

**(2010) 09 JH CK 0097**

**In the Jharkhand High Court**

**Case No :** Letters Patent Appeal No. 128 of 2009

Anik Industries Limited

APPELLANT

Vs

Jharkhand State Housing Board, Managing Director, Chief Engineer, Both are Jharkhand State Housing Board and Steadfast Commercial Company Limited

RESPONDENT

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**Date of Decision :** 30-09-2010

**Acts Referred:**

Constitution of India, 1950 — Article 14

**Citation :** (2010) 09 JH CK 0097

**Hon'ble Judges :** Sushil Harkauli, J;D.N. Patel, J

**Bench :** Division Bench

**Final Decision :** Allowed

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## Judgement

D.N. Patel, J.—This Letters Patent Appeal has been preferred against the judgment and order dated 18th December, 2008, passed by the learned single Judge in a writ petition bearing W.P.(C) No. 3374 of 2007, whereby, the writ petition was dismissed. Against this order of dismissal, the Appellant (original Petitioner) has preferred the present Letters Patent Appeal.

2. Following questions have mainly, been raised by Appellant for consideration;

2.1 Whether State instrumentality (Respondent No. 1) has acted unfairly and arbitrarily in grant of contract of public interest to Respondent No. 4;

2.2 Whether the decision making process of State instrumentality was influenced by extraneous/irrelevant considerations; and

2.3 Whether the Court has power of judicial review, in the matters of commercial/contractual transactions, between State instrumentality with the private party (Respondent No. 4 herein).

3. Factual Matrix:

3.1 Expression of Interest was published by the Jharkhand State Housing Board,

Ranchi (Housing Board for the sake of brevity), inviting offers to develop the property of the Housing Board at Adityapur, Jamshedpur in a joint venture with the private developers. Express of Interest was floated on 13th November, 2005. The Appellant submitted its offer on 11th December, 2005 (Annexure 3 to the memo of appeal). Pursuant to the same, the Appellant was asked to attend the Pre-Bid discussion at the office of Respondent No. 2 on 1st February, 2006 and selected participants were asked by the Superintending Engineer of the Housing Board to give proposals with quotations, while providing the details of plots and scheme, by 18th May, 2006. This last date was extended by Respondent No. 2, asking the bidders to submit earnest money in the form of bank draft by 29th June, 2006. The Appellant submitted its offer along with the required bank draft as earnest money on 29th June, 2006 and thereafter, time and again the Appellant (original Petitioner) was called by Respondent No. 1 and on 24th August, 2006, Respondent No. 2 communicated the Appellant that its offer for Plot No. 6, earmarked for construction of residential as well as commercial complex, was found to be the highest and the Appellant was asked to show its financial credibility to meet the expenditure for such construction. Thereafter, Plot No. 6 was never allotted to the Appellant, though solvency certificates were given by the Appellant to Respondent No. 2 on 30th August, 2006 (Annexure 11 to the memo of appeal). Thereafter, several letters were written by the Appellant to Respondent Nos. 1 and 2 to issue the allotment order in respect of a land under Plot No. 6, situated at Adityapur, Jamshedpur. These letters are dated 29th March, 2007 (Annexure 12 to the memo of appeal), 10th April, 2007 (Annexure 13 to the memo of appeal), 10th May, 2007 (Annexure 14 to the memo of appeal) etc. Meanwhile the Board invited the second highest bidder, who is Respondent No. 4, who increased its offer whereas the Appellant, though was the highest offerer for the joint venture, was not called to increase its contribution in the joint venture.

3.2 On 25th April, 2007, ultimately Respondent No. 2 wrote a letter to the Appellant, communicating therein, that the original Petitioner/Appellant has not been selected for Plot No. 6. The original Petitioner/Appellant came to know under the Right to Information Act, 2005, that Respondent No. 4 has been allotted Plot No. 6, situated at Adityapur, Jamshedpur, for development, on 14th March, 2007. Thus, though the original Petitioner/Appellant was found to be the highest offerer for a joint venture, it has not been offered Plot No. 6. Thus, a writ petition bearing W.P.(C) No. 3021 of 2007 was preferred by the original Petitioner/Appellant for quashing the letter dated 25th April, 2007, whereby, the Appellant was communicated by Respondent No. 2 that it has not been selected for Plot No. 6, but, under the Right to Information Act, 2005, in June, 2007, the original Petitioner/Appellant came to know that now Respondent No. 4 has been selected. The writ petition was withdrawn, with a liberty to the original Petitioner/Appellant to file a fresh writ petition and, thereafter, another writ petition bearing W.P.(C) No. 3874 of 2007 was preferred, wherein, the letter dated 14th March, 2007, which was issued by the Housing Board to Respondent No. 4 was prayed

to be quashed. This writ petition having been dismissed by judgment and order dated 18th December, 2008, the present Letters Patent Appeal has been preferred.

