

(2009) 05 SC CK 0121

In the Supreme Court Of India

Case No : Civil Appeal No. 3459 of 2009 (Arising out of S.L.P. (C) No. 13149 of 2008) and Civil Appeal No's. 3460, 3461-62, 3463-64 and 3466-67 of 2009 (Arising out of S.L.P. (C) No's. 11229, 11355-11356, 21754-21755 and 21756-21757 of 2008)

Ravi Development

APPELLANT

Vs

Shree Krishna Prathisthan and Others

RESPONDENT

Date of Decision : 11-05-2009

Acts Referred:

Constitution of India, 1950 — Article 14
Maharashtra Government Rules of Business, 1975 — Rule 12, 3
Maharashtra Housing and Area Development Act, 1976 — Section 164

Citation : AIR 2009 SC 2519 : (2009) AIRSCW 4398 : (2009) 4 BomCR 50 : (2009) 6 JT 556 : (2009) 8 SCALE 96 : (2009) 7 SCC 462 : (2009) 8 SCR 654

Hon'ble Judges : P. Sathasivam, J;K. G. Balakrishnan, J

Bench : Division Bench

Advocate : G.E. Vahanvati, S.G., P.P. Rao, Mukul Rohatgi, Pravin H. Parekh, R. Anand Padmanabhan, for Pramod Dayal, Kiran Suri, S. J. Amith, Sahar Bakht, Purushottam, Utsav Sidhu, R.K. Adsure, Gopal Balwant Sathe, E.R. Kumar, Rukhmini Bobde, Subhranshu Padhi, for Parekh and Co. and Shakun Sharma, for the Appellant; Shyam Diwan, Rakesh Dwivedi, Vishwajit Singh, Ritesh Agarwal, Siddharth Sengar, Shantanu Krishna, Abhindra Maheshwari, Ravindra Keshavrao Adsure and Asha Gopalan Nair, for the Respondent

Final Decision : Allowed

Judgement

P. Sathasivam, J.—Ravi Development and Maharashtra Housing and Area Development Authority (in short "MHADA") filed S.L.P.(c) No. 13149 of 2008, S.L.P.(c) Nos. 11229 of 2008 and 11355-11356 of 2008 against the common order dated 27.03.2008 in W.P. (L) No. 2714 of 2007 with PIL No. 72 of 2007 of the High Court of Bombay, whereby it was held that inviting public tender on 20.05.2007 for development of the Government lands by invoking the Swiss Challenge Method with a view to confer preferential treatment to Ravi Development was wholly unfair, unreasonable, arbitrary, illegal and quashed the

contract awarded to Ravi Development. As in the impugned judgment, High Court disapproved the Swiss Challenge Method and accordingly, MHADA had refused to award the contract to Shree Developers to whom land at Kavesar, Thane was allotted and Gurukrupa Developers, to whom land at Chhitalsar Manpada at Thane was allotted, both the said developers filed S.L.P.(c) Nos. 21754-21755 & 21756-21757 of 2008 respectively challenging the very same common order after getting permission from this Court.

2. Leave granted.

3. The common issue involved in all these appeals centres around the validity of the Swiss Challenge Method adopted by the MHADA on a pilot basis with respect to a proposal received from a private entrepreneur i.e. Ravi Development for development of undeveloped land owned by MHADA.

4. Brief facts in a nutshell are as under: Ravi Development submitted a proposal dated 25.08.2006 to the Chief Executive Officer, MHADA for development of undeveloped land in Survey No. 126 to 130, 150 (pt.), 151 (pt.) at Mira Road, District Thane which was received by MHADA on 31.08.2006. On 11.10.2006, similar proposal was also submitted by Ravi Development to the Chief Minister of Government of Maharashtra who was also holding the portfolio of Housing. The Desk Officer, Housing Department, Government of Maharashtra forwarded the aforesaid proposal received by the office of Chief Minister on 11.10.2006 to MHADA calling upon a detailed report. On 04.12.2006, the Chief Executive Officer, MHADA submitted note regarding proposal of Ravi Development to Housing Department of Government of Maharashtra. The Chief Executive Officer, Maharashtra on 24.04.2007 submitted detailed report of West Bengal Joint Venture Method and Jaipur Swiss Challenge Method to Housing Department of Government of Maharashtra and recommended for Swiss Challenge Method thereby seeking Government's approval. It was recommended that proposal received could be advertised under Swiss Challenge Method on pilot basis.

