

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

Reserved on: 27.07.2017
Pronounced on: 18.01.2018

+ **W.P.(C) 5891/2016 & C.M. APPL.24246/2016**
HONSHU BUILDCON PRIVATE LIMITED Petitioner
versus

NORTH DELHI MUNICIPAL CORPORATION Respondent

+ **W.P.(C) 7135/2016 & C.M. APPL.29365/2016**
RIEHEN INFOSOLUTIONS PRIVATE LIMITED.... Petitioner
versus

NORTH DELHI MUNICIPAL CORPORATION Respondent

Through: Sh. Rajesh Gupta with Sh. Harpreet Singh,
Advocates, for the petitioners.

Ms. Mini Pushkarna, Standing Counsel with Ms.
Vasundhara Nayyar and Ms. Anushruti, Advocates, for
NDMC.

Ms. Renu Jagdev, Addl. Commissioner, NDMC.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT

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Facts and Contentions

1. The writ petitions [W.P.(C) 5891/2016 and W.P.(C) 7135/2016] relate to similar issues and will be dealt with as connected matters. The brief facts and issues arising from these writs are as follows.

2. Honshu Buildcom Private Limited ("Honshu") is a company incorporated under the Companies Act, 1956 having its registered office at 148, Bazar Matia Mahal, Gali Gokul Shah. Delhi-110006, Mr. Mohsin Anwar is its Director. The North Delhi Municipal Corporation ("NDMC") is

a local National Capital territory (NCT) statutory corporation formed that provides and maintains civic amenities and, *inter alia*, maintains various parking lots, advertisement sites etc within its jurisdiction in the NCT of Delhi.

3. The NDMC, through a Notice Inviting Tenders (NITs)/E-Auction Notice dated 22.04.2016 invited e-tenders for allotment for cluster-wise display of advertisement in its jurisdiction on payment of an advance monthly licence fee on quarterly basis for a period of three years (further extendable). Thereafter, the NDMC on 02.05.2016 issued a corrigendum and amended certain conditions of the NIT/e-auction. Honshu, being desirous of displaying the advertisement on cluster basis as above, submitted its bid in respect of Civil Line Zone Cluster No. 04 and deposited the requisite EMD amounting to 20% of the minimum reserved price as stipulated in NIT/E-auction Notice. Honshu also deposited the requisite amount towards the cost of the e-tender form as well as offered a monthly licence fee (“MLF”) of ₹18,50,000/-. After the closing of the e-bidding process by the NDMC on 13.05.2016, it issued a Letter of Intent (“LoI”) bearing No. ADC (Advtt.)/NDMC/2016/D-3021 dated 17.05.2016 to Honshu, being the successful (H1) bidder in respect of e-auction for allotment of advertisement rights for various advertisement site(s) of NDMC on Cluster Basis as described previously, and requested Honshu to download the Letter of Intent, sign the same in acceptance and upload it to the portal as a token of acceptance within 07 days of issue of letter, not later by 24.05.2016. This was to be submitted alongwith the auction processing fee being equivalent to 1.25% of the MLF quoted by the Petitioner No. 1 and was to be paid through online mode, these terms were subsequently complied with by Honshu.

4. By means of the LoI, the NDMC also requested Honshu to pay an amount equivalent of two months' MLF towards the security deposit alongwith three months' licence fee payable in advance, within a period of 05 days from the date of acceptance of the LoI, but not later than on 31.05.2016. By the said LoI dated 17.05.2016 issued by NDMC, Honshu was also requested to execute a licence agreement within 10 days of the offer with the NDMC, in the prescribed format, and the allotment letter was to be issued to the petitioner only after completion of the formalities.

5. Honshu cites clause 22 of the terms and conditions of the NIT/E-auction issued by the NDMC, which is as follows:

“Existing display of media will be allowed up to date of maturity of existing contract. At the time of bidding, it will be assumed that all the sites are vacant and MLF of the existing contract shall be deducted from the MLF amount of successful bidder of cluster(s). After the maturity of existing contract, the MLF as per existing contract will be started to be paid by the cluster holder”.

6. Honshu, thereby, alleges that its Directors i.e., Mr. Mohsin Anwar and Mr. Akram Khan by their letters dated 30.05.2016 informed the NDMC that 22 Unipole sites had been previously allotted to them in their individual capacity on a quarterly licence fee basis by the Respondent through e-auction dated 25.02.2016 and in respect thereof, the security deposit/licence fee had been paid. The period of allotment of the 22 Unipole sites was to expire on 16.06.2016. Both of them, i.e., Mr. Anwar and Mr. Khan requested for adjustment of the security amount of ₹ 72,09,330/- towards the advance licence fee and security deposit of Civil Line Zone Cluster No. 04 by letters dated 30.05.2016 issued to Honshu.