#### 4. Arguments canvassed by the parties:

4.1 Mr. G.L. Rawal, Sr. Advocate appearing on behalf of the Appellant (original Petitioner) submitted that the Petitioner/Appellant had submitted its offer with all necessary documents and details in pursuance of an Expression of Interest, published by Respondent No. 2 for development of Plot No. 6, situated at Adityapur, Jamshedpur, in a joint venture with the Housing Board for residential as well as commercial complex. After inviting all the bidders, from the selected participants proposal with quotation was demanded, which was also given by the Petitioner/Appellant for Plot No. 6 and the Petitioner/Appellant was also asked to furnish earnest money in the form of bank draft, which was also given by the Appellant. Again, the offers made by the bidders were scrutinized and the Petitioner/Appellant was found to be the highest for Plot No. 6. as per the communication letter No. 1873 dated 24th August, 2006 (Annexure 10 to the memo of appeal). For a long time thereafter, though the Petitioner/Appellant demanded through several letters, Plot No. 6 was never allotted to the Petitioner/Appellant. These letters are at Annexure 12, 13 and 14 etc. to the memo of appeal and ultimately, on 25th April, 2007, Respondent No. 2 issued a letter to the Petitioner/Appellant that it has not been selected for Plot No. 6, situated at Adityapur, Jamshedpur, for the reasons that the papers pertaining to financial credibility were not deposited by the Appellant by 30th August, 2006. Mr. G.L. Rawal, Sr. Advocate appearing on behalf of the Petitioner/Appellant further submitted that the Appellant had submitted all the papers, pertaining to financial credibility on 30th August, 2006, including solvency certificates, showing sanction of terms loan of Rs. 35 Crores (Annexure 11 to the memo of appeal) and, in fact, the Petitioner/Appellant has already been allotted Plot No. 4, situated at Adityapur, Jamshedpur, which reflects the financial credibility of the Appellant. Therefore, there was no need for asking any papers pertaining to financial credibility. Moreover, this condition was never attached in the tender conditions and, therefore, on this ground, the selection of the Petitioner/Appellant, which was found to be the highest offerer for the joint venture, cannot be discarded, on the ground of non-supply of the papers, pertaining to financial credibility and, therefore, the letter dated 25th April, 2007 (Annexure 15 to the memo of appeal) deserved to be quashed and set aside. Conditions of tender cannot be altered or amended unilaterally by the Housing Board. In absence of any such condition in the tender for supply of the papers pertaining to financial credibility, selection of the Petitioner/Appellant for grant of Plot No. 6 cannot be discarded on this ground.

4.2 It is further submitted by Mr. G.L. Rawal, Sr. Advocate, that the reason which was never given in the letter dated 25th April, 2007 is now canvassed in the counter affidavit, filed by the Respondent-Housing Board in the writ petition. For

the first time, in the counter affidavit a plea has been taken by the Respondent-Housing Board that the Petitioner/Appellant was not the highest offerer rather Respondent No. 4 was the highest offerer and, therefore, the selection of the Petitioner/Appellant was cancelled. This ground cannot be canvassed by the Respondent-Housing Board because this was never a ground in the letter of the Respondent-Housing Board dated 25th April, 2007 (Annexure 15 to the memo of appeal). Learned Counsel for the Petitioner/Appellant has relied upon a decision rendered by the Hon'ble Supreme Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, and it is submitted that the case of the Respondent-Housing Board cannot be improved on affidavit by supplying the reasons, which were never mentioned in the impugned order, otherwise all non-speaking orders or invalid orders will be converted into speaking orders or valid orders, by passage of time. There is a material improvement by the Respondent-Housing Board in its counter affidavit. Thus, though the Petitioner/Appellant was found to be the highest offerer vide letter dated 24th August, 2006, the Petitioner/Appellant was not allotted Plot No. 6, situated at Adityapur, Jamshedpur. This letter has never been withdrawn or cancelled by the Respondent-Housing Board, even by letter dated 25th April, 2007 (Annexure 15 to the memo of appeal) it is only alleged against the Petitioner/Appellant that since the Petitioner/Appellant has not submitted papers pertaining to financial credibility, it is not selected. Thus, the fact remains, even on 25th April, 2007, that as per the Housing Board, the Petitioner/Appellant was the highest offerer, but, as there was no papers pertaining to financial credibility, the Appellant was not selected for Plot No. 6. Thus, the Petitioner/Appellant was the highest offerer even as per the Respondent-Housing Board, not only by letter dated 24th August, 2006, but, also by letter dated 25th April, 2007.

4.3 It is further contended by the learned Senior Advocate Mr. G.L. Rawal that Respondent No. 4 was allotted Plot No. 6 on 14th May, 2007 (Annexure 17 to the memo of appeal). Never Respondent-Housing Board has issued any letter to Respondent No. 4 that Respondent No. 4 is the highest offerer. It appears that Respondent No. 4 was constantly pursuing its matter by writing letters to the Respondent-Housing Board, after the Board has written a letter to the Petitioner/Appellant on 24th August, 2006. By this letter dated 24th August, 2006, the Housing Board communicated the Appellant that it was found to be the highest offerer and privately, the Respondent-Housing Board called 2nd highest offerer i.e. Respondent No. 4 for enhancement of the amount, which Respondent No. 4 did. It is submitted by the learned Counsel for the Appellant that, in fact, the Respondent-Housing Board ought to have called upon the highest offerer i.e. the Appellant for further negotiations for increasing the amount of its contribution to the Respondent-Housing Board, but, the Respondent-Housing Board has never called the Appellant and privately Respondent No. 4 was called to increase the amount. Had an opportunity been given to the Appellant, the Appellant is ready and willing to increase the amount to a tune of Rs. 5,00,00,000/- (rupees five crores) whereas Respondent No. 4 has increased only Rs. 100,00,000/- (rupees