5. The Housing Department of Government of Maharashtra approved Swiss Challenge Method on 17.05.2007 and directed MHADA to use the same on pilot project basis and for other similar proposals in future MHADA should take policy decision at its own level. Pursuant to the said decision MHADA issued a public notice on 20.05.2007 for development of the land in question and two other lands by Swiss Challenge Method. In the public notice as well as bid document, it was specifically stated that Swiss Challenge Method would be applied. The Swiss Challenge Method was also explained in the publication as well as in bid document making it clear that the developer, who has given proposal, would have first right of refusal.

6. In respect of the land in question, MHADA received four bids on 11.06.2007, they are: (a) M/s EBR Enterprises; (b) M/s Harshad P. Doshi Associates; (c) M/s Ravi Developments; and (d) M/s Ostwal Builders Ltd. All the bidders including M/s Ostwal Builders Ltd. accepted knowledge of initiator of proposal and following

of Swiss Challenge Method and gave an undertaking to the effect that they are well aware of Swiss Challenge Method and that the original proposer shall be given an opportunity to take up the project on the highest eligible bid offer. They were also informed that in case the original proposer agrees to match his bid to the highest offer then the project shall be awarded in his favour. On 14.06.2007, Ravi Development wrote a letter to MHADA accepting to match highest bid amount. While so on 04.09.2007, Shree Krishna Pratisthan filed PIL No. 72 of 2007 before the High Court of Bombay challenging the public notice dated 20.05.2007 issued by MHADA only in respect of Mira Road Project and not in respect of two other projects.

7. On 22.11.2007, MHADA passed Resolution No. 6284 of 2007 accepting the bid of Ravi Development and awarded contract to them for getting construction of 30,000 Sq. Mtr. + 18,841 sq. mtr. (in lieu of receivable amount) = 48,841 sq. mtr. After giving undertaking accepting the Swiss Challenge Method and after participation and having failed in tendering process, M/s Ostwal Builders Ltd. filed W.P. (L) No. 2714 of 2007 challenging the public notice dated 20.05.2007 as well as MHADA's resolution dated 22.11.2007. The High Court of Bombay, by the impugned common order dated 27.03.2008, allowed the writ petition holding that Swiss Challenge Method itself is arbitrary and unreasonable consequently, struck down the action taken thereto. Aggrieved by the said order, MHADA, Ravi Development, Shree Developers and Gurukrupa Developers filed the above appeals by way of special leave petitions.

8. Heard Mr. G.E. Vahanwati, learned Solicitor General of India for State of Maharashtra and MHADA, Mr. P.P. Rao, learned senior counsel for Ravi Development, Mr. Mukul Rohtagi, learned senior counsel for Shree Developers, Mr. P.H. Parekh, learned senior counsel for Gurukrupa Developers and Mr. Shyam Diwan and Mr. Rakesh Dwivedi, learned senior counsel for the contesting respondents.

