
(2008) 03 GAU CK 0040
In the Gauhati High Court

Shree Pacetronix Ltd. and Another

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 04-03-2008

Acts Referred:

COMPANIES ACT, 1956 — Section 4
Constitution of India, 1950 — Article 12, 226, 32

Citation : (2010) 159 CompCas 386 : (2010) 3 GLR 65 : (2008) 2 GLT 640

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—Can, in India, a subsidiary of a subsidiary of a holding company be treated as the subsidiary of the holding company even if the holding company is not registered in India and functions, in India, through its subsidiary, which is not registered, in India, as a company under the Companies Act, 1956, but which, in turn, functions through its subsidiary, which is registered, in India, as a company under the Companies Act, 1956? When a subsidiary is a wholly owned subsidiary of the holding company, can the law ever treat the activities, acts or omissions of such a subsidiary as the activities, acts or omissions of its holding company? These are the two questions of paramount importance, which this writ petition has raised.

2. This writ petition is unusual. Unusual, because, in the present case, the writ petitioners, instead of attacking the respondents, are themselves under attack, for, the writ petitioners are accused by the respondents to have suppressed the truth, made incorrect, false and misleading statements, in their writ petition, in order to persuade the High Court to restrain, in exercise of its powers under Article 226 of the Constitution of India, the State respondents from receiving, pursuant to a tender process, a model of pacemaker, which was, in public interest, selected consciously by the State respondents for the common good of cardiac patients of the three medical colleges, in Assam, following a decision-

making process, which was, otherwise, completely fair, entirely transparent and wholly legal.

3. Before I describe as to what the respective cases of the parties to this writ petition are, some material facts/which are not in dispute, maybe noted. With the object of providing to some, if not all, cardiac patients "Permanent Pacing System", commonly known as "pacemaker", within the financial year 2007-2008, for three medical colleges of Assam, the Director of Health Services, Government of Assam, published, on 03.05.2007, a Notice Inviting Tender (in short, "NIT"), whereby sealed tenders, under two bids system, namely, "technical bid" and "price bid", for supply of about 400 "Permanent Pacing System" from the manufacturers thereof. While the last date and time of receipt of the tender was 28.05.2007 at 2.00 pm, the date and time of opening of the bids was 28.05.2007 at 3.00 pm. The NIT stipulated opening of the bids in presence of the bidders' representatives, who ought to have had the authorisation to negotiate price, terms, conditions, etc. Six tenders were altogether received including the ones, which were submitted by the petitioner No. 1 and the respondent No. 4. In course of time, respondent No. 4 stood selected for award of the contract. It is the selection of respondent No. 4, which stands challenged in this writ petition.

4. This writ petition, as succinctly indicated above, receives resistance, at its very threshold, from the respondents on the ground that the writ petition suffers from suppression of material facts and is largely based on incorrect, false and misleading statements and that it is on the strength of such incorrect, false and misleading statements that the writ petitioners have procured interim direction(s) from this Court. It is also alleged that after the writ petitioners were found to have obtained interim order(s) by misleading this Court, the petitioners have tried to save themselves by projecting a case, which is substantially different from what the case, originally, presented before this Court was.

5. In order to correctly appreciate as to why the petitioner company is claimed to have changed and improved its case from what it had, originally, presented to this Court, it is necessary to take note of the petitioner company's case as, originally, presented and the manner in which the petitioner company is shown to have developed its case. The case with which the writ petitioners came to this Court may, in a nut shell, be set out as under:

