
(2012) 12 GAU CK 0003
In the Gauhati High Court
Case No : WP (C) No. 399 (AP) of 2011

Mega Electricals (M/s.) and Others

APPELLANT

Vs

State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 17-12-2012

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 226

Citation : (2013) 4 GLT 202

Hon'ble Judges : Prasanta Kumar Saikia, J

Bench : Single Bench

Advocate : N. Dutta, Mr. S. Sarma, Mr. N.N.B. Choudhury, Mr. A. Gohain, Mr. B. Talukdar, Mr. Tapan Deuri, Ms. Jyoti Rabha, Mr. B. Pandun, Mr. B. Pandum and Mr. K. Gogoi, for the Appellant; P. Taffo, Biki Tapa, Ms. N. Danggen, T. Gyadi and Ms. J. Doji, for the Respondent

Judgement

Prasanta Kumar Saikia, J.—In this proceeding, writ petitioners" firm, inter alia, challenges the notice of acceptance, dated 19.09.2011, issued by the Executive Engineer (Elect) Roing Electrical Division in favour of the respondent No. 5 (M/s. Krishna Constructions) favoring him with the work of construction of C/O 33 KV line from Aholi to Dambuk i/c 2 Nos. across the river Sissiri (Package No. 2) NLCPR/33 KV IMEBO-DMK/RED/02. The facts, necessary for disposal of this present writ proceedings, in short, are that the Notice Inviting Tender (in short "NIT"), dated 08.07.2011, issued by the Executive Engineer (Elect) Roing Electrical Division, Department of Power for construction of 33 KV line from Mebo to Aholi i/c 2 Nos. Tower across the river Byathbo Korong (hereinafter referred to as package No. 1) (ii) for construction of 33 KV line from Aholi to Dambuk i/c 2 Nos. across the river Sissiri (hereinafter referred to as package No. 2) and (iii) for construction of 33 KV sub-station Bay i/c 1000 KVA, 33/11 LV power transformer, 33 KV multi use switching unit for sectionisation at Dambuk, 11 KV uniploarisation switching unit at Dambuk for control panel & 33 KV auto reclosure unit at Mebo (hereinafter referred to as package No. 3). The estimated values of the work at package No. 1, 2 & 3 were quoted at Rs. 220.68 lakhs, 167.96 lakhs

and 158.93 lakhs respectively.

2. The firm of the petitioners is a partnership firm, engaged in the business of construction and maintenance of all types of high voltage transmission line and sub-station in the North Eastern States. The petitioners firm which has expertise and experience in the field aforesaid along with others submitted bid vying for three packages of work, aforesaid. It was stated in the NIT that only those bidders who would qualify in technical bid would be invited for taking part in the price bid.

3. Accordingly, petitioners and three others qualified in technical bid for which all those four bidders were called by the Executive Engineer (Elect) Roing Electrical Division (respondent No. 4) to remain present in his Office on 30.08.2011 so that the price bid, offered by them, could be opened in their presence. Accordingly, on 30.08.2011 the price bids were opened in presence of the bidders and the prices, quoted by petitioners in respect of all three packages, were found to be the lowest of all the bids.

4. Here, it may be mentioned that in the tender papers, the respondent authorities quoted total lump sum estimated costs in respect of all the packages of work and lump sum estimated costs, in respect of work at package No. 2 was fixed at Rs. 1,67,95,660/-. However, in respect of work at package No. 2, petitioners quoted lump sum price at Rs. 1,67,21,381/-. On the other hand, the respondent No. 5 quoted Rs. 1,69,44,984/- as the price in respect of such work.

5. Thus, the bid, quoted by firm of the petitioners is found 0.44% lower than, the estimated rate whereas the bid, quoted by the respondent No. 5 was found 0.89% higher than the estimated cost. The above clearly reveals that the bid, quoted by the firm of petitioners is the nearest to the estimated cost and on allotment of work at package No. 2 in favor of petitioners, the State authorities could have saved Rs. 2,23,604/- from the Government Treasury which could have been utilized for more beneficial purposes for the benefit of common people, more particularly, the down trodden section of the society.

6. In that connection, it has been stated that as per sub clause 35.3 of the Instruction of Bidders (in short "INB"), the bids, offered by all the bidders, were to have compared amongst themselves to determine the lowest evaluated bid and as a result of such comparison, the bidder who was found offering the lowest bid was to have awarded the contract.

7. As per sub-clause 12.1, 35.1 of the INB and 4.3 of the Special Condition of the Contract (in short "SSC"), the bidders were to quote the complete scope of work for the package which means, according to the petitioners, the bidders had to quote their bids for the entire contract and not part of the same. Again as per sub clause 4.4 of the SCC, the bids were to be compared on the basis of lump sum price made against the entire scope of work, covered by each of the packages, which was to include ex-work price, transportation & insurance charges, erection charges and all applicable taxes, duties and levies.

8. After opening the bids, quoted by the bidders, the State respondents found the firm of the petitioners offering the lowest price in respect of the work at package No. 2. Surprisingly enough, having found the petitioners the lowest bidders in respect of all the work, the State respondents divided bid value, quoted by the bidders, into two parts, namely, ex-work price and erection charges although under the terms and conditions, aforementioned, such segregation for the purpose of comparison of the bids was not permissible.