9. Learned Solicitor General for the State and MHADA and learned senior counsel appearing for Ravi Development contended that there was no flaw in applying Swiss Challenge Method and awarding contract in favour of Ravi Development. They also submitted that there is no arbitrariness or illegality in the said contract as concluded by the High Court, on the other hand, Swiss Challenge Method is followed in many countries as well as several States in India also. It was also pointed out that by adopting the said method proper public notice was issued, all the intending developers offered their bid and originator of proposal was given an opportunity to match the highest bid amount and after fulfilling all the formalities the contract was accepted in favour of Ravi Development. It was further submitted that the Government of Maharashtra was, in no way, suffered any financial loss or sidelined the other developers in awarding contract in favour of Ravi Development. It is their claim that the High Court cannot substitute its decision in the light of various clauses in the tender documents, particularly, when the policy decision of the Government is based upon the expert opinion. On

the other hand, learned senior counsel appearing for the contesting respondents submitted that in the absence of any innovative method offered by Ravi Development, application of Swiss Challenge Method and awarding of contract in their favour cannot be sustained. They also submitted that the High Court was fully justified in quashing the public notice and awarding of contract in favour of Ravi Development.

10. We have considered the rival contentions and perused the relevant materials. It was highlighted that the High Court has gone totally wrong in observing that the proposal of Ravi Development under Swiss Challenge Method ought to have been innovative and since the said proposal was not innovative, the same should not have been processed under Swiss Challenge Method. With regard to the said conclusion, MHADA and the Government of Maharashtra placed materials to show that the said proposal under Swiss Challenge Method by 'originator of proposal' need not be innovative at all and the said requirement has nowhere been stated under the said Swiss Challenge Method. Accordingly, it was pointed out that the repeated observations of the High Court to that effect are unsustainable.

11. It is useful to refer the Project details about the contract allotted to Ravi Development:

Project Details

1.1 Maharashtra Housing and Area Development Authority (MHADA) established under MHADA Act, 1976 is engaged in the activity of housing development, Konkan Housing and Area Development Board is a regional unit of MHADA. An opportunity to private develop land at Mira Road, District Thane, owned by MHADA, is made available.

1.2 Scheme of the Project:

1. The work of Planning, scheme, actual construction and for that purpose obtaining necessary sanctions from various authorities concerned shall be done by the developer.

2. The area of the said project is approximately 3.55 hectares, bearing survey Nos. 226 to 230, 150 (part) and 151 (part).

3. The successful developer has to prepare plans/designs in consultation with MHADA.

4. In this project approximately 60% of the flats should be for Lower Income Group, is possible.

5. Plans shall have got to be sanctioned by the Mira-Bhayander Municipal Corporation. Save and except the minimum area required to be handed over to MHADA free of costs, the developer will be at liberty to sell remaining area at market price.

1.3 Details of the Project:

1. Area Approximately 3.55 hectares.
2. Area available for construction approximately 70,000 sq. meters.
3. The specifications of the flats, which are required to be handed over to MHADA free of costs, shall be as directed by MHADA.
4. The remaining area, as per sanctions of Mira-Bhayandar Municipal Corporation, may be utilized for High Income Group and Commercial purpose.

1.6 SWISS CHALLENGE METHOD

1. MHADA has received a Suo Moto proposal from a developer for development of this land. The tenders will be received in response to this advertisement will be compared with the proposal given by the developer (original proposer) to MHADA. As per the Swiss Challenge method the developer who has given the original proposal has the opportunity (first right of refusal). However, the said developer has to match/raise his bid (rate) with the highest proposal tendered. The original proposer shall have the opportunity to take up the project on highest offer, and in the event if he refuses, then the highest bidder shall have right to implement the project.

As such if the original proposer exercises his right of first refusal then the project will be offered to the highest bidder. However, if such highest bidder refuses the offer then the amount deposited shall be forfeited.

12. It was highlighted by the appellants that Swiss Challenge Method is adopted in Chile, Coasta Rica, Guram (U.S. Territory), Indonesia, Korea, Philippines, South Africa, Sri Lanka, Taiwan (China), Virginia (U.S.) and also in India by Andhra Pradesh, Rajasthan, Madhya Pradesh, Chhattisgarh, Gujarat, Uttaranchal, Punjab States and Cochin Port authorities. The above information by way of an assertion shows that Swiss Challenge Method is already in prevalence in various States in India as well as overseas.