In terms of the NIT, the tender papers were to be opened at 3.00 pm on 28-05-/2007 and accordingly, the petitioner company's authorized representative, namely, Shri Indranil Gupta, was present, along with the representatives of other tenderers, in the office of the Directorate of Health Services, Govt. of Assam, to attend to the opening of the tenders on behalf of the petitioner company. Though the said Indranil Gupta was present as aforesaid at the scheduled time of opening of the tenders, the authority concerned merely informed the petitioner company's said representative that the authorities were not in a position to open the tender papers on 28-05-2007. For their inability to

open the tender papers, no reason was assigned; rather, the petitioner company's said representative was told by the authorities concerned that the "probable date" for opening of the tenders would be intimated to the tenderers subsequently. Though, on 28-05-2007, as indicated hereinbefore, the authorities concerned had told the petitioner company's representative that the date of opening of the tenders would be notified subsequently, no intimation whatsoever was received by the petitioner company with regard to the out-come of the tender process. However, on subsequent inquiry made from the office of the Directorate of Health Services, Assam, the petitioner company could come to learn that in the absence of the representatives of the other tenderers, but in the presence of the representative of the respondent No. 4, the tender papers, in respect of the technical bids, were opened on 02.06.2007, and the price bids were opened on 06.07.2007.

6. Though the comparative statement, prepared by the authorities concerned, clearly reflected that the petitioner company's offered price was lowest among the four tenderers, who had been found eligible, it is the respondent No. 4, who has been selected as the successful bidder, and the endeavour is being made by the authorities concerned to place the supply order with the respondent No. 4. Having come to know all these facts, the petitioner company addressed a letter, dated 28.07.2007, to the Director of Health Services, Assam, bringing it to the notice of the latter that the petitioner company was yet to receive information as regards the outcome of the tender process and that they had come to know from their local representative that the products of the petitioner company were not being considered despite the fact that the offer made by the petitioner company was the lowest, its products satisfy the quality specifications and are being used, for the last more than 15 years, not only in India, but are also being exported to European and Asian countries; whereas a foreign company's product had been considered, though the said product had failed to meet the specifications mentioned in the bidding documents. On receipt of the petitioner company's letter, dated 28.07.2007, the Director of Health Services, Assam, issued a letter, dated 31.07.2007, addressed to the petitioner company and the other two eligible bidders informing them that the tender documents, submitted by the said three tenderers, were not in order and, hence, they were requested to collect the Earnest Money Deposit (EMD) from the office of the Directorate of Health Services, Assam. On receipt of the letter, dated 31.07.2007, the petitioner company made further inquiry from the office of the respondent No. 2, namely, Director of Health Services, Assam, and came to learn that the respondents concerned were preparing to give the supply order to the respondent No. 4 by going beyond the specifications mentioned in the NIT. The specifications, sought for by the tender documents, were for pacemakers having single chamber with multi programmable facilities, commonly known as VVI (Ventricular Inhibited Mode). The petitioner company had accordingly submitted its bid in respect of pacemakers of VVI mode; but surprisingly enough, the respondent authorities have deviated from the specifications and sought to place order for supply of

Regency SR+2400 L having Auto Capture & Rate Response Mode at a price of Rs. 49,000/- each. This apart, the NIT stipulated submission of tenders by only manufacturers of pacemakers and none else, but respondent No. 4, though not manufacturer of pacemakers, has been selected for allotment of the contract. Though the NIT was floated inviting tenders in respect of pacemakers having VVI mode, the pacemakers, eventually, selected by the State respondents is of a different mode, namely, VVI(r). Thus, there is material deviation from the stipulated specifications in selecting the product. The product, which had been offered by the petitioner company, was not considered at all by the Technical Committee and what the Technical Committee had examined was a model, which the petitioner company had never offered.

7. Thus, when the writ petitioners came to this Court, challenge to the selection of the respondent No. 4, was based, broadly speaking, on the following five grounds:

(i) The tender papers were not opened in presence of the representative of the petitioner company.

(ii) The selection of the respondent No. 4, as the awardee of the contract, cannot be sustained inasmuch as the respondent No. 4 is not a "manufacturer" of any permanent pacing system, though Clause (ii) of the NIT specifically stipulated submission of tenders by only the "manufactures" of Permanent Pacing System and none else.