7. Honshu, later by its letter dated 31.05.2016 confirmed to the NDMC of having signed and uploaded the LoI dated 17.05.2016 and having paid the requisite e-auction processing fee on the e-portal of the NDMC. By this letter it also deposited a pay order dated 31.05.2016 for ₹ 17,63,310/- towards the remaining amount of security deposit and licence fee of the said advertisement cluster after adjustment of ₹ 72,09,330/- being the security deposit of the 22 Unipole sites already having been supposedly deposited by the directors in their individual capacity. Honshu, through letter, dated 02.06.2016 requested the NDMC to issue an allotment letter in respect of Civil Line Zone Cluster No.4. Mr. Mohsin Anwar and Mr. Akram Khan by their letters (both dated 15.06.2016) reiterated to the NDMC of their request to adjust the security deposit of ₹ 72,09,330/- mentioned above.

8. Thereafter, the NDMC by its letter, dated 16.06.2016 informed Honshu that there was no provision for adjustment and no prescribed mode of payment by “adjustments”. It was stated that if at all, any deposits were to be refunded, with respect to any sites, they were to be carried out only by the prescribed procedure. Consequently, the request was declined. By the said letter, the NDMC also informed Honshu that as on 31.05.2016, i.e., the prescribed last date for payment, no such security deposit was payable, because the contract for which these security deposits had been made, were still operating and had not been terminated. Hence, any proposal to consider refund of such security deposits was premature and hypothetical. NDMC stated that it could not be considered. Therefore, the competent authority, by orders dated 10.06.2016, directed the advertiser to deposit the balance amount, in respect of Civil Line Zone Cluster No.04 amounting to ₹

71,26,690/- alongwith interest @24% per annum from 01.06.2016 till the date of deposition, within a period of three days from issue of the letter, failing which the EMD deposited by them was going to be forfeited as per the terms and conditions of the cluster and the cluster would be re-auctioned without any further correspondence.

9. Honshu, after receipt of letter dated 16.06.2016 from the NDMC, by its letter dated 18.06.2016 informed them that the period of 22 Unipole sites for which adjustment was sought by Mr. Mohsin Anwar and Mr. Akram Khan in their individual capacity towards the advance licence fee and security deposit of Civil Line Zone Cluster No.04 to be paid by Honshu, had already expired on 16.06.2016 and as such their request to adjust the same was justified. By the said letter Honshu also confirmed of having submitted the original G-8 receipts of the security amount by its directors in their individual capacity and also having submitted affidavits stating therein, that they would not claim the said security amount in future once the same is adjusted towards the licence fee and security deposit of the Civil Line Zone Cluster No.04. In that letter, Honshu also asserted that NDMC's stand was mischievous, because on one hand, the G-8 receipts and desired affidavit submitted by its directors in their individual capacity had been acknowledged by the NDMC and on the other hand, the request for adjustment of the amount was denied. It further stated that the requirement to deposit of interest of 24% on the balance amount w.e.f. 01.06.2016 till the date of deposit, was unsupported on any provision in the terms and conditions of the NIT/E-auction/agreement. Honshu denied its liability to deposit any interest; it, therefore, requested the NDMC to withdraw the letter, dated 16.06.2016 and adjust the security amount and refrain from

taking any coercive action against it.

10. Honshu received a Show Cause Notice dated 30.06.2016 from the NDMC, by it (the NDMC) while referring to clause 1(i) of NIT, which provides *“in case an individual whether in person or as a part of the company / firm etc. is a defaulter is debarred from some reason, any other company where the above individual has an interest will not be allowed to participate in the auction”*, alleged that it (Honshu) had a direct connection with certain defaulter companies which violated the terms and conditions of the NIT and asked Honshu to explain why its application submitted for participation in the e-auction held on 13.05.2016 for the Civil Line Zone Cluster No.04 should not be cancelled and further action not be initiated against them for submission of facts as per the Delhi Municipal Corporation Act. Honshu was also asked by the NDMC also informed that in case it wished to be heard, appearance was to be effected before the ADC (Advtt.) on 01.07.2016 or 04.07.2016, failing which further necessary action was to be initiated against it without further notice.