9. The petitioners further allege that in order to defeat the legal claim of the firm of the petitioners and also to favor the respondent No 5 with work notified through the NIT dated 08.07.2011, State respondents fabricated another story which was to the effect that the Detailed Project Report (in short "DPR") for the projects in question was conceived in 2007-08 and the rate, quoted in the NIT, was estimated on the basis of price index prevailing at the time of preparation of the DPR in 2007-08.

10. Since a good deal of time was required to obtain sanction for such project and since a period, more than four years, was required in obtaining the sanction, the estimated rate, according to the respondents, was to have enhanced considerably to commensurate with the price index prevailing in the year in which such NIT was published. As four years have passed by since the time of conceptualization of the project, the estimated price ought to have been upped by at least 40% than the price, quoted in the NIT.

11. However, the respondents have found that petitioners have already quoted a price which is 24% lower than the estimated price and thus, the price which petitioners quoted was, in fact, 64% lower than the actual price prevalent at the time when the NIT was floated. The State respondents, therefore, apprehend that the firm of the petitioners would not be in a position to execute the work in package No. 2 maintaining the quality which such work demands.

12. However, refuting all those contentions which the State respondents have pressed into action, the petitioners contend that since under the NIT and under various other clauses, there-under, the prospective bidders "were to quote their price in respect of entire scope of work aforesaid on lump sum basis, and not on component wise, which constitutes the work in the packages aforesaid, the action of State respondents in comparing the price, quoted by bidders component wise, is not only violative of all the terms and conditions on which NIT in question was floated but it is against all the rules and procedures holding the field.

13. Referring to various provisions incorporated in the NIT, INB and the SCC, more particularly, sub clause 12.1, sub clause 13.1, sub clause 35.1 and sub clause 35.3, of the INB as well as sub clause 4.3 and 4.4 of the SCC. The petitioners have submitted that the grounds, assigned by the respondent authorities, in rejecting the claim of petitioners in respect of package No. 2 and also in issuing notice of acceptance in favor of the respondent No. 5 hardly find

any support from the various conditions, incorporated in those documents.

14. All those, in turn, make the decision of the respondent No. 1 to 4 in issuing letter of acceptance in favour of the respondent No. 5 arbitrary, illegal and oppose to all principles of openness and transparency, so essential in all kinds of public transactions. They are testimonies to respondent authorities resorting to limitless unreasonableness/highhandedness and above all, being totally partisan to some of the bidders in the fray. The petitioners, therefore, urge this Court to grant the reliefs sought for in the present writ petition.

15. In support of his case, he has referred me to the decision rendered by the Hon"ble Supreme Court in the case of Dutta Associates Pvt. Ltd. Vs. Indo Merchandiles Pvt. Ltd. and Others, as well as the decision of this Court in the case of Educomp Solutions Ltd. and Others Vs. State of Assam and Others, .

16. The respondents on being served with notice entered appearance and having filed counter affidavit contested the case. In their counter affidavit, the State respondents have stated that the project in question was conceived into 2007 and the DPR was also prepared on the basis of price index prevailing in that year. As per norms, 10% costs enhancement is to be added every year but same was not added to such estimated cost, notified in the NIT in question. As such, the estimated cost in the NIT was already 40% lower than the cost prevailing at the time of issuance of the NIT.

17. In spite of all these, the bid, quoted by the petitioners was 24% below the estimated cost which was already down by 40% of the prevailing market rate at the time of issuance of the NIT, which means that the rate quoted by petitioners was 64% below the rate prevailing at the time of issuance of NIT. In view of abnormally low rate, quoted by petitioners, particularly in respect of erection charges, the respondent authorities genuinely feel that petitioners could never/ever execute the work at package No. 2 at the price, quoted by it, maintaining quality.

18. Referring to sub-clause 12.1, 35.1 and 35.3 of the INB, it has been contended that the terms and conditions, incorporated therein are binding only when the deviation between estimated cost in the NIT and bid offered by the tenderers is upto 10% and not beyond. But when the deviation between aforesaid prices is more than 10%, the department is not obliged to settle the contract in favor of a bidder only for his being the lowest bidders.

19. This is more so, since in view of sub clause 37.1, sub clause 38.1 and clause 39 of the INB, the department always reserves the right to accept or reject any bids or to annul bidding process and reject all the bids at a time, if the respondents genuinely believe on some valid reasons that the bidders are not in a position to execute the work, offered through the NIT maintaining the specifications, notified.

20. As in our instant case, deviation between the prices, aforesaid is, in fact, as

whopping as 64%, conditions in aforesaid provisions no way saddled the department to settle the work only with the lowest bidder. In that connection, it has also been submitted that subclause 35.1 and sub clause 35.3 of the INS cannot be read in isolation. Rather they need to be read in conjunction with sub clause 6.1.2, sub clause 6.1.4 & sub clause 6.1.5 of the sse (Section-V).

21. On such a conjoint reading of those provisions, it would appear clear that the contention of the firm of the petitioners that the respondent authorities were to make comparison of the bids on the basis of lump sum price quoted by bidders in respect of whole package of work, and not component wise, and that the State respondents are bound to settle the work only with the lowest bidder are found wholly irrelevant and inappropriate.