(iii) There is major deviation in the specifications, stipulated in the NTT, in respect of the selected "Permanent Pacing System" inasmuch the mode of the "Permanent Pacing Systems" in respect whereof the tenders were invited was VVI, whereas the mode of the selected "Permanent Pacing System" is VVI (r).

(iv) The product, which had been offered by the petitioner company, was not taken into consideration by the Technical Committee and what the Technical Committee had examined was a model, which had not been offered by the petitioner company.

(v) The price in respect of the "Permanent Pacing System", which the petitioner company had offered, was much below the price at which the respondent No. 4's offered model has been selected by the State respondents.

8. On the basis of the above pleaded facts, the petitioners prayed for, inter alia, (i) issuance of appropriate Writ(s) declaring that the award of the contract, sought to be made in favour of respondent No. 4, is arbitrary, illegal and unreasonable, (ii) setting aside and quashing the impugned order, dated 24.07.2007, issued by the Director of Health Services, Assam, forwarding the approved list of Permanent Pacing System so as to enable the respondent No. 4 to sign the requisite agreement for supply of the said item, (iii) setting aside and quashing the award of the supply order made in favour of respondent No. 4 and (iv) directing the respondent authorities to issue order(s) awarding the contract

to the lowest eligible bidder, i.e., the petitioner company.

9. By making this writ application, the petitioners also sought for interim direction(s) suspending the operation of the impugned order, dated 24.07.2007, whereby the approved list had been forwarded to the various medical colleges of Assam for doing the needful so as to obtain supply of the pacemakers from respondent No. 4.

10. While entertaining this writ petition, the High Court passed an order, on 20.08.2007, directing the official respondents/authorities concerned not to permit supply of the appliances, in question, by the respondent No. 4 without leave of the Court until next date, i.e. 29.08.2007. This interim direction continued until the time the Court considered the question of continuance of the said interim directions in the light of the affidavits filed by the respondents concerned. Upon consideration of the respective cases of the parties concerned, the Court, by its order, dated 17.09.2007, modified the interim order and permitted thereby placement of supply order with the respondent No. 4 to the extent of 100 pacemakers. While so modifying the interim order, the Court, in its order, dated 17.09.2007, observed, inter alia, as under.

The contract, as already noticed, is for supply of pacemakers. If the petitioners contentions are to be accepted in toto, the petitioner would be entitled to the grant of the contract in which eventuality he would have made some profits from the supply of the pacemakers. Such profits are capable of being computed in terms of money.

Mr. Saikia, learned Standing Counsel, Health, has made a statement that even if the interim order passed by the court is suitably modified and supply of 100 numbers of pacemakers are permitted to be executed In terms of the grant made in favour of the respondent No. 4, the needs of the three Medical Colleges for a period of about three months would be taken care of.

In view or the identification of the grievances of the petitioner and the eventual relief being capable of being computed in terms of money, I am of the view that the earlier interim order of this Court should be modified to permit placement of supply orders on the respondent No. 4 to the extent of 100 pacemakers. In doing so, the Court has taken further note of the fact, as available from the records, that the pacemakers, offered by the respondent No. 4, has been cleared by as many as four duly constituted Committees/Boards including a Technical Committee, which consisted of three eminent Cardiologists of the State.

It is also made clear that in the event the writ petition is answered in favour of the petitioner, the monetary benefit that the petitioner would have received, if the 100 pacemakers covered by the present interim order were to be supplied by him, may form part of the final relief(s) that may be granted by the Court.

11. From the observations made by the Court in the order, dated 17.09.2007, aforementioned, it is clear that the Court modified the interim order, dated

20.08.2007, aforementioned, because of the fact that the Court took the view that the loss, if any, to be incurred by the petitioner company, can be computed in terms of money.