11. On receipt of the Show Cause Notice Honshu confirmed that its directors, as well as its shareholders had no direct relation with the defaulter companies as alleged, and requested the NDMC to withdraw the said Show Cause Notice on this ground alone. By the said letter, Honshu also confirmed of having appeared before the concerned officer of the NDMC on 04.07.2016 and having apprised the officer about the facts of the case. It, requested the NDMC to withdraw the Show Cause Notice dated 30.06.2016 being without any merit. The NDMC, on receipt of Honshu's reply, by the impugned letter dated 06.07.2016, (received by Honshu on 08.07.2016), cancelled the LoI dated 17.05.2016 issued to the Petitioner No. 1 and also

forfeited EMD amount of ₹ 3,60,000/- deposited by the petitioner in respect of Cluster No.04 Civil Lines Zone. Honshu is aggrieved by the actions of the NDMC, and has preferred W.P. (C)- 5891/2016 alleging that the cancellation is arbitrary and *mala fide*.

12. Reihem Infosolutions Private Limited (“Reihem”), is also an incorporated company with its office at C-52 /17, Street No. 5, C Block, Gamri Extension, Delhi-110053; Shri Yogesh Kumar is its Director. The NDMC, by Notice Inviting Tender dated 08.06.2016, invited e-tenders for e-auction for allotment for display of advertisement rights through Kiosk on Lamp Poles/ Street Light Poles located in the central verge of commercial and MLU roads in Karol Bagh Zone and City Zone in the jurisdiction of North DMC for a period of one year (further extendable for 02 years). Reihem submitted its bid in respect of the Karol Bagh Zone and deposited requisite EMD (25% of the minimum reserved price) as stipulated in NIT/E-auction Notice. During the course of online e-bidding on 22.06.2016, Reihem offered to pay a monthly licence fee of ₹ 22,70,000/- in respect of Karol Bagh Zone.

13. After closing the e-auction bidding process on 22.06.2016, the NDMC, instead of issuing the Letter of Intent, issued a letter dated 24.06.2016 and informed that Reihem had emerged as H-1 bidder in the e-auction in respect of Karol Bagh Zone and in view of clause 1(c), it was asked to submit an affidavit stating that it did not have any stake/financial dealings/direct or indirect involvement in the management of defaulter companies/firms as stated in the said letter. By that letter, NDMC directed Reihem to submit an affidavit containing the details immediately to facilitate the issuance of LoI in respect of the e-auction of Pole Kiosks of Karol Bagh

Zone.

14. On receipt of the aforesaid letter dated 24.06.2016 from NDMC, Reihem by its letter dated 27.06.2016 informed the former that in view of clause 1(c) of the e-tender document, intending bidders were not directed/required to submit any such affidavit as being demanded, but in order to avoid any controversies, Reihem furnished an affidavit verifying that the information/statement /details sought by NDMC. By that letter Reihem asked NDMC to acknowledge the affidavit it enclosed as required and issue the LoI in respect of the Karol Bagh Zone at the earliest. NDMC, on receipt of letter and affidavit dated 27.06.2016 from Reihem and being satisfied with the statement/declaration (as well as documents submitted at the time of e-tender), issued the Letter of Intent bearing No. ADC (Advtt.)/NDMC/2016/D-3160 dated 28.06.2016 to Reihem as the successful (HI) bidder in respect of the e- auction for display of Media through Kiosk on Lamp Posts/ Street Light Poles in the central verge of Commercial and MLU Roads maintained by PWD or MCD in the jurisdiction of North DMC at a monthly licence fee of ₹ 22,70,000/- in respect of the Karol Bagh Zone and requested Reihem to download the LoI, sign it in acceptance and upload it to the portal as token of acceptance within 03 days of issue of letter by 01.07.2016 alongwith the auction processing fee being equivalent to 1.25% of the MLF by online mode.

15. By the aforesaid LoI dated 28.06.2016, NDMC requested Reihem to pay an amount equivalent to three months' MLF towards security deposit alongwith three months licence fee payable in advance, and the payment was to be made within a period of 07 days from the date of acceptance of the LoI, but not later than on 08.07.2016. By the LoI, Reihem was also required to

execute an agreement within 10 days of the issue (of the LoI), with NDMC, in the prescribed format, before allotment of advertisement rights (for display of the media through Kiosk on Lamp Posts / Street Light Posts in central verge of commercial and MLU Roads maintained by PWD or MCD). The allotment letter was to be issued only after completion of the formalities. Reihien signed the said LoI and uploaded the same on the portal of NDMC as token of its acceptance on 28.06.2016.

16. After issuance of the LoI, NDMC informed Reihien that the Letter of Intent issued, dated 28.06.2016 towards the display of media through pole kiosks in Karol Bagh Zone stood withdrawn with immediate effect as the matter was stated to be under technical examination. After the withdrawal letter was issued, the NDMC by its Show Cause Notice dated 01.07.2016 informed Reihien that on going through the documents uploaded, it was observed that Sh. Jitender Singhal was its partner and that he also had interest in Trigen Electronics Pvt. Ltd. Further, from the bank transactions statements, it apparently appeared that huge sums of money were regularly transferred into the accounts of M/s Ashima Infrastructures Pvt. Ltd and M/s Shri Sai Nath and it appeared that Reihien had substantial financial relations/interests in these two companies.