22. Quite contrary to it, on reading of the terms and conditions in the NIT as well as other documents, annexed with the NIT, in their entirety, one would be totally justified in coming to the conclusion that the respondent authorities had the right to make comparison of the price, quoted by the bidders, component wise so as to ascertain the most suitable bidders in respect of work offered through the NIT dated 08.07.2011.

23. Therefore, all the contentions including the contention that the State respondents under the terms and conditions of the contract were to make comparison of the bids on the basis of lump sum price quoted in respect of scope of work in package No. 2 as well as that there was a hidden agendum in issuing the letter of acceptance in favor of respondent No. 5 in respect of work in package No. 2 and that too on the direction of political muster of the state respondents fall through.

24. The respondent No. 5 has also submitted an affidavit, wherein it reiterated the stances, taken by the official respondents. He, however, further submits that the contention of the petitioners that the non notifying of the base price against the respective price component in the draft NIT was illegal is ridiculous.

24A. This is because of the fact that it is known to one and all concerned that reserved prices are never notified in any tender process because the bidders are expected to make bid keeping in mind the prevailing market rate and as such, lump sum price is notified in the tender notice. According to the respondent No. 5, the real competition amongst the bidders, vying for contract, lies in breakup price, quoted component wise.

25. In support of his case, the respondent No. 5 has referred me to the decisions reported in:

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

(2) Tata Cellular Vs. Union of India, ,

(3) Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, .

- (4) Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, ;
- (5) Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, ,
- (6) (2007) 14 SCC 577 in the case of Jagdish Nandlal Vs. State of Orissa & Ors.
- (7) Siemens Public Communication Networks Pvt. Ltd. and Another Vs. Union of India (UOI) and Others,
- (8) M.V. Thimmaiah and Others Vs. Union Public Service Commission and Others,
- (9) Laxmikant and others Vs. Satyawan and others, and
- (10) Rajasthan Housing Board and Another Vs. G.S. Investments and Another, .

26. The firm of the petitioners had, however, filed affidavit-in-reply and tried to refute the claims, so made in the counter affidavit of the respondents. In its affidavit-in-reply, the petitioners reiterated their stands, which they have already taken in the writ petition.

27. I have given my anxious consideration to the arguments, advanced by the learned counsel for the respective parties. A perusal of the pleadings of the parties in the light of the documents, annexed therewith, I have found that the parties are at variance on the following points.

- (i) Whether the State respondents are entitled to make comparison of the bids on the basis of price quoted the components wise which constituted the work in package No. 2;
- ii) Whether the claim of the State respondents that the petitioners bid is 64% below the market price on the date when NIT was floated stands to reason;
- iii) Whether considering the nature of the work under the NIT, the rates quoted by the respondent No. 5 in respect of the work on land and work on the river are absolutely unreasonable as claimed by the petitioners;
- (iv) Whether under the terms and conditions in the NIT, the State respondents are bound to award the work to the lowest bidder;
- (v) Whether the State respondents issued the letter of acceptance in favor of the respondent No. 5 in a malafide way;
- (vi) Whether the State respondents issued letter of acceptance in favour of respondent No. 5 on the basis of some hidden criterion;
- (vii) Whether the bid made by the respondent No. 5 is liable to be rejected since such bid does not include as required under the NIT all the taxes/levies and duties.
- (viii) Whether in the present case, the Court is permitted to bring the dispute under judicial review.

28. I have proposed to consider the dispute arose between the parties point wise

and point No. 1 is taken up for consideration.

Point No. (1) Referring to sub clause 12.1, 35.1, 35.3 of the INB and sub clause 4.3 and 4.4 of the SCC, the firm of the petitioners arduously contends that when the aforesaid provisions are read together, it would appear more than clear that under the NIT and under various tender papers, annexed therewith, petitioners are required to quote a lump sum price for the entire scope of work.

29. The fact that in the NIT, estimated cost in respect of package No. 2 was shown in lump sum price further fortifies the inference that the prospective bidders are to quote lump sum price and the State respondents are to make comparison of the offers, made by the bidders, on the basis of lump sum price, so quoted by the bidders and on no other consideration(s), whatsoever.

30. On the other hand, referring to sub clause 6.1.4 & 6.1.5 of the SCC and sub clause 37.1, 38.1 and 39 of the INB, the above contention was opposed to by the learned counsel for the respondents. As stated above, the respondents argue that the above provisions in the NIT and in the related documents, more particularly, in sub clause 35.3 of the INB cannot be read in isolation. Rather they need to be read together with sub clause 6.1.4 & 6.1.5 of SCC and sub clause 37.1, 38.1 and 39 of the INS since such a reading unmistakably demonstrates true meaning and import of the various conditions, incorporated in the aforesaid documents.

31. The learned counsel for the respondents have contended that a reading of the aforesaid documents in between the lines would reveal that the department had always retained the right to compare the price bids, quoted by the bidders, component wise in order to ascertain the responsiveness of the bidders and viability of the offers, made by the tenderers. Therefore, the allegation that the State respondents are not entitled to make a comparison of the prices, quoted by the bidders, component wise, does not stand to reason.