12. Let me, now, deal with the writ petitioners' averments, made in the writ petition, in paragraph 7 and 8, which allege thus: The tender papers were to be opened at 3.00 p.m. on 28.05.2007, the petitioner company's authorised representative, Indranil Gupta, was, along with the authorized representatives of the other tenderers, present in the office of the Director of Health Services, Assam, on 28.05.2007 at 3.00 pm; but the authorities concerned informed the petitioner company's representative that they were not in a position to open the tender papers on 28.05.2007. The respondents/authorities concerned, however, assigned no reason as to why they were not in a position to open the tender papers; rather, the respondents/authorities concerned told the petitioner company's said representative that the "probable date" for opening of the tender papers would be intimated to the tenderers subsequently. No intimation was, however, ever received by the petitioner company as regards the outcome of the tender process and it was only upon enquiry made, later on, by the petitioner company from the office of the Director of Health Services, Assam, that they came to learn that the tender papers for the technical bid were opened on 02.06.2007 and the tender papers for the price bid were opened on 06.06.2007, but these bids had been opened in the absence of the representatives of all the other tenderers except the respondent No. 4.

13. In the counter-affidavit, which was " filed, on 07.09.2007, by respondent No. 2, namely, Director of Health Services, Assam, this respondent, while reacting to the petitioner company's above accusations, asserted that all the tenderers, including their representatives, were informed, vide notice, dated 28.05.2007, about the extension of the last date and time of receipt of the tenders up to 29.05.2007 due to a Bandh call on 28.05.2007 and, in consequence of this notice, the petitioner company's representative, Indranil Gupta, was accordingly present on the following day, i.e., on 29.05.2007, at the time of opening of the tender papers. With the help of their counter, the respondent No. 2, thus, challenged the veracity of the very foundation of the petitioner company's case that no reason had been assigned by the authorities for not opening the tender papers on 28.05.2007 and since no reason had been assigned for not opening the tender papers on 28.05.2007, the petitioner company remained ignorant of the reason as to why the tenders had not been opened on 28.05.2007 nor could they learn, on 28.05.2007, as to when the tender papers would be opened. These assertions of the respondent No. 2 further challenged the correctness of the petitioner company's case that all the tenderers were merely told, on 28.05.2007, that they would be informed about the "probable date" of opening of the tenders, but contrary to such assurance given by the State respondents, no information was ever given to anyone and the petitioner company remained completely in the dark as regards the opening of the said tender papers. This apart, in support of his assertion that the last date and time of receipt of the

tenders was extended up to 29.05.2007 due to a Bandh call on 28.05.2007, respondent No. 2 annexed a copy of the Notice, dated 28.05.2007 (Annexure A1), which is reproduced hereinbelow:

No. HSPB/5/Pacemaker/07/664 Dated Guwahati the 28.05.2007.

Notice

Last date & time of receipt of Tender Vide NIT No. HSPB/5/Pacemaker/07/480 dated 03.05.2007 is hereby extended up to on 29-05-2007 due to Kamrup Bandh on 28-05-2007.

Other terms and conditions will remain unchanged. Sd-Jt. Director of Health Services, Assam Hengerabari; Guwahati - 36.

Memo No. HSPB/5/Pacemaker/07/665-66 dated Guwahati the 28-05-2007.

Copy to:

1. The Secretary to the Govt. of Assam, Health & F. W. Deptt., Dispur, Guwahati-6.
2. Notice Board of this Directorate.

Sd/- Jt. Director of Health Services, Assam Hengerabari; Guwahati - 36.

14. In short, thus, with regard to the petitioner company's averments, made in their writ petition, that they had not known as to why the tender papers had not been opened on 28.05.2007, they had not been informed as to when the tender papers would be opened and that the tender papers had been opened behind the back of the petitioner company, the respondent No. 2 asserted that the tenderers had come to know, in consequence of the notice, dated 28.05.2007, aforementioned, that the date and time of receipt of the tender papers had been extended up to 29.05.2007 due to a Bandh call and that the other terms and conditions of the tender notice would remain unchanged and in consequence of such a notice, when the tender papers were opened on 29.05.2007, the petitioner company's representative, namely, Indranil Gupta, was very much present.

