Commissioner of Central Excise, Delhi-II, has observed as under:

8. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words statutes; their words are not to be interpreted as statutes.....

10. Circumstantial flexibility, one additional or different fact may make a world of

difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

32. Even though in the present instance, the Petitioner has not challenged any of the tender terms, yet even if the same had been challenged, the said challenge would not survive in view of the judgments of the Hon''ble Supreme Court in *Tata Cellular Vs. Union of India*, as well as in *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, , wherein it has been held that tender terms are in the realm of contract and are not open to judicial scrutiny unless the same are so unreasonable and arbitrary that they violate Articles 14 and 19 of the Constitution of India - which they certainly do not violate in the present instance.

33. Even otherwise the challenge to a tender floated in December, 2007 by filing a writ petition on 20th May, 2008 challenging its terms and conditions suffered from unexplained laches and the mere filing of a review and/or a curative petition in the Hon''ble Supreme Court cannot absolve the petitioner of laches. Valuable rights had accrued in favour of the successful bidder by the award of tender and payments made by it.

34. In fact, the objective behind the two bid system adopted by NDMC, at the instance of Government of India's directives is to ensure that only high quality firms with the best available track record pre-qualify on the basis of an objective and transparent criteria. In our opinion, NDMC, by following the two bid system, has attempted to ensure that there is real competition between the best qualified firms so that world class infrastructural facilities can be created. Therefore, in our view, the eligibility criteria is founded on an intelligible differentia and the differentia has a rational relation to the object sought to be achieved as stipulated in *The State of West Bengal Vs. Anwar Ali Sarkar*, .

35. Consequently, in our view, the writ petition is without any merit and is dismissed with costs of Rs. 50,000/- to be paid to the Prime Minister's Relief Fund.