17. Reihien, on receipt of the Show Cause Notice dated 01.07.2016, replied on 05.07.2016 clarifying that the allegation that Mr. Jitender Singhal was a partner in the concern, was misplaced and that he was one of its chartered Accountants/ Auditors, not a partner and/ or director. It also informed to the NDMC that it did not have substantial relations / interest in the two companies, i.e. M/s Ashima Infrastructures Pvt. Ltd and M/s Shri Sai Nath as alleged, and pointed out that the NDMC had not disclosed the

alleged sums of money, which were said to have been regularly transferred into the accounts of these two companies. It stated that in absence of such information, it was unable to provide any clarification on the same. Reihem requested the Respondent to withdraw the Show Cause Notice alongwith letter dated 28/29.06.2016, stating that it was devoid of any merit. Not receiving a subsequent response from the NDMC, Reihem approached this High Court by way of writ petition W.P. (C) 5881/2016; however, it was withdrawn as the final order was not passed on the Show Cause Notice dated 01.07.2016. Reihem was permitted to approach the Court in case a final order, adverse to it, was made.

18. Thereafter, the NDMC cancelled the LoI bearing No. AD (Advtt.)/NDMC/2016/D-3160 dated 28.06.2016 issued to Reihem and also forfeited the EMD amount of ₹2,37,500/- deposited by it in respect of the Karol Bagh Zone. Being aggrieved by this action of the NDMC Reihem filed W.P. (C) 7135/2016.

19. Mr. Rajesh Gupta, learned counsel for Honshu and Reihem argued that NDMC's assumption of nexus between their concerns and other individuals/concerns, to show some kind of affinity, or commonality, is entirely incorrect. It is urged that there is no nexus and/or integrity of any kind between the petitioners and other companies. Those concerns are separate and distinct entities without any proximity and/or relationship with the petitioners. None of the said companies and/or their directors are directors and/or share-holders in the petitioner company and *vice-versa*. It is argued that there is no basis to infer the alleged nexus. As regards bank-transactions it is stated the petitioners had explained that such transaction pertained to loans that they had taken in course of its business and its refund,

and there is no other financial transaction between the two. It is stated that in course of their regular business the petitioners availed loan facilities from the said companies, which have been disbursed and re-paid from time to time as reflected in the bank statement. Petitioners assert that apart therefrom there is no other entry and/or transaction of any kind with the said companies or entities.

20. It is submitted besides, that the three concerns with which Honshu is alleged to have nexus and be the *benami* or shadow concern of (according to NDMC) i.e. Trigen Electronics Pvt Ltd, USB Enterprises Pvt Ltd and Ashima Infrastructure (P) Ltd, the fact is that such concerns are continuing to transact business and file returns. Besides, they too have ongoing contract with the NDMC. In these circumstances, the latter cannot say that there is some secret understanding or financial nexus, based on stray or isolated borrowings *inter se*.

21. It is submitted on behalf of Reihen by Mr. Gupta that the concerns which are alleged to have nexus with it (M/s. Ashima Infrastructures Pvt. Ltd., M/s. Manoj Computer World, M/s. Shri Sai Nath, M/s. Trigen Electronics Pvt. Ltd., M/s. USB Enterprises, M/s. Honshu Buildcon Pvt. Ltd) are likewise, independent entities with their board of directors, they, like Reihen are income tax payees and have separate bank accounts. Just because some of their balance sheets reflected out standings to Reihen, or that the latter had lent or borrowed money from them can lead to no inference. So far as the allegations of the Delhi Police's Economic Offences Wing in its report are concerned, counsel submitted that nothing adverse can be found or concluded; they are only surmises and allegations. In any case, they did not lead to any prosecution or definitive conclusions, much less a charge sheet in

any criminal proceeding. NDMC could not have denied the contract to Reihen, based merely on such sketchy and inconclusive material. Therefore, NDMC's actions are utterly whimsical and unjustified.

22. Ms. Mini Pushkarna, learned counsel for NDMC, produced the original files in relation to both the tenders, containing all the relevant documents and file notings. She argued that Honshu's submission that some amounts were outstanding to it, as security deposits were lying with NDMC, is incorrect. In this regard, it was urged that those security deposit amounts were not adjustable as they related to ongoing contracts, entered into by Honshu at the time of its bid for the current parking lots. It was submitted that Honshu's plea of innocence and lack of any nexus between it and other concerns is not justified. Counsel submitted that Honshu as well as Reihen were issued a Show Cause Notice alleging its nexus and connection with the other concerns, such as Ashima Infrastructure, M/s. Trigen Electronics Pvt. Ltd., M/s. USB Enterprises, Shri Sai Nath Enterprises and Manoj Computer World; its replies and protests were unsatisfactory. The materials available, argued learned counsel, showed a clear relationship Honshu and the said concerns. The NDMC, as a state authority and public agency, was justified in deciding that the nexus was dubious and contrary to the tender conditions that spelt out eligibility because some of those concerns were defaulters (in payments to NDMC) and were set up by either the same individual, or a group of individuals, with a view to engage in monopolistic practices.