one crore). Learned Counsel for the Petitioner/Appellant has relied upon a decision, rendered by Hon''ble Supreme Court in the case of Ram and Shyam Company Vs. State of Haryana and Others, as well as a decision, rendered in the case of Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others, as also a decision, rendered by Hon''ble Supreme Court in the case of Tata Cellular Vs. Union of India, and submitted that the State authorities cannot invite one of the bidders and get the amount increased to give a contract to a selected bidder. In fact, all the bidders should have been called and, at lest, the Petitioner/Appellant must have been called by the Respondent-Housing Board, the Appellant being the highest offerer, for further negotiations, so that the Petitioner/Appellant can also get an opportunity to increase the amount. The Respondent-Housing Board has selectively called Respondent No. 4, who increased its offer and got the contract. This patently in violation of the principles laid down in the aforesaid judicial pronouncements. The Respondent-Housing Board, being an instrumentality of the State, has acted contrary to the public good and public interest and has acted unfairly, unjustly and unreasonably in its contractual, constitutional and statutory obligations or it really acted contrary to the constitutional guarantee, found under Article 14 of the Constitution of India.

4.4 Lastly, it is submitted by the learned Counsel for the Petitioner/Appellant that Respondent No. 4 has not done anything substantial upon Plot No. 6 so far, as is evident from a detailed letter written by the Respondent-Housing Board on 29th June, 2009 (Annexure 14 to I.A. No. 1989 of 2010 in the present Letters Patent Appeal). By this letter, it has been stated by the Respondent-Housing Board that from June, 2007 though two years have lapsed, plans for development of the property have not been got approved Respondent No. 4 from the concerned Development Authority. See(sic) reminders have been given, though within three years the work was to be completed of the construction of residential as well as commercial complex i.e. from 21st June, 2007, but, still the work has not yet been started by Respondent No. 4. Learned Counsel for the Appellant submitted that Respondent No. 4, in fact, has not yet started the construction work. Photographs of the barren land of Plot No. 6, situated at Adityapur, Jamshedpur, are annexed at Annexure 25 of the I.A. No. 1989 of 2010, filed in the present Letters Patent Appeal. Thus, it is submitted by the learned Counsel for the Appellant that nothing substantially has been done by Respondent No. 4 for construction of residential as well as commercial complex over Plot No. 6, situated at Adityapur, Jamshedpur, in the joint venture and, therefore, let the letter dated 25th April, 2007, issued to the Appellant (Annexure 15 to the memo of appeal) as well as the letter dated 14th March, 2007, issued by the Respondent-Housing Board to Respondent No. 4 (Annexure 17 to the memo of appeal) be quashed and set aside and let the Petitioner/Appellant as well as Respondent No. 4 be called for further negotiations for offering the highest amount in the joint venture with the Respondent-Housing Board for construction of residential as well as commercial complex over Plot No. 6, situated at Adityapur, Jamshedpur.

4.5 Mr. S.K. Kapoor, learned Senior Advocate appearing on behalf of Respondent No. 4, submitted that, in fact, Respondent No. 4 was the highest offerer, which has offered 30.25% to the Respondent-Housing Board of the total plinth area of all the floors of residential as well as commercial units whereas the Petitioner/Appellant had quoted 30%. The letter issued by the Respondent-Housing Board to the Appellant dated 24th August, 2006 was a mistake and, therefore, Respondent No. 4 was the highest offerer and, therefore, the Respondent-Housing Board has selected Respondent No. 4 for construction over Plot No. 6 in joint venture with the Respondent-Housing Board. Learned Counsel for Respondent No. 4 has relied upon a decision, rendered by Hon'ble Apex Court in the case of Wander Ltd. and Another Vs. Antox India P. Ltd., . He has also submitted that the Petitioner/Appellant has failed to submit papers pertaining to financial credibility within the stipulated time i.e. on or before 30th August, 2006 and, therefore also, Respondent No. 4 was selected for construction over Plot No. 6. It is further submitted by the learned Counsel for Respondent No. 4 that Respondent No. 4 has already increased its offer from Rs. 25,67,98,440/- to Rs. 26,26,62,240/-. Thus. Respondent No. 4 has offered Rs. 58,63,800/- more after negotiation. Thus, approximately an amount of Rs. 59,00,000/- has been increased by Respondent No. 4 after negotiation. This is evident from Annexure R-4/I of the counter affidavit, filed by Respondent No. 4 in the present Letters Patent Appeal.