15. Confronted with such a bold denial of the petitioners' case by the respondent No. 2, as mentioned hereinabove, the petitioner company retraced their steps, modified their assertions and came up with a new story, which can be best depicted in their own words, for, they, at para 6 of their affidavit-in-reply, asserted as follows:

6. That, the statements made in paragraph 7 of the Affidavit are not wholly correct and as such, the same are denied by the deponent. The tender in the instant case is a two bid system and as such, the tenderers were required to submit Technical Bid and Price Bid in two separate and different sealed envelopes. Thereafter, those two sealed envelopes were to be put inside a single sealed envelope subscribing "Tender for supply of Permanent Pacing System for

D.H.S Assam (Tender No. HSPB/5/Pacemaker/2007/480) due at 14 Hrs on 28.05.07 addressed to the Directorate of Health Services, Assam". Thereafter, the said sealed single envelope containing the Technical Bid and Price Bid in two different sealed envelopes was required to be submitted in a sealed tender box provided by the Directorate of Health Services (hereinafter referred to as DHS) in his office. It may be pointed out that the tender specifically mentioned that 28.05.07 up to 2.00 PM is the last date and time of receipt of the tender. However due to an "Assam Bandh" on 28.05.07 though many tenderers were ready to submit their tenders on 28.05.07. However, a notice was found to be affixed on the Notice Board of the office of the DHS informing that the last date and time of receipt of the tender papers are extended up to 29.05.07 but the said notice is absolutely silent about the date and time of opening of the tender. The deponent further states that thereafter the Tender Box was opened and the single sealed envelopes containing both the Technical Bid and Price Bid belonging to different tenderers were opened in presence of the tenderers/representatives of the tenderers who participated in the tender on 29.05.2007 itself. The present deponent was present on 29.05.2007 at the time of opening the Tender Box and the single sealed envelopes containing Technical Bids and, Price Bids. However, the two sealed single envelopes containing Technical Bids and Price Bids of the tenderers were not opened. They were kept in the Office of the DHS. On completion of the aforesaid exercise, the tenderers were informed on 29.05.2007, that they would be informed about the probable time and date of opening of the tenders namely Technical Bids and Price Bids on a subsequent date. But the Petitioner-company was never informed about the time and date of opening the Technical Bids and Price Bids. It may be pertinent to note that the notice dated 29.05.2007 affixed on the aforesaid Notice Board (Annexure A-1 to the Affidavit) also did not mention specifically about the time and date of opening the tenders (Technical Bids and Price Bids). It is further stated that the tender papers could not have been opened on 29.05.2007 as contended by the Respondent No. 2 In his Affidavit. The tender papers consist of Technical Bid and Price Bid. The Technical Bids are required to be scrutinized by the Technical Committee. Therefore, a Technical Committee for scrutinizing the Technical Bids was constituted by the DHS by letter-dated 04.06.2007 (vide Annexure B/Page 16 to the Affidavit). By the said letter, the members of the Technical Committee were requested to be present to examine the Technical Bids in the meeting to be held at 11.00 AM on 09.06.2007. Similarly, the Bid Evaluation Committee evaluated the Bids on 07.07.2007 which can only be done on receipt of the Scrutiny Reports of the Technical Bids made by the Technical Committee, which was done on 09.06.2007. Therefore, the tender papers (Technical Bid and Price Bids) could not have been opened on 29.05.2007 as contended by the Respondent No. 2 in his Affidavit. In that view of the matter, the deponent reiterates and reaffirms that the tender papers including the Technical Bid and Price Bid, were not opened in presence of the Petitioner-company or his representative.