13. The application of Swiss Challenge Method by MHADA is accused of being not fair and transparent but the said contention raised by the respondent as well as concluded in the impugned judgment cannot be relied upon as the public notice for tender dated 20.05.2007 issued by MHADA had clearly mentioned about the said method and the scheme to be followed under it. Moreover, in the said notice the rule of "First right to refusal" to the "originator of the proposal" has also been discussed accordingly. Though the name of the "originator of the proposal" may not have been mentioned but it was contended in the said public notice that "MHADA has received a suo motu proposal from a developer for development of this land" pointing out the land marked in the said public notice for due development. So it can be concluded that the existence of the "originator of the proposal" was very much in knowledge of the other builders at the time of applying for the said bidding. The relevant portion of the Judgment of this Court in M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, , which has been relied upon by the High Court in the

impugned judgment reads as under:

10. There have been several decisions rendered by this Court on the question of tender process, the award of contract and have evolved several principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:

(i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest.

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

We are of the view that the said rejection of the highest bidder has been made by following the pre-condition of the acceptance of the tender already given in the said public notice.

14. The appellant had provided MHADA in its innovative project plan how to balance with highly developed high-rise with the low-rise building of lower specifications built up for the EWS, LIG and MIG groups and in that way this project plan was in accordance with the objective MHADA was looking for as well as profit sharing mode in a public-private partnership. After going through this idea, it can be concluded that the contention given in the impugned judgment of the High Court that there was dearth of innovativeness and originality in the proposal made by the appellant is wrong on factual ground. Moreover, the acceptance letter of the appellant to accept the project on the terms offered by the highest bidder to MHADA was sent on 14.06.2007 i.e. much before the filing of PIL No. 72 of 2007 to challenge the public tender. So it can be concluded that failure in the said bidding has raised the question of acceptability of Swiss Challenge Method and not before that when the public notice was actually published.

15. It was also pointed out that the tender notice and bid documents specify the details about Swiss Challenge Method without mentioning the innovativeness of the proposal, in such circumstances, interference by the High Court under the wrong assumption of innovativeness as one of the pre-conditions in the proposal of Ravi Development is totally incorrect.

16. The following materials are culled out from the information furnished by MHADA and State of Maharashtra. They are:

At Mira Road, total land available with MHADA is 100286.25 sq.mtr. and out of the same (excluding area of 18969.40 sq.mtr. which went under D. P. Road,

Nalla, amenities, open spaces etc.), near about 46400 sq.mtr. have been utilized and on the same, construction of merely 17840.23 sq.mtr. is actually carried. Thus, it is a fact that with the available subsidy to keep prices of LIG, EWS & MIG affordable MHADA has to construct low rise structures with poor specifications and MHADA was not able to utilize the potential of the land which is the case in most of the MHADA layouts. Further from the year 2001 to 2005 MHADA was not able to sale these constructed houses even at reduced prices & MHADA had same experience in case of another property at Ambernath, Thane. As against this, in the present proposal submitted by M/s Ravi Development on the available balance land of 35500 sq. mtr., construction of 70000 sq.mtr. was proposed with richer specifications. Furthermore, for allowing 0.8 TDR, additional construction 65052.80 sq.mtr. (with the total share of MHADA to 48841.02 sq.mtr.) will be there on the said land of 35500 sq.mtr. from that point of view, proposal of Ravi Developments can be called as innovative proposal. Further, though as stated herein above, Swiss Challenge Method is adopted in various countries outside, and also in various States in India, but for MHADA and for State of Maharashtra, this was suggested and applied for the first time therefore, it can certainly be called as pilot innovative proposal of M/s. Ravi Developments.

17. It is also seen from the approved order of the Government of Maharashtra dated 17.05.2007 that Swiss Challenge Method has to be applied in the area of Mira Road land, Kavesar land, Chitalsar Manpada land on Pilot Project basis and MHADA has to evolve its own policy for taking decision in future in identical cases. In those circumstances, as rightly pointed out by Mr. G.E. Vahanwati, learned Solicitor General appearing for MHADA and Mr. P.P. Rao, learned senior counsel for Ravi Development that requirement of innovativeness is not there in Swiss Challenge Method, even otherwise, the above mentioned facts clearly show that the proposal of Ravi Development under the Swiss Challenge Method was a new innovative venture for MHADA and for State of Maharashtra.