4.6 Learned Counsel Mr. Sumeet Gadodia for Respondent 1, 2 and 3 submitted that the Court should remain slow in interfering with the contractual matters. Once the context is already allotted to Respondent No. 4 and as Respondent No. 4 has already started its construction work, now it is impossible to re-allot the contract to anyone. Moreover, it is submitted by he learned Counsel for the Respondent-Housing Board that the letter issued by the Respondent-Housing Board dated 24th August, 2006, to the Petitioner/Appellant, which is at Annexure 10 to the memo of appeal, was a mistaken letter. In fact, the Petitioner/Appellant was never the highest offerer. Respondent No. 4 has offered 30.25% of the entire constructed area where the Petitioner/Appellant has offered 30% and, therefore, H-1 was Respondent No. 4 and not the Petitioner/ Appellant. Moreover, Respondent No. 4 has increased its offer to the Respondent-Housing Board by approximately Rs. 59 lacs and if the FAR goes up to 3, then much more benefit will go to the Respondent-Housing Board from Respondent No. 4. Learned Counsel for the Respondent-Housing Board has relied upon a decision, rendered by Hon'ble Supreme Court in the case of Vividh Marbles Pvt. Ltd. Vs. Commercial Tax Officer, and submitted that a mistaken letter, which was issued by the Housing Board, which is dated 24th August, 2006, cannot put the Appellant in any advantageous position. Moreover, it is submitted by Mr. Sumeet Gadodid, learned Counsel for the Respondent-Housing Board, that the papers pertaining to financial credibility from the Petitioner/Appellant were never received and what is alleged by the Petitioner/Appellant that it has forwarded the papers pertaining to financial credibility to the Housing Board on 30th August, 2006 is absolutely

wrong and, in fact, the Housing Board has never received any papers pertaining to financial credibility from the Petitioner/Appellant and, therefore, the selection of the Petitioner/Appellant was rightly cancelled.

## 5. Reasons:

The tender conditions could not have been amended/alterd.

### 5.1 Following were the conditions to be fulfilled by the participants:

Information to be furnished to listed participants.

1. Maps of each plots with exact dimensions and boundaries will be given in three days

2. Land earmarked for Petrol pumps to taken out from this scheme.

3. Hotel & Hospital will be given on Lease Rent Basis

4. Mall will seen on Joint Venture Basis. A separate company to be formed. Decision will be based on percentage of share to be given to Jharkhand State Housing Board.

5. Harmu Plot No. -14 has been taken out from this scheme. But plot No. -15 is included in this scheme with a condition that successful bidder have to construct a Community Hall in Ground floor for 300 users at a time with requisite facility of lavatories and toilet and it will be of Jharkhand State Housing Board. The upper floors have to be utilized as commercial such Offices, Coaching Centers etc.

### 6. The % of LIG/MIG & MIG/HIG are as follows:

Harmu Plot

No. -3 - H.I.G. - 60% & M.I.G. - 40%

No. -9- H.I.G.- 50% & M.K.G.- 50%

No. -10A - M.I.G.

No. -10B - L.I.G.

No. -11 - MIG - 40% & Commercial - 60%

No. -13 - MIG - 50% & L.I.G. - 50%

7. The interested parties have to quote their rates in terms of percentage (%) to be given to the Housing Board. The % will be of constructed area only i.e., [Sealable Constructed Area floor wise]. Please do not ADD any adjective before or after the "Constructed Area". Simply quote [.....% of constructed area] to be given to Jharkhand State Housing Board.

8. Detailed structural design etc. is not needed at this stage. But Housing Board will have power to negotiate on the Design/Drawing features.

9. In Vegetable Market you have to provide 20 shops for meet and 60 shops for Vegetable and remaining maximum space as per permissible F.A.R. have to be utilized as commercial space.

10. The participants are to follow RRDA Norms and P.W.D. Specifications.

11. You are required to enclose separate envelope for each plot ie., your offer for a plot along with requisite amount of Earnest Money for that plot should be in one envelope and all such envelopes of a company should be submitted in one sealed envelop.

12. For each plot you have to deposit Earnest Money @ Rs 5/- per sft. and maximum of 15 lacs of each plot.

13. In the structure you have to provide all external walls of 10" thickness.

14 The Board reserves the right NOT TO ALLOT TUB WORK of any plot if the given offer is not sufficiently beneficial to the Board. The decision of Board in this regard is FINAL.

5.2 There was no condition to furnish papers pertaining to financial credibility. Such condition cannot be added, so as to make it essence of acceptance of offer. The Petitioner/Appellant filled up the necessary tenders along with other documents and it was found to be the highest offerer and, therefore, the Respondent-Housing Board issued a letter dated 24th August, 2006 (Annexure 10 to the memo of appeal), stating therein, that the Petitioner/Appellant having quoted the highest rate, Plot No. 6, situated at Adityapur, Jamshedpur, is now also required to give financial credibility on or before 30th August, 2006.

5.3 The Petitioner/Appellant furnished papers pertaining to financial credibility along with the papers of Central Bank, Corporate Finance Branch, Siyaganj, Indore, likewise of IDBI Bank. There are also papers pertaining to sanction of terms loan of Rs. 35 Crores by Central Bank of India.

5.4 It appears that thereafter, several letters were written by the Petitioner/Appellant on 29th March, 2007, 10th April, 2007 and 10th May, 2007 (Annexure 12, 13 and 14 respectively to the memo of appeal).

5.5 Thereafter, the Petitioner/Appellant received a letter on 18th May, 2007, written by Respondent-Housing Board dated 25th April, 2007 to the effect that as the Petitioner/Appellant could not submit the papers pertaining to financial credibility, it is not selected for construction over Plot No. 6. This letter is under challenge in the writ petition.