32. For ready reference, the provisions of sub clause 6.1.4, 6.1.5 of the SCC and 37.1, 38.1 & clause 39 of the INB are also reproduced below:--

6.1.4 The Bidder's separation of price components in accordance with para 6.12 above shall be solely for the purpose of facilitating the comparison of bids by the owner and shall not in any way limit the Owner's right to contract on any of the terms offered.

6.1.5 All prices and price components quoted by the Bidder shall be firm and no price adjustment shall be applicable for any of the price components.

37.1 Department of Power will award the contract to the successful Bidder whose bid has been determined to be substantially responsive and has been determined as the lowest evaluated bid, provided further that the Bidder is determined to be qualified to perform the Contract satisfactorily. Department of Power shall be the sole judge in this regard.

38.1 Department of power reserves the right to accept or reject any bid and to annul the bidding process and reject all bids at any time prior to award of contract without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for Department of power's action.

39.1 Prior to the expiration of the period of bid validity and extended validity period, if any, Department of power will notify the successful Bidder in writing by registered letter or by cable/telex/fax to be confirmed in writing by registered letter that its bid has been accepted.

33. In order to appreciate the rival claims of the parties, I also find it necessary to reproduce the terms and conditions of mentioned in the NIT and other related tender papers, referred to by the petitioners as well. I have already found that the petitioners have heavily relied on clause 12.1 & 35.3 of the INB and 4.3 & 4.4 of SCC to prop up, their claims on this count. The provisions, so quoted by the petitioners, are also reproduced below:

12.1 The Bidder shall quote in the appropriate schedule of Bid Form lump-sum price for the entire scope of works covered under the Bidding Document) and also the unit rates of the goods it proposes to supply under the contract on FIRM PRICE BASIS,

35.1 The bids shall be compared on the basis of lump-sum prices (i.e. for supply portion and prices for services to be rendered as quoted by the Bidder) for the entire scope of the Proposals as defined in the Bidding Document.

35.3 All evaluated bid prices of all the bidders shall be compared amongst themselves to determine the lowest evaluated bid and as a result of comparison, the lowest bid will be selected for the award of contract.

4.3 Bidder has to quote for the complete scope of work for the package.

4.4 Pursuant to Clause 35.0. Section-INB of Part-III. Bids shall be compared on the basis of lump sum price for entire scope of works under the packages, which shall include ex-works price, transportation & insurance charges and erection charges and all applicable taxes & duties such as excise duty, sales tax, service tax and any other taxes/duties/levies etc. applicable solely on the transaction between the contractor and the Owner and octroi/entry tax on bought-out finished items, as applicable on the date of Bid opening.

34. To consider the dispute well, I also find it necessary to reproduce sub clause of 34.1 of the INB which defines and clarifies meaning of "Bid Price," incorporated in the NIT and other related documents.

34.1 for the purpose of evaluation and comparison of bids, the following meanings and definitions will apply:--

a. "Bid Price" shall mean the base price quoted by each Bidder in his Proposal for the complete scope of works.-

35. I have carefully perused the aforesaid provisions incorporated in the NIT and other related documents having regard to the arguments advanced by the learned counsel for the parties. On such a perusal, I have found that the NIT particularly, sub clause 12.1, 34.1 and 35.1 of the INB and sub clause 4.3 and 4.4 of SCC very firmly demonstrate that the respondents asked the prospective bidders to quote their price for entire scope of work, notified through the NIT, on lump sum basis. Those terms and conditions further reveal that the respondent authorities are to make comparison of the offers quoted by the bidders on the basis of lump sum price.

36. The fact that the NIT too fixed the estimated costs on lump sum basis doubly affirms the aforesaid proposition. Situations being such, under the terms and conditions of the NIT, the State respondents are to make comparison of the bids only on the basis lump sum price, quoted against the entire scope of work, and not on the basis of prices, rendered component wise since such an arrangement is wholly incompatible with the terms and conditions, enumerated in the NIT.

37. In such a scenario, the State respondents, on taking shelter under sub clause 6.1.4 & 6.1.5 of the SCC, cannot not make comparison of the bids, offered by the bidders, on the basis of price, rendered component wise. However, by doing so, the State respondents not only import something new to the terms and conditions in the NIT which were never there in the NIT in question but they also make their action aforesaid utterly indefensible.

38. In this connection, the decision rendered by this Court in the case of Educomp Solutions Ltd. and Others Vs. State of Assam and Others, was relied on by the petitioners. In the aforesaid case this Court held as follows:

(49) We are unable to persuade ourselves to accept the contention of the learned Senior counsel Shri R.K. Anand that it is not at all necessary for the Governmental agencies to notify the selection criteria in detail even at the threshold and the same can be done at any stage. Does it mean the selection criteria can be evolved after opening of the technical bids/would it not give room and leverage to the decision makers to manipulate the result to suit the convenience of a particular bidder? In our view even if such criteria is not notified at the beginning, the same should be made known to all the interested before submission of bids by duly informing them about the proposed criteria to be applied and the methodology in awarding the marks to evaluate the technical and commercial bids. In the case on hand such in course ought to have been adopted at least on 14.12.2005 when the amendments to the NIT were communicated to all the concerned. In fact, the case set up by the matron is as if the methodology, criteria and the formula of 60:40 was communicated to all the concern on 14.12.2005 which plea is not acceptable to us because record does not reveal the same. In absence of such a communication the contention that decision makers applied hidden criteria evolved as a tailor made to suit the fourth respondent acquires the legitimacy. We accordingly, hold that the procedure adopted by the decision maker is vitiated by the application of hidden

criteria, lack of transparency and accountability. Procedural in propriety is writ large on the face of record.