18. The next ground on which the High court interfered with the decision of MHADA awarding contract for developing Mira Road in favour of Ravi Development was about the influence of the Chief Minister of Maharashtra. With regard to the said allegation, the MHADA and the State of Maharashtra placed relevant materials which show that at first Ravi Development submitted their proposal to the Chief Executive Officer, MHADA on 25.08.2006 and thereafter, to the Chief Minister of Maharashtra on 11.10.2006. It is clear from the provisions of MHADA Act, 1976, that MHADA is an undertaking working under the control and in coordination with the Housing Department of Government of Maharashtra. It was explained that Ravi Development on 25.08.2006 submitted the proposal to the CEO, MHADA and since no immediate decision was taken by MHADA level as the same was new proposal, therefore, on 11.10.2006 similar proposal was submitted by them to the Chief Minister of Government of Maharashtra. It was pointed out that the Chief Minister had portfolio of Housing Department and as per Rules 3 and 12 of Maharashtra Government Rules for Conduct of Business, 1975 - business of the concerned Department of the Government are transacted

by the Cabinet Minister of the said Department. In those circumstances, there was nothing wrong in submitting the same proposal to the Chief Minister of Maharashtra on 11.10.2006. As rightly pointed out by Mr. P.P. Rao, learned senior counsel, if there was no decision by MHADA in respect of their proposal dated 25.08.2006, naturally the party concerned viz., Ravi Development in the normal circumstances could approach to the higher authorities, in the case on hand, Cabinet Minister of Housing Department (i.e. Chief Minister of Maharashtra), hence rightly approached the Chief Minister by submitting the same proposal on 11.10.2006 which cannot be motivated or deemed as contrary to any of the Government orders. It was pointed out that the Chief Minister or Government has not at all favoured Ravi Development and no order or endorsement to that effect was either made or reflected anywhere in the record. On the other hand, the Desk Officer of Housing Department of Government of Maharashtra, by letter dated 20.10.2006, simply forwarded the proposal submitted by Ravi Development to MHADA thereby calling upon a detailed report. Pursuant to the said communication, CEO, MHADA recommended the proposal of Ravi Development on 04.12.2006 and also submitted a detailed study report on 24.04.2007 to Principal Secretary, Housing Department, Government of Maharashtra after examining the merits and demerits of 'West Bengal Joint Venture Method' and 'Jaipur Swiss Challenge Method' and recommended for following the Swiss Challenge Method and sought Government's approval. It is seen that thereafter, Housing Department of Government of Maharashtra, by letter dated 17.05.2007, issued directions to follow Swiss Challenge Method as recommended by MHADA and also directed MHADA to take policy decision at its own level for other similar proposals in future. It was pointed out that thereafter, by a letter dated 14.06.2007, in terms of the Ravi Developments willingness to match the highest bid, MHADA took a decision on 22.11.2007 to award the said contract to Ravi Development. In those circumstances and in view of the materials placed, particularly, two letters dated 20.10.2006 and 10.05.2007 issued by the Housing Department of Government of Maharashtra, it is clear that no favoritism was ever shown to Ravi Development at the instance of the Chief Minister of Maharashtra. We are satisfied that contrary observations of the High Court are baseless and not warranted.