5.6 Thus, it appears that though the Petitioner/Appellant was found to be the highest offerer, in terms of percentage of total plinth area of all the floors of the residential as well as commercial units, the selection of the Petitioner/Appellant was not made, only because of the fact that it has not supplied the papers pertaining to its financial credibility.

5.7 Thus, there was no such condition in the tender and, therefore, the ground canvassed for non-selection of the Petitioner/Appellant is arbitrary. The Petitioner/Appellant has got a terms loan sanctioned for Rs. 35 Crores from Central Bank of India, Indore. This letter of Central Bank of India is dated 25th August, 2006. This letter having been obtained by the Petitioner/Appellant was sent to the Respondent-Housing Board. This letter is not a fabricated letter nor it can be a backdated document and there was no reason for the Appellant after procuring all these letters from Central Bank of India as well as IDBI Bank to retain them without sending the same to the Respondent-Housing Board. The letters written by the Petitioner/Appellant, which are at Annexure 12, 13 and 14 have not been replied at all by the Respondent-Housing Board.

5.8 Moreover, the Petitioner/Appellant has also been allotted Plot No. 4, situated at Adityapur, Jamshedpur. This was also governed by the same terms and condition and this Plot No. 4 was allotted to the Petitioner/Appellant, without calling the Appellant or demanding from the Appellant to furnish the papers pertaining to financial credibility. Thus, there was no condition for supply of financial credibility papers in the original tender and, therefore, on that ground, though the Appellant was the highest offerer, as per the letter of the Respondent-Housing Board dated 24th August, 2006, the selection of the Petitioner/Appellant cannot be discarded for want of supply of financial credibility papers.

5.9 It has been held by Hon'ble Supreme Court in the case of Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, , that the decision making process of public authorities, if influenced by the extraneous/ irrelevant considerations, would vitiate the decision even if it is without bias. Decision making process is open to judicial review. Though there was no condition in the tender for supply of papers pertaining to financial credibility, the Respondent-Housing Board has discarded the right of the Petitioner/Appellant on this extraneous/irrelevant considerations. This vitiates the decision making process.

## 6. Flaw in a decision making process:

6.1 From the lengthy argument and voluminous records, it appears that Respondent No. 4 was the second highest offerer, because the letter dated 24th August, 2006 (Annexure 10 to the memo of appeal), issued by the Respondent-Housing Board to the Petitioner/Appellant was never withdrawn. The Respondent-Housing Board called Respondent No. 4 for further negotiations in February, 2007 and Respondent No. 4 has increased the amount from Rs. 25,67,98,440/- to Rs. 26,26,62,240/-. Thus, Respondent No. 4 has increased the amount after negotiation to the tune of Rs. 58,63,800/- i.e. approximately Rs. 59 lacs. This is evident from Annexure 20 to the memo of appeal (page-121) or is evident from Annexure R-4/1 of the counter affidavit, filed by Respondent No. 4 in the present Letters Patent Appeal. From this Annexure, it is clear that the Petitioner/Appellant was never called for negotiation for Plot No. 6. Learned single Judge has failed to appreciate this factual aspect. Thus, without calling the Petitioner/

Appellant, further negotiations were held with Respondent No. 4 by the Respondent-Housing Board.

6.2 It is submitted during course of argument by Shri G.L. Rawal, Sr. Advocate appearing on behalf of the Petitioner/Appellant that had an opportunity been given to the Appellant for further negotiations, it would have also increased the amount or percentage of Total Plinth Area of all the floors of residential/commercial units to be given to the Housing Board. The Respondent-Housing Board has called only Respondent No. 4 for further negotiations. This vitiates the decision making process for awarding a public contract. The procedure followed by the Respondent-Housing Board is unfair and opposed to the norms, which the Housing Board should follow in such matters, viz. openness, transparency and fair dealing. In the case of Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others, , the Hon''ble Supreme Court held that the Government had followed the procedure by calling only serial No. 3 to revise its offer, and serial No. 3 -Dutt Associates Pvt. Ltd. Increased the offer and its bid was accepted. This action was challenged by Indo Merchantiles Pvt. Ltd., which was at serial No. 13 in the High Court. Learned single Judge dismissed the writ petition. L.P.A. Preferred by Indo Merchantiles Pvt. Ltd. was allowed by Division Bench and against this L.P.A. Judgment, SLP was preferred by original Respondent and while dismissing Civil Appeal, it was held by the Hon''ble Supreme Court that accepting the tender of Dutt Associates Pvt. Ltd., which has revised its offer without calling Indo Merchantiles Pvt. Ltd., which is at serial No. 13, is contrary to the law, unfair and arbitrary. Such opportunity should have been given to other tenderers also.

6.3 In the facts of the present case, Respondent-Housing Board has called only Respondent No. 4 without calling the Petitioner/Appellant and got the offer revised. In such cases, the Petitioner/Appellant should also have been invited for negotiations and, therefore, the procedure followed by the Respondent-Housing Board is contrary to law, unfair and arbitrary for accepting the tender of Respondent No. 4

6.4 Similarly in the case of Ram and Shyam Company Vs. State of Haryana and Others, , the Hon''ble Supreme Court held that acceptance of unsuccessful bidders, subsequent offer, being higher than the highest, without affording opportunity to the highest bidder, is arbitrary and against the fair play. While disposing of public property, the State must give equal opportunity to all the concern and endeavour to fetch the best available price in a public interest. Disposal of public property partakes the character of a trust. So the disposal of the State property in public interest must be by such method that the Board grants an opportunity to the public at large to participate in it.