39. The above decision, in my considered opinion, clearly covers the case under scrutiny which makes it inescapable for this Court to hold that by making comparison of the bids made by tenderers component wise, the State respondents had done something which was not authorized under the NIT and other related tender papers.

Point No. (ii) Referring to paragraph 7 of counter affidavit, filed by respondent No. 4, their learned counsel contends that State respondents are entitled to reject the bids, made by the bidders since the price quoted by petitioners is abnormally low. In order to fortify its claim, it has been stated that the concerned DPR was conceived in 2007-08 and the estimated price of the same was evaluated in 2007-08 on the basis of prevailing market price. However, since then a period as long as four years had already elapsed. Being so, according to the respondents, the estimated cost, quoted in the NIT was already 40% lesser than the market rate prevailing at the time when such NIT was floated.

40. But still then, petitioners had quoted a price of 24% lesser than the estimated cost specified in the NIT meaning thereby that firm of the petitioners undertakes to execute the work at a price 64% lesser than the market rate prevailing at the time in question. Such a price, quoted by petitioners firm, is unfortunately enormously absurd and it requires the State respondents to come to an inevitable conclusion that in the event of awarding the award to the lowest bidder, he would not be in a position to execute the work in respect of package No. 2 without compromising the quality which such work demands.

41. It is in that circumstances, the State respondents were forced to ignore the offer, made by the petitioners firm and to issue letter of acceptance in favour of the respondent No. 5 whose offer is otherwise found to be the most responsive and the most viable amongst the bids, made by the tenderers.

42. Such an argument was, however, refuted by petitioners contending that according to prevalent tender norms, the estimated costs of a particular project is prepared on the basis of market rate prevailing at the time of floating of the NIT, and not a day before. The present case is no exception to such norms.

43. The fact that there is no information, whatsoever, in either the NIT or any other related documents stating that estimated costs in the NIT was made on the basis of price prevailing at the time of preparation of the DPR in 2007-08, makes it inescapable for this Court to hold that such a contention has been devised just to deprive firm of the petitioners of something which they are legally entitled to.

44. I have considered the arguments, so advanced by the learned counsel for the parties, keeping in view the materials on record. On such an exercise, I am constrained to hold that the claims, made by the respondents that the estimated price quoted at the NIT was founded on the basis of price prevailing at the time

of preparation of the DPR in the year 2007-08 is without any substance, whatsoever. The reasons assigned in that regard by the learned counsel for the petitioners, in my considered view, are impeccable in nature and as such, I have no difficulty in accepting such a contention, made by the learned counsel for petitioners.

45. Here, it is worth noting that the respondents contends that when there is deviation between estimated costs and price quoted by the bidder is upto 10%, the owner can still settle the contract with the bidders despite such deviation. But in the present case, the deviation, being 64% between the estimated cost and the bid made by the firm of the petitioners, the rate quoted by the petitioners firm could not be accepted although he happens to be the lowest bidder.

46. However, above contention is found to be much without substance since there is no material on record to show that the deviation between estimated costs and price quoted by the firm of the petitioners was 64%. Our forgoing has made it more than clear. As such, I have no hesitation, whatsoever, in rejecting such a contention too, advanced for and on behalf of the respondents.

Point No. (iii) Referring to the paragraph 5 of the affidavit-in-reply, petitioners argue that due to its nature, the most difficult part of the work in package No. 1 is work pertaining to execution of work over the river and it would, therefore, entail much higher costs than the costs, involved in execution of the work over the land. However, in the present case, in respect of work to be executed on the land respondent No. 5 had quoted unusually high rate while it quotes far too low rate in respect of work to be executed over the river.

47. Thus, in respect of work to be executed over the river the respondent No. 5 claims Rs. 14,000/- per KM per Unit whereas, in respect of work on the land, it claims Rs. 45,000/- per KM per Unit which is absolutely illogical to say the least. Such inconsistent and incompatible rates in respect of work over the land and the work over the river are nothing but a huge fraud being committed on the State by the respondent No. 5.

48. The fact that quantity of work over the river is only 1.5 km whereas volume of work over the land is as big as 49.42 km further shows that bid made by the respondent No. 5 is huge deception perpetuated on the State. This itself, according to the petitioners, is a ground for State respondents not to issue any letter of acceptance in respect of work in package No. 2 in favor of the respondent No. 5.

49. In that connection, it has been pointed out that the firm of the petitioners claims Rs. 16,000/- per Km per Unit for execution of work over the land while in respect of work over the river, it claims similar rate. On the materials on record, as claimed by the petitioners, one would inevitably find that work on the river is far too complex and difficult than the work on the land.

50. On perusal of the records, I have found that above contention as far as

quotation of rates for the work on land and for the work on the river are concerned has been clearly borne out by materials on record. I may note here that one does not require any expert knowledge to come to a finding that the work on the river would entail more costs than the costs, involved in executing the work on land.