23. Learned counsel submitted that the material on record established that the nexus was in the form of common directors, common addresses, and financial relationship between the concerns in their commercial dealings. This violated the tender eligibility conditions; besides, it was against public

interest to keep awarding contracts to the same individuals or group, who through camouflage and dubious subterfuge, portrayed distinct corporate entities. The NDMC, it was urged, could pierce the corporate veil, to discern the reality and conclude that Honshu and Reihen were part of a network of concerns, controlled by the same group of individuals, to corner all parking lot contracts within its jurisdiction, undermining public interest and competition.

24. It was submitted that NDMC cancelled tenders in which Ashima Infrastructure Pvt. Ltd. and Anuradha Sharma, having close nexus with Ashima Infrastructure Pvt. Ltd., had participated; they filed petitions in this court for refund of their amounts. The said petitions were W.P. (C) 10745/2015 - *Ashima Infrastructure Pvt. Ltd. v. North DMC* and W.P. (C) No. 10747/2015 - *Anuradha Sharma v. North DMC*. The Court disposed off the said writ petitions, when the NDMC adjusted the amounts deposited by those parties towards dues payable for parking sites operated by their companies. The learned counsel relied upon the office orders adjusting amounts deposited by those two entities, (with the Land & Estate Department) by the RP Cell of NDMC for dues towards parking sites. Ms. Pushkarna submitted that the materials on record, in the form of bank statements of Honshu, sufficiently pointed to very significant financial dealings between Ashima and Honshu. Honshu had paid Ashima over ₹ 54 lakhs; whereas Ashima Infrastructure had paid Honshu nearly ₹ 5 lakhs. Likewise, counsel highlighted that with respect to Reihen, the relative transactions between that concern and Ashima Infrastructure, *inter se*, in the form of credits and debits, were to the extent of over ₹ 55 lakhs. Learned counsel also relied upon orders made by NDMC, blacklisting Ashima

Infrastructure and Trigen Electronics (P) Ltd and Shri Sai Nath Enterprises (all dated 28.03.2015).

Analysis and Conclusions

25. In the NIT issued by the NDMC in respect of the allotment of cluster-wise display of advertisement in the jurisdiction of North Delhi Municipal Corporation, the clause that speaks about interest free security deposit (in the NIT to which Honshu submitted its bid), is as follows:

“17.1 The selected Bidder shall deposit an amount equivalent to 02 months quoted MLF as security deposit within 5 (five) days from the date of issue of the acceptance letter by the North D.M.C. ...”

26. Further the corresponding license agreement has the following clause:

“4.2 In case of failure to deposit the license fee in time, interest @ 24 %per annum will be levied from the due date of deposit until the date of deposit. In case of delay up-to 15 days, interest shall be payable for 15 days and for delay of more than 15 days (up-to 30 days) interest payable shall be for one month. In case license fee is not paid on due date, a notice will be issued to the Licensee/ Advertiser to pay his dues within 7days, if dues are not cleared in that period, notice for cancellation of the contract will be issued by giving time of another 7 days. If even then dues are not paid contract will be cancelled immediately. On delayed payment, interest@24 %per annum on entire outstanding amount will be levied up-to the date of clearing the dues or date of cancellation.”

27. The above clauses of the NIT and the license agreement (signed by Honshu) were reiterated in the LoI by the NDMC, the amounts equivalent of two months’ MLF towards the security deposit along-with three months’ MLF payable in advance, were to be paid by Honshu, the bidder within a period of 05 days from the date of acceptance of the LoI, but not later on

31.05.2016. However, instead of making the deposits accordingly, Honshu requested for an adjusted remission for the same by seeking that the security deposit / licence fee paid for a previous allotment by its directors be modified in a way that the security amount of ₹ 72,09,330/- of the previous allotment (that was about to expire) be adjusted towards the advance licence fee and security deposit of Civil Line Zone Cluster No. 04 by letters dated 30.05.2016. However, NDMC urges that there is no provision for adjustment and no prescribed mode of payment by “adjustments” in the NIT/licence agreement. Thus, the directions that Honshu should deposit the balance amount, in respect of Civil Line Zone Cluster No.04 amounting to ₹ 71,26,690/- by the Respondent is correct and congruous with the requirements of the NIT. Further, as evident from the cited clause 4.2 of the license agreement above, on delayed payment, interest @ 24 % per annum on the entire outstanding amount is to be levied up to the date of clearing the dues or date of cancellation. Thus, the levy of the same from 01.06.2016 till the date of deposition by the Respondent is also, only in compliance with the terms of agreement arising from the NIT/ license agreement.