6.5 In the facts of the present case, there is a total departure by the Respondent-Housing Board from the aforesaid principles for grant of public contract and hence the decision making process followed or adopted by the Respondent-Housing Board is against the law, arbitrary and unfair.

7. Different stand taken by the Respondent-Housing Board in the impugned letter dated 25th April, 2007 and in the counter affidavit, filed by Respondent No. 1-Housing Board;

7.1 From the well knitted arguments, canvassed by all the Advocates, it appears that the original stand taken by the Respondent-Housing Board for not granting public contract to the Petitioner/Appellant was to the effect that it had not supplied the papers pertaining to its financial credibility. This is evident from the letter dated 25th April, 2007, written by the Respondent-Housing Board to the Petitioner/ Appellant, which is at Annexure 15 to the memo of appeal, whereas, in the counter affidavit, filed by the Respondent-Housing Board, stand has been taken to the effect that the Petitioner/ Appellant was never the highest offerer, but, Respondent No. 4 was the highest offerer. In fact, the letter written by the Respondent-Housing Board to the Petitioner/Appellant dated 24th August, 2006 that the Appellant is the highest bidder, has not been cancelled or withdrawn. This letter is at Annexure 10 to the memo of appeal.

7.2 Thus, the ground taken in the counter affidavit by the Respondent-Housing Board is nowhere reflected in the correspondence between the Respondent-Housing Board and the Petitioner/Appellant.

7.3 For the first time in the Court, the aforesaid stand has been taken by the Respondent-Housing Board that the Petitioner/Appellant has offered 30% of total plinth area of all the floors of the residential as well as commercial units, whereas, Respondent No. 4 had offered 30.25% of total plinth area of all the floors of the residential as well as commercial units.

7.4 One more stand has been taken in the counter affidavit by the Respondent-Housing Board to the effect that letter dated 24th August, 2006, which was issued by the Respondent-Housing Board to the Appellant, wherein it was mentioned that the Petitioner/Appellant was the highest offerer, was mistakenly issued. For the first time, this stand is taken with a view to avoid the Petitioner/Appellant. Never in any correspondence, the Respondent-Housing Board has communicated to the Appellant after 24th August, 2006 that the letter issued by the Respondent-Housing Board dated 24th August, 2006 is a mistaken letter. Thus, the impugned letter dated 25th April, 2007 (Annexure 15 to the memo of appeal) states that the Respondent-Housing Board has not selected the Petitioner/Appellant for want of supply of papers pertaining to its financial credibility, whereas, the counter affidavit says altogether another reason.

7.5 It has been held in para 8 by Hon"ble Supreme Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, as under:

8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by

the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, (at p. 18):

Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself

Orders are not like old wine becoming better as they grow older.

(Emphasis supplied)

8. Whether the execution of contract which is granted to Respondent No. 4 has travelled upto a stage, which is irreversible ?

8.1 From a well developed arguments by both the parties, it appears that nothing substantially has been done by Respondent No. 4 at Plot No. 6, situated at Adityapur, Jamshedpur. This plot was given to Respondent No. 4 for construction of residential as well as commercial units in a joint venture with the Respondent-Housing Board. It is alleged that from March, 2007 Respondent No. 4 has been selected for this contract by the Respondent-Housing Board. It appears from the letter written by the Managing Director of Adityapur Industrial Area Development Authority, Adityapur, dated 1st April, 2008 to Respondent No. 4 that Respondent No. 4 has been communicated by the Area Development Authority that additional fees for built up area has not been paid by Respondent No. 4. There are anomalies and deviations from the bye-laws on drawing indicated in the letter dated 26th December, 2007 (written by the Area Development Authority), which are to be corrected. Four sets of revised drawings are to be submitted. If any preliminary of foundation work is to be done, it will be entirely at the risk and cost of Respondent No. 4. Paragraph No. 4 of this letter reads as under:

4. As regards your request for permitting you to go ahead with construction of the building pending approval of the drawings, please note that the same can not be permitted. You may however initiate action on preliminary work and foundation work upto ground level only (Repeat upto ground level only) till the drawings are approved. Such preliminary and foundation work shall be done by you entirely at your risk and cost and if any part or parts of the work executed by you underground becomes redundant as per approved drawings then the cost for dismantling and/or modification of the same should be borne by you. Please note that this permission for allowing you to execute preliminary and foundation work is given without prejudice to the right of AIADA and your obligation towards approval of drawings, hence this permission should not be construed as approved of drawings, which has to be obtained by you as per Bye-Laws provision.

8.2 The aforesaid letter is at Annexure R-4/Z to the counter affidavit, filed by Respondent No. 4. Thus, it appears from the aforesaid letter that the plans have not been approved for development of Plot No. 6 i.e. for construction of residential as well as commercial units.