19. Apart from the above information and conclusion by us, it was highlighted that MHADA, as a State Government Undertaking, works under the control of Housing Department of Government of Maharashtra and as per Section 164 of the MHADA Act, 1976, Government could issue instructions if really had to favour Ravi Development and the same would be statutorily binding on MHADA. However, the materials placed by the State and MHADA show that on receipt of the representation from the Ravi Development without any endorsement or direction to consider the case of Ravi Development, the officer concerned merely forwarded the same to the Chief Executive Officer, MHADA to offer their remarks. As rightly pointed out, perusal of the entire documents clearly shows that there was no attempt either from the authorities of the State of Maharashtra or from

the Chief Minister to favour Ravi Development. In such circumstances, the contention of the learned Solicitor General appearing for the State and MHADA is well founded and the contrary conclusion of the High Court is liable to be rejected.

20. In the public notice and bid documents dated 20.05.2007, it was specifically mentioned about the principle of "initiator or proposer" and with the said understanding Shree Ostwal Builders Ltd. has participated in the tender process and also gave an undertaking on 11.06.2007 while submitting their bid document. The following undertaking submitted by them which is not in dispute is as follows:

We are well aware of Swiss Challenge method and that the original proposer of the suo moto proposal shall be given opportunity to take up the project on the highest eligible bid offer. In case the original proposer agrees to match his bid to the highest offer then the project shall be awarded in his favour.

In view of clear undertaking, as rightly pointed out by the State, after participation in tender process and failing in the same when the contract was awarded to Ravi Development by MHADA's decision dated 22.11.2007 only at that point of time i.e. on 11.12.2007 Shree Ostwal Builders filed a writ petition in the High Court.

21. It is relevant to mention that the legality of Swiss Challenge Method in its entirety is not challenged. Except the land at Mira Road, in respect of other two remaining properties, no challenge was ever raised till date by any party. Only after issuance of public notice in the newspaper to follow Swiss Challenge Method, Krishna Pratisthan choose to file public interest litigation that too only in respect of land at Mira Road, Thane and admittedly no challenge was raised in respect of other two properties.

22. It was submitted by the learned Solicitor General before us that as per the initial tender document, what was receivable for MHADA was 30,006 sq. mtr. construction (out of 70000 sq.mtr. construction) with 1.2 Floor Space Index (FSI). As per the rules, with the help of Transferable Development Rights (TDR), FSI can be extended upto 2 that means 0.8 TDR = 65052.80 sq.mtr. can be utilized. For this utilization of 0.8 TDR i.e. additional construction of 65052.80 sq.mtr., MHADA was entitled to receive amount of Rs. 2750/- per sq. mtr. which comes to Rs. 17.89 crores. However, it was pointed out that changing the said terms in the approval order dated 22.11.2007, it is the assertion of MHADA that it gained more and Ravi Development had to loose more, as in view of the said amount of Rs. 17.89 crores, M/s Ravi Development was directed to give additional constructed carpet area of 18841 sq. mtr., whose actual market value comes to Rs. 60.69 crores. Thus, it was pointed out that after the said alternate construction of Rs. 60.69 crores is compared to receivable amount of Rs. 17.89 crore, then, MHADA is in fact gaining advantage of Rs. 42.80 crores. It was brought to our notice that all the details are matter of record. In those

circumstances, it was pointed out that the terms were altered to the great advantage of MHADA and more dis-advantage of Ravi Development.

23. The further particulars furnished by the State of Maharashtra show that National Housing Policy & Maharashtra State Housing Policy promote Public-Private partnership for construction of EWS (Economically Weaker Section), LIG (Lower Income Group), MIG (Middle Income Group) Housing. MHADA is a major player for the same in state of Maharashtra. Subsidy provided is not adequate and MHADA has no control on actual quality construction, therefore, MHADA has to construct low rise and ground floor structures with poor specifications so as to keep the prices of the EWS, LIG, MIG houses affordable to masses and FSI of 1.20 is unutilized due to the low rise structures and poor specifications in almost all the layouts of MHADA in Mumbai and in Mumbai Metropolitan region and MHADA is finding it difficult to sell even these houses at concessional rates. Therefore, MHADA conducted a detailed survey of Public Private Participation (PPP) options available for carrying out land developments for construction of better EWS, LIG and MIG houses at affordable price. In the report dated 24.04.2007, written to the Government, pros and cons of Joint Venture Method and Swiss Challenge Method are clearly reflected and Swiss Challenge Method is recommended with due application of mind. Therefore, on that count also, application of Swiss Challenge Method into present allotment of Mira Road land at Thane is justified and not violative of Article 14 of the Constitution.