51. But then, the respondent No. 5 did not subscribe to such a proposition if one goes by the price, quoted by the respondent No. 5 for work under consideration. What is sad is that State respondents too accepted such proposition blissfully oblivious to the inherent contradictions in such proposals. In the face of above, I am constrained to hold that the ratio aforesaid vis-?-vis work on the river and the work on the land is quite bizarre to say the least. Consequently, I have no hesitation in accepting the above contention of the petitioners.

Point No. (iv) I have already found that lump sum price, quoted by petitioners in respect of package No. 2 was found to be the lowest of all the bidders. But then, State respondents claim that being the lowest bidder may not always be sole and lone criterion for settlement of the award in favor of the lowest bidder. The owner still reserves the right not to settle the contract with the lowest bidder. In that connection, my attention has been drawn to sub clause 37.1, 38.1 & 39.1 of the INB and to sub clause 6.1.4 and 6.1.5 of SCC.

52. The decisions, rendered by the Hon''ble Supreme Court in the case of Laxmitkant (supra) has also been relied on by the respondents to fortify the claim made on this count. Hon''ble Supreme Court in the case of Laxmitkant (supra) held as follows:--

From a bare reference to the aforesaid conditions, it is apparent and explicit that even if the public auction has been completed and the respondent was the highest bidder no right had accrued to him till the confirmation letter has been issued to him. The conditions of the auction by the Board of Trustee was a must and the Trust reserved the right to itself to reject the highest or any bid. This Court has examined the right of the highest bidder at public auctions in the case of Trilochan Mishra, etc. Vs. State of Orissa and Others, . State of Orissa and Others Vs. Harinarayan Jaiswal and Others, . Union of India (UOI) and Others Vs. Bhim Sen Walaiti Ram, and State of Uttar Pradesh and Others Vs. Vijay Bahadur Singh and Others, . It has been repeatedly pointed out that State or the authority which can be held to be State within the meaning of Article 12 of the Constitution is not bound to accept the highest tender or bid. The acceptance of the highest bid is subject to the conditions of holding the public auction and the right of the highest bidder has to be examined in context with the different conditions under which such auction has been held....

53. However, the decision, aforesaid, or for that matter sub clause 37.1 and sub clause 38.1 of INB and sub clause 6.1.4 and sub clause 6.1.5 could no way come in aid of the respondents to further their cause on this count. It is true that the respondent No. 1 to 4, being the owners, retain the right not to settle the

contract with the lowest bidder. In appropriate cases, the owners may settle the contract to a bidder despite he not being the lowest bidder.

54. But then, whenever the owner intends to deprive the lowest bidder from getting the award, he must have founded his decision on reason, logic and law. If his decision is found embroidered with arbitrariness, capriciousness and whimsicality, then same is liable to be set aside, since such a decision, apart from violating the principle of natural justice, also offends the rights, guaranteed under the Constitution of India.

55. Coming to our case, I have found that the respondents refused to issue the notice of acceptance in favor of petitioners despite they are found to be the lowest bidder but they did so, not on valid ground but on the ground which is already found to be much without substance. Our foregoing discussion has made it more than clear and no further repetition on this count is therefore, necessary. Suffice it to say that the respondents, having denied the petitioners the letter of acceptance despite they being the lowest bidders, committed illegality of enormous proportion.

56. One more thing that deserves discussion here is that one of the main reasons of the State respondents in disregarding the claim of the petitioners in respect of work in package No. 2 was that petitioners have quoted abnormally low price in respect of erection work and for that purpose they looked at the price, quoted by the parties, component wise. I have also found that the petitioners quoted Rs. 16,000/- per KM per Unit in respect of erection work.

57. But then, the rate, quoted by the respondent No. 5, for such work was even lower than the rate quoted by the petitioners since the respondent No. 5 claims Rs. 14,000/- per KM per Unit for the same work. Very surprisingly, in spite of the rate, quoted by the respondent No. 5 in respect of erection work being lower than the rate, quoted by the petitioners, his offer was accepted. This is strange to say the least.

58. Such a conduct on the part of the State respondents only firmly demonstrates that they adopted two different standards in measuring the claims of the bidders before them. Unfortunately, such revelation becomes emphatic testimony to the fact that the petitioners were treated quite unequally and unfairly in matter of assessment of its bid by the respondent authorities. On this count as well, the action of State respondents needs to be condemned.

Point No. (v) Petitioners have contended that despite they being the lowest bidder in respect of work in package No. 2 and that despite there being no valid reason to do so, the firm of the petitioners was not favored with award in question and instead they issued letter of acceptance in favor of respondent No. 5 although he totally fails to compete with the offer, made by the petitioners vis-à-vis the work, offered through the NIT in question. These are clear testimonies of notice of acceptance being issued with a malafide intention in favor of the respondent No. 5. The firm of petitioners, therefore, urges this Court

to set aside the notice of acceptance dated 19.09.2011 issued in favor of the respondent No. 5.