16. Apart from the fact that respondent No. 4 folly supported, in their counter affidavit, dated 17.09.2007, the assertions made by the respondent No. 2 to the effect that on 29.05.2007, six tenders were opened in the presence of the bidders/their representatives to ensure whether the technical and price bids were in separate envelopes, the earnest money and Court-fees stood enclosed or not and whether other statutory documents were in order or not. In its counter, respondent No. 4 further asserted that the presence of the representatives of the respective bidders can be verified from the attendance register, in question, and that at the time of opening of the tender papers, the petitioner company's representative, namely, Indranil Gupta, was present and, in fact, he had put his signature on the attendance register along with the representatives of the other tenderers including the respondent No. 4. The respondent No. 4 also pleaded that in the light of the facts, so averred, the petitioner company's averments, as reflected from their writ petition, were nothing, but false averments and that their such conduct disqualifies them from getting any relief under the writ jurisdiction, which is equitable in nature, and that on this ground alone, the writ petition is liable to be dismissed.

17. Besides what have been indicated above; a counter affidavit was filed by respondent No. 2 in response to the affidavit-in-re-ply, dated 17.09.2007, of the petitioner company. Paragraph 4 of this counter affidavit is of great relevance and is, therefore, reproduced hereinbelow:

4. That as regards to the statements made in paragraph 6 of the affidavit-in-reply, the deponent in most categorical terms begs to deny the contention of the writ petitioners that Technical Bid was not opened on 29.05.2007. In fact, all the envelopes containing the Technical Bids of all the tenderers had been opened on 29.05.2007 in presence of the tenderers and/or their authorized representatives. It is correct that the tender in the instant case is a two bid system and the tenderers were required to submit Technical Bid and Price Bid in two separate sealed envelopes. The deponent respectfully states that M/s Pacetronix, the writ petitioner herein, had enclosed two envelopes with the title:

Technical and Commercial Bid, and (1) Price Bid and both the envelopes had been enclosed in a larger single envelope with the heading "supply of Permanent Pacing System". On 29.5.2007, in presence of their representative, Sri Indranil Gupta, the larger envelope containing both the above-mentioned envelopes and the envelope with the heading "Technical and Commercial Bid" were opened. Similarly, in respect of other tenderers also the Technical Bids were opened. After opening the Technical Bid envelopes of all the tenderers, all relevant documents including the Earnest Money Deposit were checked and thereafter, the officials of the department had duly entered necessary remarks in the attendance register. Furthermore, the said officials also put their signatures on all the documents found in the Technical Bid envelopes on that day i.e. 29.05.2007. The whole exercise was carried in front of the tenderers and/or their authorized representatives including that of the writ petitioner company and the said

tenderers or their authorized representatives had duly signed the attendance register to mark their presence. It is pertinent to mention that in the "Technical and Commercial Bid" envelope of the writ petitioner which was opened on 29.05.2007 in presence of the representatives of the petitioner company, the original literature/specifications of the product of Pacetronix along with original tender booklet duly filled in and signed, Demand Draft No. 022475 dated 25.04.2007 for Rs. 33,36,000/- as Earnest Money, quotation dated 25.5.2007 in duplicate, attested copy of valid manufacturing license, annual turnover statement for last three years with Balance Sheet, Sales Tax Clearance Certificate, photo-copy of Board Resolution for signing authority, life time warranty certificate from parent company, past credential certificate, Income Tax Clearance Certificate, C.E. Certificate and ISO 9001 Certificate were found to be enclosed and after checking, all these documents were duly signed by the officials who opened the tender in presence of the representative of the petitioner company. It is again reiterated that the representatives of the petitioner company and other tenderers had put their signature in the register maintained for the purpose. On 7.06.2007 as stated in the affidavit in opposition of the deponent, the tender papers of six tenderers including those of the writ petitioner and the respondent No. 4 were scrutinized by the Scrutiny Committee constituted by the Government of Assam and the Scrutiny Committee rejected three tender papers and the remaining three tenders, which includes the petitioner's tender were placed before the Technical Committee on 09.06.2007. The Technical Committee on considering the technical aspect of the equipments offered by the petitioner, found the same to be far below the norms asked for and hence rejected their tender. The Technical Committee recommended the items offered by respondent No. 4 and M/s Medtronik India Pvt. Ltd. Later on the Bid Evaluation Committee constituted by the Government of Assam had taken up the report of the Technical Committee and the Scrutiny Committee and opened the Price Bid of respondent No. 4 and M/s Medtronik India Pvt. Ltd. Thereafter, on 17.07.2007, the Purchase Board constituted by the Government of Assam, considering the report of the Technical Committee and Bid Evaluation Committee, accepted the recommendation of the Technical Committee.