24. As pointed out earlier, in the Swiss Challenge Method, there is no provision for allowing other tenderers to raise the bid further, when "initiator of proposal" accepts to raise up to the highest bid. It was brought to our notice that even there was no such request by Shree Ostwal Builders Ltd. after Ravi Development accepting to match highest bid by their letter dated 14.06.2007.

25. It is well settled principle that in the matters of Government contract, the scope for judicial review is very limited and that the Court cannot substitute its own decision for that of the government vide *Tata Cellular Vs. Union of India*, and *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, . Even as early as in *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, , this Court held that when the State Government is granting licence for putting up a new industry, it is not at all necessary that it should advertise and invite offers for putting up such industry. The State Government is entitled to negotiate with those who have come up with an offer to set up such industry. In that case, the predominant purpose of the policy decision dated 30.12.1984 was to ensure construction and setting up of new distilleries with modern technologically advanced plant and machinery at new sites where there would be no possibility of air and water pollution and if for achieving this purpose the State Government considered the offer of the existing contractors and negotiated with them and ultimately decided to grant to them licences for construction of new distilleries on the terms and conditions set out in the recommendations of the Cabinet Sub-Committee. This method was approved by the Court and held that the State Government could

not be said to have acted arbitrarily or capriciously in violation of Article 14. In *M and T Consultants, Secunderabad Vs. S.Y. Nawab and Another*, , it is worthwhile to refer the following conclusion in para 17:

17. ...It is by now well settled that non-floating of tenders or absence of public auction or invitation alone is no sufficient reason to castigate the move or an action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise or improper abuse of power by the authority concerned. Courts have always leaned in favour of sufficient latitude being left with the authorities to adopt their own techniques of management of projects with concomitant economic expediencies depending upon the exigencies of a situation guided by appropriate financial policy in the best interests of the authority motivated by public interest as well in undertaking such ventures....

26. The decision to apply Swiss Challenge Method clearly fell within the realm of executive discretion and in this case, exercised after due application of mind. It is clear from the materials placed before us that there is neither arbitrariness nor unreasonableness in the adoption of the said policy.

27. Recently, there has been shift towards encouraging private participation in the government works and promoting of public-private partnership. The Ministry of Housing and Urban Poverty Alleviation in its National Urban Housing Habitat Policy, 2007 specifically mentions participation of private sector as one of its aims. It envisages that the State Government and the Central Government shall act as facilitators and enablers. The Maharashtra State Housing Policy dated 23.07.2007 provides for private participation. Pursuant to the declared policy by the Central and State Governments, the Maharashtra State Housing Board and MHADA are well within their rights to apply the Swiss Challenge Method with respect to the MHADA lands that were lying undeveloped since the same was being applied only on trial basis as a method of encouraging private participation. Though an argument was built up by the contesting respondents based on *Ramanna Dayaram Shetty v. International Airport Authority of India and Ors.* (1979) 2 SCC 489, *E.P. Royappa Vs. State of Tamil Nadu and Another*, , *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , and *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, , in the light of the stand of the State of Maharashtra and MHADA and the materials placed before us, we are of the view that while holding that there is no doubt about the principles laid down but they are not helpful to the case on hand. On the other hand, we are satisfied that the State of Maharashtra, after due deliberations and study of the methodologies which is prevailing in the country for dealing with suo motu development proposals, decided to apply Swiss Challenge method to the proposal of Ravi Development. Further, Swiss Challenge method was being applied by the State Government only on a pilot basis. The method is transparent inasmuch as all the parties were well aware of the "right of first refusal" accorded to the "originator of proposal". As per the method which was known to all the parties the originator of the proposal must in consideration of his vision and his