28. NDMC alleges to have discovered that Honshu and Reihen had relations with certain defaulter companies/ entities, which is in violation of the terms and conditions of the NIT, in both the issues. The relevant clauses from the NIT stating the same, in the two cases, are as follows.

29. The relevant condition in the NIT, advertised by the NDMC calling for parking contract bids, reads as follows in Honshu’s case:

“(c) The Bidder, whose license has been cancelled/ blacklisted/ debarred in the past for breach of terms and conditions of the agreement signed with any Central/ State Government Department/ Autonomous Bodies anywhere in India, shall not

be eligible for participating in this e-auction process of North D.M.C. The Bidder shall furnish an undertaking to this effect along with e-auction form.

(d) If any of the Bidder's Partner (s)/ Proprietor (s)/ Director(s)/ Member (s) have been blacklisted in the past for breach of terms and conditions of the agreement signed with any Central/ State Government Department/ Autonomous Bodies anywhere in India, shall not be eligible for participating in this e-Auction process of North D.M.C. The Bidder shall furnish an undertaking to this effect along with e-auction form."

30. In the case of Reihien, the relevant tender condition was as follows:

"b. Any individual / partnership firm / public limited company / private limited company /sole proprietor firm/consortium etc., whose license has been cancelled / black listed / debarred in the past by any Central / State Govt. department / autonomous bodies all over India, if any, or any of its partner /proprietor / director / member have been blacklisted for breach of terms and conditions of the agreement, shall not be eligible for offering bid and the individual / partnership firm / Public Limited Company / Pvt. Limited Company/sole proprietor firm/consortium firm/shall be required to furnish an undertaking to this effect along with e-auction form.'

c. Any person/ party/ firm or registered advertiser/sole proprietor firm/consortium who is disqualified or ineligible to participate in the e-auction according to the aforesaid conditions shall not be qualified to offer the bid in the name of its associate concern subsidiaries/ principals/ front and the commissioner/authorized officer on his behalf may declare the e-auctioneer disqualified on this ground, if he is of the opinion that the said e-auctioneer/bidder is acting in collusion with for. the benefit of any other party who would have been disqualified to participate in e-auction.

- d. Benami transition not allowed.*
e. if there is an individual who has an interest in whatsoever form, in more than one company/firm etc. then he cannot submit bids of both the companies for the same auction.”

31. In the case of Honshu, the copies of bank statements showing regular transactions with other defaulter companies (Annexure R-1 in W.P. (C) 5891/2016), established its direct relations with defaulter companies such as: M/s Balaji & Sons, M/s Ashima Infrastructure Pvt. Ltd., M/s Manoj Computer Word, M/s USB Enterprises Pvt, Ltd, M/s Trigen Electronics Pvt. Ltd., M/s Shri Sai Nath Enterprises. This is directly in violation of clause 1(i) of the NIT as highlighted above. The same observation arises in case of Petitioner No. 2 from its bank account statements that also showed regular transactions with defaulter and black-listed companies (Annexure R-1 in W.P.(C)7135/2016), namely, the same as those that Petitioner No. 1 engaged with, and additionally a few others too, namely, M/s. Akram Khan, M/s Mohsin Anwar etc. Undeniably, such action on the part of the Petitioners incurs direct violation of the terms of the respective NITs.

32. Clause 8(i) of the NIT issued to which Petitioner No. 1 submitted their bid, and clause 3(i) of the NIT to which Petitioner No. 2 submitted their bid, states:

“North DMC reserves the right to reject any or all bids without assigning any reason thereof and without incurring any liability to the affected Bidder(s) or any obligation to inform the affected Bidder(s) of the grounds of such decision.”

33. The final call with respect to acceptance or rejection of the bids is reserved by the NDMC. The Petitioners accepted that condition when they lodged their bids. Therefore, what is in issue is the power exercised by

NDMC, as a public tendering agency, to not enter into contract with any bidder. The decision of a public agency to enter into a contract, or not into a contract with anyone or any concern, is subject of very limited judicial scrutiny, under Article 226 of the Constitution of India.