8.3 Likewise, it also appears from the letter written by the Respondent-Housing Board to Respondent No. 4 dated 29th June, 2009 (Annexure 24 to I.A. No. 1989 of 2010 in the present Letters Patent Appeal) that a Development Agreement has been entered into in between the Jharkhand State Housing Board and Respondent No. 4 on 21st June, 2007. A period of two years has lapsed thereafter. Respondent has still not got the maps approved by the Adityapur Industrial Area Development Authority. It has also been stated by the Jharkhand State Housing Board to Respondent No. 4 in this letter that as per the Development Agreement, within three years the construction work was to be completed, but, still it has not been started at all and thereby the Respondent-Housing Board is incurring financial losses. It has been further stated in the aforesaid letter of the Respondent-Housing Board that if within one week the work is not started, the process for cancellation of Development Agreement will be started. The aforesaid letter is annexed as Annexure 24 to I.A. No. 1989 of 2010 in the present Letters Patent Appeal.

8.4 Looking to Annexure 25 series, which are photographs of Plot No. 6. situated at Adityapur, Jamshedpur, it appears that Plot No. 6, as on the date of filing of interlocutory application i.e. 12th May, 2010, was a barren land. Nothing has been constructed at all, much less residential and commercial units.

8.5 Thus, as a cumulative effect of these Annexure, it appears that nothing substantially has been done by Respondent No. 4 on Plot No. 6. situated at Adityapur, Jamshedpur. Soil testing etc., which is alleged to have been done by Respondent No. 4, cannot be labelled as such an irreversible stage of a contract. This can be compensated by the Respondent-Housing Board, if the Board is fetching more consideration from the bidders. Mr. G.L. Rawal, Sr. Advocate appearing on behalf of the Petitioner/ Appellant has submitted that Respondent No. 4 has increased approximately Rs. 59 lacs in negotiations and the Appellant-company was never invited. Nonetheless, the Appellant is ready and willing to offer Rs. 500 Lacs more and if the Appellant is allowed to have negotiations with the Respondent-Housing Board along with Respondent No. 4, still there is possibility of enhancement of few hundred lacs more to be given to the Respondent-Housing Board. Thus, the contract given to Respondent No. 4 has not reached to an irreversible stage.

9. Powers of judicial review in respect of contracts entered into on behalf of the State:

7.1 It has been held in catena of decisions, consistently by Hon''ble Supreme Court that the decision making process of public authorities, if influenced of extraneous/irrelevant considerations, would vitiate the decision, even if it is

without bias. If a decision taken by the public authorities in commercial/contractual transactions of State or its instrumentality, then such decision making process is open to judicial review. Though the Court cannot act as an appellate authority, but, if the process is violative of Article 14 of the Constitution of India, the Court can strike down the decision and the action taken pursuant thereto, as has been held in the case of Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, .

9.2 In the facts of the present case and as stated hereinabove, though there was no condition as per tender terms, to supply the papers pertaining to financial credibility by the Appellant (original Petitioner), but, the Appellant has been discarded from grant of public contract on this irrelevant consideration. Moreover, Respondent No. 4 was called for further negotiations, which has increased approximately Rs. 59 lacs whereas the Appellant was never called for negotiations and has offered in the open Court while arguing this L.P.A. that the Appellant (original Petitioner) is ready and willing to offer Rs. 500 lacs more and if the Petitioner/Appellant is allowed to compete with Respondent No. 4 and if the Petitioner/Appellant is called for negotiations, still, few hundred lacs, more can be offered by the Appellant (original Petitioner) to the Respondent-Housing Board. The stands taken in the impugned letter filed by the Respondent-Housing Board and in the affidavit by the Board are different. It was never communicated by the Respondent-Housing Board to the Appellant that the Appellant was never a highest bidder whereas in the counter affidavit, it is stated that Respondent No. 4 is the highest bidder. Letter issued by the Respondent-Housing Board dated 24th August, 2006 (Annexure 10 to the memo of appeal), stating therein, that the Appellant is the highest bidder, has never been withdrawn or cancelled by the Respondent-Housing Board.

9.3 The State is under obligation for augmentation of revenue and nothing else. The State is under an obligation to secure the best market price available so that larger revenue comes to the coffers of the State administration. It has been held by Hon"ble Supreme Court in the case of Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation, in paragraph No. 14 as under:

14. The public property owned by the State or by any instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should undoubtedly act fairly. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which given an impression of bias, favouritism or nepotism. Ordinarily these factors would be absent if the matter is brought to public auction or sale by tenders. That.....the Court repeatedly stated and reiterated that the State owned properties are required to be disposed of publicly. But that is not the only rule. As O. Chinnappa Reddy, J. observed "that though that is the ordinary rule, it is not an invariable rule." There may be

situations necessitating departure from the rule, but then such instances must be justified by compulsions and not by compromise. If must be justified by compelling reasons and not by just convenience.

(Emphasis supplied)

9.4 Thus, looking to the nature of the contract, in question, it appears that larger public interest is involved. Number of residential as well as commercial units are to be given to the Jharkhand State Housing Board, which will be utilized ultimately by the public at large and, therefore, Respondent No. 1 being an instrumentality of the State engaged in performing a public duty, cannot be allowed to act arbitrarily and unfairly, so as to cause harm and injury, flowing from its unreasonable conduct, to the Appellant. In such a situation, the Court is not powerless and the Court can issue suitable directions to set right, the arbitrary action of the Respondent-Housing Board. It has been held at paragraph No. 23 of a decision, rendered by Hon"ble Supreme Court in the case of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, as under:

23. It is clear from the above observations of this Court, once the State of an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the Appellants the first Respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first Respondent. In this context, we may note that though the first Respondent is a company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of this Company is 2,50,000/- shares out of which 2,49,998 shares are held by the President of India while one share each is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and industry respectively. The objects enumerated in the memorandum of association of the first Respondent at para 10 read:

to undertake such functions as may be entrusted to it by the Government from time to time, including grant of credits and guarantees in foreign currency for the purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export.