59. This contention was opposed to by the respondents, who contend that the materials on record never ever disclose that letter of acceptance was issued in favor of the respondent No. 5 on malafide consideration. Quite contrary to it, respondent No. 5 was favored since its bid was found to be the most responsive and since his bid, amongst the lot, was also found to be most viable and workable as well. As such, the selecting of the respondent No. 5 for the purpose, aforesaid, by no stretch of imagination can be said to have been actuated by some malafide considerations.

60. It has further been contended that a mere utterance that the respondent No. 5 was favored with work in the package No. 2 of the NIT on malafide in consideration was not enough. There must be clear, concrete, real and positive materials on record to show with certainty that allotment of certain work was done on malafide considerations.

61. In this connection, my attention has been drawn to the decision of the Hon"ble Supreme Court in the case of M.V. Thimmaiah and Others Vs. Union Public Service Commission and Others, . In the aforesaid decision, Hon"ble Supreme Court held as follows:--

The allegation of malafide is very easy to be leveled and it is very difficult to substantiate it, specifically in the matter of selection or whoever is involved in the decision-making process. People are prone to make such allegation but the Courts owe a duty to scrutinize the allegation meticulously because the person who is making the allegation of animus does sometimes bonafidely or sometimes malafidely due to his non-selection. He has a vested interest. Therefore, unless the allegations are substantiated beyond doubt, till that time the Court cannot draw its conclusion.

62. I have already found that firm of petitioners was not favor with the letter of acceptance in respect of work at package No. 2 though such a firm was found to be the lowest bidder. On the other hand, notice of acceptance in respect of work in package No. 2 has been issued in favor of respondent No. 5 although he was not the lowest bidder in respect of such work.

62A. What is more, the respondent No. 5 was favored with work although the price quoted by him is found to be riddled with several infirmities of enormous nature. But these were all astonishingly ignored by the State respondents. Unfortunately, all those conduct on the part of State respondents speak loud and clear that the State respondents in issuing the letter of acceptance impugned acted with malafide considerations.

Point No. (vi) The firm of the petitioners all along maintains that since the bid of the firm aforesaid was rejected not on expressed terms and conditions, made in the NIT but on some considerations which were never made known to the

prospective bidders, one cannot but conclude that the respondent No. 5 was favored with the letter of acceptance in respect of work in package No. 2 on the basis of some hidden facts which is hostile to the idea of openness, fair and transparency in public dealings.

63. In that connection, my attention has been drawn to the decision of this Court in the case of Educomp Solutions Ltd. & Ors. (supra). In the decision aforesaid, this Court found that criteria for assessment/evaluation of bids were not made known to the bidders and contract was awarded ignoring the lowest bidders.

64. On the above facts, it was held even if selection criteria was not notified at the beginning, same should be made known to the bidders before submission of bids made by them. If that was not done, even before the submission of the bids by the prospective bidders, then subsequently, the assessment of bids cannot be made on the basis of conditions, not made known to the bidders till the time of submitting of their bids.

65. Reliance is placed also on the decision of the Hon''ble Supreme Court, in the case of Dutta Associates Pvt. Ltd. (supra). Hon''ble Supreme Court in the case of Dutta Associates Pvt. Ltd. (supra) held that whatever procedure Government proposes to follow in accepting the tender, it must be clearly stated in the tender notice. The consideration of the tenders, received and the procedure to be followed in matter of acceptance of a tender should be transparent, fair and open.

66. When the tender notice did not specify the viability range nor did it say that only the tenderers coming within the viability range will be considered subsequently, the owner cannot put such conditionality to accept or reject the bidders who were not aware of such a specification, same not being specified in the NIT.

67. But the respondents, particularly respondent No. 5, tries to repel such argument contending that the base price of respective components which constituted the work in the draft NIT are not to be notified since it is a common practice that all reserved price components are never notified in any tender process because in making the bids, the bidden are expected to make bid keeping in mind the prevailing market rate and as such, only lump sum price is notified in the tender notice. As a matter of fact, the competition always lays in the break up price, rendered, component wise. Therefore, no offence can be taken for not notifying the base price of the respective components of work in the draft NIT.

68. In that connection, the learned counsel for the respondents has referred me to the decisions of Hon''ble Supreme Court in the case of Haryana State Agriculture Marketing Board (supra). Hon''ble Supreme Court in the case of Haryana State Agriculture Marketing Board (supra) held as follows:--

...That apart we do not find anything unfair in not disclosing the reserve price. It is common knowledge that when reserve price is disclosed the bidders often form

cartels and bid at or around the disclosed price, though the market rate is much higher. We therefore do not agree with the High Court that the appellants had acted in an unfair manner in not disclosing the reserve price at the time of inviting tenders or even at the time of holding the auction.

69. Here, it is worth noting that the bid, made by the firm of the petitioners in respect of work in the package No. 2 was rejected also on the ground that his rates, component wise, particularly the rates, he quoted, in respect of erection work was found far too below the estimated cost I have already noticed that there was no mention anywhere in the NIT or other related documents that the prospective bidders were to quote their rates component wise as well.

70. Instead what the State respondents had done and that too quite prominently was that they required the prospective bidders to quote lump sum price against each of the packages, so mentioned in the NIT. When the NIT or other related tender papers do not require the prospective bidders to quote rates in respect of work in package No. 2, component wise nor was there any forewarning that the prices, quoted by the bidders, would be compared, component wise, the State respondents cannot subsequently be allowed to make comparison of the bids, component wise.