34. It was held in *Central Coalfields Limited and Ors. V. SLL-SML (Joint Venture Consortium) and Ors.* AIR 2016 SC 3814, that a Court before interfering in tender or contractual matters in exercise of power of judicial review, considers whether the decision (to award contract, or not) was actuated by *malafide*, was the process adopted arbitrary and irrational, and whether the public interest is affected; if the answers are in the negative, there should be no interference in the decision by the court. The Supreme Court went on to highlight how the decision of the authority must be accorded due regard in the following words:

“47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber.”

35. Thus, when the State invites tender bids, it ought to adhere to the terms of the NIT, and ideally not waver from complying with the conditions set forth in the NIT. This was highlighted in the Supreme Court decision of *Harinder Singh Arora v. Union of India and Ors.* AIR 1986 SC 1527. The terms of the NIT are the guidelines that enable the procedure of conducting the tender process, thus, in order to ensure that the same is conducted efficiently, they should not be digressed from, as far as applicable. The Supreme Court in *Central Coalfields Limited and Ors.* (*supra*) upheld the sanctity of administrative decision making. This judgment has found resonance in numerous decisions thereafter to ensure and enforce adherence to this principle. Hence, as a state agency, the NDMC has invited tenders extended through the respective NITs, and has carried out the bidding process accordingly; and due regard ought to be given to such decision making process.

36. The scope of judicial review in the award of tender of a contract by the State or a state agency has the subject of discussion in a number of Supreme Court decisions (*Tata Cellular v Union of India* 1994 (6) SCC 651; *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. & Anr.* 2016 (16) SCC 818); *BECIL v. Arraycom India Ltd. & Ors.* 2010 (1) SCC 139; *Michigan Rubber (India) Limited Vs. State of Karnataka & Others* (2012) 8 SCC 216; *JSW Infrastructure v Kakinada Seaports* 2017 (4) SCC 740 and *Sterling Computers Limited and Ors. v. M & N Publications Limited and Ors.* AIR 1996 SC 51 etc.) to primarily carve the line of discretion in the exercise of judicial review in administrative matters. In *BECIL* (*supra*) it was held as below:

“16. In administrative matters, the scope of judicial review is

limited and the judiciary must exercise judicial restraint in such matters, as held by this Court in Tata Cellular v. Union of India: AIR 1996 SC 11 : (1994) 6 SCC 651. Moreover, the view of Prasar Bharti also appears reasonable because Prasar Bharti has to pay the amount inclusive of sales tax, since there is no concessional forms. If Prasar Bharti has taken up one possible interpretation, the High Court should not have intervened. The scope of judicial review in administrative matters is limited.”

37. The limited scope of judicial review in public contractual matters was iterated time and again, in *Jagdish Mandal v. State of Orissa* (2007) 14 SCC 517 (as was also highlighted in *Tata Cellular v Union of India* (supra) and also, recently in *Bakshi Security and Personnel Services Pvt. Ltd. v. Devikishan Computed Pvt. Lt. and Ors.* AIR 2016 SC 3585). In *Bakshi Security* (supra) it was stated that the Court ought not to interfere at the instance of the unsuccessful bidder in respect of a procedural violation in the following words:

“Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual

disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.”

38. Therefore, consistent judicial view has been that public law review of tender matters ought to be exercised, judiciously. Such judicial review must be restrained to ensure that the choice or decision is made “lawfully” and not to exercise oversight over whether choice or decision is “sound”. This Court, therefore, will apply the same standard in the present cases. Public and state contracts involve expenditure of substantial public money. Therefore, it is quite crucial to ensure that no anomaly arises that could jeopardise such expenditure. The fact that the petitioners were found to have relations with black-listed companies not only violates the clauses of the NIT, but also emerge as red flags to the safe and effective implementation of public resources. These considerations have been given due regard by the administrative authorities in arriving at its decision, as observed above.

39. As regards cancellation of the letters of intent initially issued to the petitioners, the Court has to be mindful of the fact that a letter of intent is not a binding agreement enforceable in Courts, and neither is it a promise to issue a subsequent allotment letter. This has been stated in *Rishi Kiran Logistics Pvt. Ltd. v. Board of Trustees of Kandla Port Trust and Ors.* AIR 2014 SC 3358 as follows:

“...merely a Letter of Intent was issued and this expressed an intention of the parties to enter into a contract but no concluded contract ultimately fructified nor there was any promise given by the Port Trust. The Court reproduced the following discussion from its earlier judgment in Nikhil Adhesives Limited:

The letter of intent issued by the Respondent Port Trust on 12.1.2006, at best, can be said to be an agreement to issue the allotment letter and to execute the lease document in favour of the Petitioner subject to fulfilment of certain conditions. However, in absence of issuance of allotment letter, the said letter of intent cannot be enforced in the court of law. The Apex Court in Dresser Rand S.A. v. Bindal Agro Chem Limited and Ors. (supra) clearly stated that a letter of intent merely indicates a party's intention to enter into a contract with the other party in future. Such a letter of intent is not intended to bind either party ultimately to enter into any contract. Even in Speech and Software Technologies (India) Pvt. Ltd. v. Neos Interactive Limited (Supra), the Apex Court clearly held that an agreement to enter into an agreement is not enforceable nor does it confer any right upon the parties.”