initiative be given to the benefit of matching the highest bid submitted. As pointed out earlier, the said method is beneficial to the government inasmuch as the government does not lose any revenue as it is still getting the highest possible value. Further, in view of financial crunch and availability of undeveloped lands, National and State Housing Policies provide for encouragement of private participation. The State Government is also well within its rights to try out on pilot basis a methodology recognized internationally as well as in India. In those circumstances, the High Court is not justified in striking out the Swiss Challenge Method without allowing the State Government to exercise its executive discretion on a pilot basis. It is not possible to reject the claim of State of Maharashtra and MHADA, in view of shortage of land, increasing cost in housing sector, the Central and State Governments recommended strongly for public private joint ventures and in the said category Swiss Challenge method is the acceptable democratic method as compared to other options.

28. The slums in urban area are primarily a resultant of shortage of supply of housing and shortage in supply of LIG/MIG category of housing. To ensure that the lands for public housing and metropolis like Mumbai are put to maximum utilization and maximum tenements are made available for families of MIG and LIG categories for which in the present scenario one of the way outs is joint venture development by public and private bodies.

29. Due to shortage of land, ever increasing cost, and maximum utilization of permissible FSI, by adopting public-private joint ventures, it would be possible to minimize the cost of LIG, EWS and MIG categories. In the present project, land is partially developed by MHADA with ground floor structures and low rise buildings with lower specifications so as to make housing affordable for EWS, LIG and MIG with the subsidies granted by the Government. The balance FSI cannot be utilized without high rise buildings which involves higher cost and expenses. Ravi Development has proposed multi-storied building to consume balance FSI with 60% number of tenements under LIG and EWS category as per DCR 33(5) of Mira Bhairdar Municipal Corporation, which if constructed by MHADA will require higher cost of construction and subsidies required to make MIG, LIG houses will be quite high. In the present project, constructed built up area with richer specifications is to be handed over by Ravi Development to MHADA free of costs in turn MHADA will be at liberty to price these tenements in accordance with policies of MHADA or as may be determined by MHADA. Therefore, utilization of maximum permissible FSI, adopting higher specifications and effecting utilization of scarce land for housing and yet make LIG, MIG housing group financially attractive to the people is possible through joint venture of public and private bodies in which reasonable built area be available by private developer free of cost to MHADA. The above claim and concept cannot be ignored lightly.

30. Lastly, we conclude that the impugned pilot project or initiation taken by the Government of Maharashtra along with MHADA to encourage public-private participation is in accordance with the need of the time as well as a laudable

effort. But to make it an effective approach Swiss Challenge Method or any other encouraging concept should be duly publicized first. The effort of public-private participation can only be possible when private entities are aware of such scheme. Also in the scheme of availing a new system thorough rules and regulations are needed to be followed otherwise unfairness, arbitrariness or ambiguity may creep in. In order to avoid such ill-effects the State Government is suggested to consider the following aspects:

1. The State/Authority shall publish in advance the nature of Swiss Challenge Method and particulars;
2. Publish the nature of projects that can come under such method;
3. Mention/notify the authorities to be approached with respect to the project plans;
4. Mention/notify the various fields of the projects that can be considered under the method;
5. set rules regarding time limits on the approval of the project and respective bidding;
6. the rules are to be followed after a project has been approved by the respective authorities to be considered under the method.
7. All persons interested in such developmental activities should be given equal and sufficient opportunity to participate in such venture and there should be healthy inter se competition amongst such developers.

These suggestions are not exhaustive and the State is free to incorporate any other clauses for transparency and proper execution of the scheme. The State Government is suggested to frame regulations/instructions on the above lines and take necessary steps thereafter in future.

31. In view of the above discussion and conclusion, the common impugned judgment and order dated 27.03.2008 of the Bombay High Court in W.P. (L) No. 2714 of 2007 and P.I.L. No. 72 of 2007 are set aside. Consequently, the appeals are allowed. No costs.