71. Therefore, the arguments that State respondents were not required to state the base prices against the each of the items which constitute the work in package No. 2 and the argument that the prospective bidders need to understand that they were to quote bids, component wise, keeping in mind that the comparison of their bids would actually be made on the basis of rates, quoted component wise, are found to be wholly mismatched with the requirements, made in the NIT and other related documents.

72. In the teeth of above revelations, there cannot be any escape from the conclusion that the State respondents by making comparison of the bids made by the bidders, component wise and also by rejecting the claim of the petitioners on the basis of such comparison despite there being no such condition in the NIT and other related documents had resorted to some hidden conditions in issuing letter of acceptance in favor of the respondent No. 5 ignoring the rightful claim, made by petitioner.

Point No. (vii) The firm of the petitioners also finds fault with the bid, made by the respondent No. 5 in so far work in package No. 2 is concerned. It has been stated that under the terms and conditions of the contract, bidders are to put entry tax, VAT applicable for bringing out goods to the price, quoted by them. But the respondent No. 5 failed to include those taxes in his bid which not only makes his bid in respect of erection work lower than the bid, made by petitioners but it also makes his entire bid illegal. This important lapse of the respondent No. 5 was also connived at by the State respondents while issuing notice of acceptance in favor of the former. The firm of the petitioners, therefore, urges this Court to set aside the notice of acceptance, issued in favor of the respondent

No. 5 on this count alone.

73. I have perused the record, particularly the counter affidavit filed by the State respondents but I have not seen any statement refuting the above contentions advanced from the side of petitioners in his affidavit-in-reply in Para 5. Such a failure requires me to conclude that the respondent No. 5 has quoted price in respect of work in package No. 2 in violation of the directions, rendered in the NIT and other related documents. In my considered view, this is another reason for which the notice of acceptance, dated 19.09.2011, needs to be set aside and quashed.

Point No. (viii) The State respondents as well as respondent No. 5 have submitted that the power of judicial review needs to be exercised only in exceptional cases where there is palpable injustice being caused by the State authorities. This is because of the fact that a writ Court exercising power, conferred on it by Article 226 of the Constitution of India, scrutinizes, not the decision of a particular authority but the decision making process of such authority.

74. Further, the writ Court exercising its power never ever acts as appellate authority. Being so, power which is available to a Court of appeal cannot be invoked by a writ Court in adjudicating a controversy exercising the power, conferred on it by Article 226 of the Constitution of India. To put it differently, power of a writ Court despite being original in nature, is circumscribed by certain factors of profound importance. Such power of judicial review gets constrained more and more again in cases where there is a commercial contract involving State.

75. In that connection, my attention has been drawn to the decision of the Hon"ble Supreme Court in the case of Tata Cellular (supra), wherein Hon"ble Supreme Court held as follows:--

70. It cannot be denied that the principles of judicial review would apply to the contractual powers by the Government bodies in order to prevent arbitrariness or favouritism. However it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

76. The same principle has been reiterated in the case of Siemons Public Communication Pvt. Ltd. (supra) Wherein Hon"ble Supreme Court held as follows:--

...when the power of; Judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders or awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bonafide and is in public interest Court will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.

77. The above principles have been quoted with approval in many other subsequent decisions. According to the learned counsel for the State respondents, the present proceeding involving a commercial contract in which State is a party, this Court should not invoke its jurisdiction under Article 226 of the Constitution of India unless it is shown that a serious miscarriage of justice has caused due to the conduct on the part of the State respondents. But, here, such a case could not be made out by petitioners and therefore, it requires this Court to dismiss the writ proceeding on this Court alone- argues learned counsel for the State respondents.

78. I have carefully considered the above submissions in the light of the materials on record. Sadly, our foregoing discussion very emphatically shows that the State respondents in issuing letter of acceptance in favor of respondent No. 5 ignoring the bid made by firm of the petitioner, and that too without any valid reason, has denied its right guaranteed under Article 14 and 16 of the Constitution of India which caused enormous injustice to the petitioners. Our foregoing discussion has made it more than clear and same needs no further reiteration here.

79. Suffice it to say that such conducts on the part of State respondents are also prolific testimony to the fact that in ignoring the rightful claim of the petitioners without there being any rhyme and reason, the State respondents have acted whimsically, arbitrarily and in violation of principles of equality incorporated in the Constitution of India as well as acted in violation of principles of natural justice. Therefore, the decisions referred to above or for that matter the principles laid down therein no way further the case of respondents herein.

80. In view of what I have discussed herein before and what have emerged therefrom, I am of the opinion that the State respondents in issuing notice of acceptance in favor of the respondent No. 5 in respect of work in package No. 2 has committed huge illegality and it also demonstrates arbitrariness and in doing so, it gives a clear go by to the principles that public auction should be conducted with all openness and transparency they deserved. Therefore, I am constrained to quash and set aside the impugned acceptance letter with a further direction to complete the entire process of issuance of letter of acceptance in favour of best bidder as indicated in our foregoing discussion within a period of (20) twenty days from the date of receipt of a certified copy of this judgment.