To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest.

(Emphasis supplied)

9.5 The aforesaid facts, reasons and judicial pronouncements were not

considered by the learned single Judge. It has been stated by the learned single Judge in paragraph No. 60 of the impugned judgment that the Petitioner (Appellant herein) has not been able to furnish satisfactory explanation in its long silence and apathy over the matter from 24th August, 2006 till 29th March, 2007 and it has been observed in paragraph No. 61 of the impugned judgment by the learned single Judge that the negligent and lethargic litigant does not deserve discretionary relief by invoking extra-ordinary jurisdiction.

9.6 It appears that the learned single Judge has not appreciated the fact that after receiving a letter from the Respondent-Housing Board that the Petitioner/Appellant was the highest offerer on 24th August, 2006 (Annexure 10 to the memo of appeal), several letters were written by the Petitioner/Appellant, which are at Annexure 12, 13 and 14 dated 29th March, 2007, 10th April, 2007 and 10th May, 2007 respectively that the Appellant has submitted the papers pertaining to financial credibility including a letter of Central Bank of India, Indore, showing sanction of terms loan of Rs. 35 Crores and much time has lapsed thereafter. Therefore, please hand over possession of Plot No. 6. Never these letters were replied to by the Respondent-Housing Board and on 18th May, 2007, a letter was received by the Appellant from the Respondent-Housing Board, which is dated 25th April, 2007, to the effect that the Appellant has not been selected, because the papers pertaining to its financial credibility have not been received by the Respondent-Housing Board. The Petitioner/Appellant has to get information under Right to Information Act, 2005 that for what reason the Petitioner/Appellant has not been allotted the contract and who has been allotted the contract for what reasons. Without cancelling the letter dated 24th August, 2006, issued to the Petitioner/Appellant, the Respondent-Housing Board called Respondent No. 4 for private negotiations and granted public contract to Respondent No. 4 on 14th March, 2007 (Annexure 17 to the memo of appeal)

9.7 It appears from this letter at Annexure 17 that the Respondent-Housing Board after writing letter dated 24th August, 2006 was privately negotiating with Respondent No. 4 whereas the Petitioner/Appellant, though has received the letter dated 24th August, 2006 to the effect that the Petitioner/Appellant was the highest bidder and though the Petitioner/Appellant has submitted all the papers pertaining to financial credibility on 30th August, 2006 and though the Petitioner/Appellant was writing several letters, one after another, dated 29th March, 2007 (Annexure 12 to the memo of appeal), 10th April, 2007 (Annexure 13 to the memo of appeal) and 10th May, 2007 (Annexure 14 to the memo of appeal), the Respondent-Housing Board has never conveyed the Petitioner/Appellant that it is now holding negotiations with the highest bidder No. 2 i.e. Respondent No. 4. These facts have not been properly appreciated by the learned single Judge.

9.8 In view of these facts, it cannot be said that the Petitioner/Appellant is a negligent and lethargic litigant. Immediately a writ petition was filed bearing W.P. (C) No. 3021 of 2007. At that time only one letter was under challenge dated 25th April, 2007 and the Petitioner/Appellant was not knowing that somebody

like Respondent No. 4 has already been chosen by the Respondent-Housing Board for grant of contract and, therefore, the writ petition bearing W.P.(C) No. 3021 of 2007 was withdrawn with a liberty to file a fresh writ petition, which was granted by this Court and, thereafter another writ petition bearing W.P.(C) No. 3874 of 2007 was instituted, challenging the letter dated 14th March, 2007, whereby, the Respondent No. 2 selected Respondent No. 4 for grant of contract and the letter dated 19th April, 2007 was also challenged, issued by Respondent No. 2 to Respondent No. 4. Thus, immediate petitions have been preferred by the Petitioner/Appellant.

10. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements, we hereby allow this Letters Patent appeal. Judgment and order passed in W.P.(C) No. 3874 of 2007 dated 18th December, 2008 is hereby quashed and set aside. We hereby quash and set aside the letters, issued by the Respondent-Housing Board to the Appellant dated 25th April, 2007 (Annexure 15 to the memo of appeal) and we further quash and set aside the letter dated 14th March, 2007, issued by the Respondent-Housing Board to Respondent No. 4, which is at Annexure 17 to the memo of appeal and we also quash and set aside the letter dated 19th April, 2007 (Annexure 18 to the memo of appeal). We hereby direct the Respondent-Housing Board to call all the bidders, who have offered for Plot No. 6, situated at Adityapur, Jamshedpur, including the Petitioner/Appellant for further negotiations and to give opportunity to all the bidders. We also direct the Respondent-Housing Board, to finalize the highest bidder within a period of four weeks from the date of receipt of a copy of the order of this Court.