40. The same point was highlighted in *Rajasthan Co-operative Dairy Federation Ltd. v. Shri Mahal Laxmi Mingrate Marketing Service Pvt. Ltd. and Ors.* AIR 1997 SC 66 as follows:

“The Letter of Intent merely expressed an intention to enter into a contact. If the conditions stipulated in the Letter of Intent were not fulfilled by respondent No. 1 and if the conduct of respondent No. 1 was otherwise not such as would generate confidence, the appellant was entitled to withdraw the Letter of Intent. There was no binding legal relationship between the appellant and respondent No. 1 at this stage and the appellant was entitled to look at the totality of circumstance in deciding whether to enter into a binding contact with respondent No. 1 or not.”

41. As regards the arbitrariness alleged to be the basis on which the NDMC cancelled the letters of intent, the Court observes that the petitioners have merely denied the grounds of the respective Show Cause Notices, without countering them substantially. Particularly, in light of the bank statements that clearly indicate a strong financial relationship between the Petitioners and a list of black-listed companies, a mere denial of such association cannot be accepted. This was highlighted in *Rishi Kiran (supra)* as follows:

“22. In so far as argument of malafides is concerned, apart from bald averment, there are no pleadings and there is not even a suggestion as to how the aforesaid decision was actuated with malafides and on whose part. Even at the time of arguments Mr. Vikas Singh did not even advert to this aspect. In fact, the entire emphasis of Mr. Vikas Singh was that since there was a concluded contract between the parties, cancellation of such a contract amounted to arbitrariness. As already pointed out above that can hardly be a ground to test the validity of a decision in administrative law. For the sake of argument, even if you presume that there a concluded contract, mere termination thereof cannot be dubbed as arbitrary. A concluded contract if terminated in a bonafide manner, that may amount to breach of contract and certain consequences may follow thereupon under the law of contract. However, on the touch stone of parameters laid down in the administrative law to adjudge a decision as are arbitrary or not, when such a decision is found to be bonafide and not actuated with arbitrariness, such a contention in administrative law is not admissible namely how and why a concluded contract is terminated.”

42. What emerges from the above factual discussion and analysis of the judicial decisions is that the impugned letters of the NDMC withdrawing the

LoIs is based on justifiable grounds, *inter alia*: violation of the conditions of the NIT by the Petitioners (such as, non-deposit of the security money and request for “adjustments” not provided for in the NIT, in the case of Honshu), and engaging in business relationships with black-listed companies in violation of the conditions of the NIT. As seen above in *Central Coalfields Limited (supra)*, the terms of the NIT cannot be ignored, hence, neither can be their violation. Such violation of the NIT conditions tempered the decision of withdrawal of the LoIs by the NDMC. Further, in light of judicial precedence, particularly, *Jagdish Mandal v. State of Orissa (supra)*, *Tata Cellular v Union of India (supra)* and *Bakshi Security and Personnel Services Pvt. Ltd. (supra)*, this Court in appreciation of the judicious exercise of judicial review, given the facts and circumstances of the present writ petitions, finds no reason to interfere with the decisions of the NDMC. The decision to award a public contract is not premised merely on fulfillment of technical qualification and financial viability of the offer of a given bidder; the larger public interest is a necessary condition which invariably informs every decision of the executive authority or agency that is to award the contract. The vital public interest in ensuring that contracts are awarded to genuine bidders, and not to those who devise myriad devices to keep out true competition on one hand, and corner contracts- in this case, in relation to parking lots cannot be undermined. The NDMC thus had a vital interest in ensuring that the group of individuals, who adopted the stratagem of ensuring that they “rotated” the contracts, through different entities, which came to light in the financial linkage between them – as well as controls through the same set of people does not hamper the transparency of the bidding process. This linkage was also evident from other materials such as common email

identities of some of the entities; common premises and, in some cases, common directors or individuals controlling the entities.

43. Further, the cancellation of the letters of intent by NDMC and thereby rejecting the tender bids of the Petitioners cannot be accepted to be arbitrary and *malafide* as such decision is based on concrete grounds, and opportunity was afforded to the petitioners to negate the same and make their stance when Show Cause Notices to that end were sent to them by the NDMC, as mentioned previously.

44. In the light of the above discussion, the writ petitions have to fail and are accordingly dismissed without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

JANUARY 18, 2018