Thus, it is once again categorically denied on 29.05.2007 the Technical Bids were not opened in presence of the representatives of the petitioner company and other tenderers. Further it is stated that the representative of the petitioner company Sri Indranil Gupta was present on 29.05.2007 at the time of opening of the tender box and the single sealed envelope containing Technical Bids and Price Bids. Be it reiterated that in presence of Sri Indranil Gupta, the Technical Bids of the writ petitioner was opened. In presence of him and other representatives/tenderers, the Earnest Money Deposit (EMD) and other relevant documents enclosed in the Technical and Commercial Bid envelope were checked and accordingly necessary remark was incorporated in the attendance register on 29.05.2007 which was duly signed by Sri Indranil Gupta on that very day. Thus it is crystal clear that the Technical Bid of Pacetronix was opened in presence of Sri

Indranil Gupta on 29.05.2007. In respect of other sequence of events in the tender process, the deponent begs to refer and rely to the statements made in the affidavit-in-opposition of the deponent herein.

A copy of the covering letter dated 25.5.2007 enclosed in the "Technical & Commercial Bid" Envelope and the two envelopes of the petitioners which were opened on 29.5.2007 are annexed herewith and marked as Annexure A, B and C respectively.

18. From the averments, made in paragraph 4 of the counter filed by the respondent No. 2, what becomes evident is that according to the respondent No. 2, all the tender papers had been opened, on 29.05.2007, in presence of the tenderers and/or their representatives and, in this process, even the petitioner company's envelope, containing technical bid, was opened, on 29.05.2007, itself, in the presence of Indranil Gupta and, upon opening of the envelope of the technical bid, all relevant documents including the documents relating to deposit of earnest money were checked and, thereafter, the officials of the Department had duly entered necessary remarks into the attendance register in the presence of the tenderers and/or their authorized representatives including the representative of the petitioner company and, apart from the fact that the officials had put their signatures, on 29.05.2007, on all the documents submitted in the envelopes, which contained technical bids, even the tenderers and/or their authorized representatives had duly put their signatures on the attendance register in proof of their being witnesses to the exercise so carried out. The respondent No. 2 further asserted, in his affidavit, that inside the envelope of the petitioner company, which contained the "technical bid", a booklet, containing the specifications of the product of the petitioner company, demand draft and earnest money, etc., were found to be enclosed. In support of these assertions, respondent No. 2, apart from enclosing the extracts of the attendance register, produced the attendance register itself at the time of hearing. It was in the face of such materials that the writ petition was taken up for hearing.

19. I have heard Mr. AK Bhattacharjee, learned Senior counsel, for the petitioners, and Mr. D Saikia, learned Standing counsel, Health Department, appearing on behalf of the respondent Nos. 1, 2 and 3. I have also heard Mr. PK Goswami, learned Senior counsel, appearing on behalf of the respondent No. 4.

20. Presenting the case, on behalf of the petitioners and, at the same time, defending them against the accusations made by the respondents, that the writ petition suffers from suppression of material facts, that the writ petitioners have made incorrect and false statements in order to, somehow, project a sustainable case and mislead thereby the Court, Mr. AK Bhattacharyya, learned Senior counsel, appearing on behalf of the petitioners, has contended that the petitioners never made any incorrect or misleading statement in the writ petition and that by subsequent filing of the affidavit-in-reply by the writ petitioners, the case of the writ petitioners have not changed.

21. Explaining his contention that the writ petition does not suffer from suppression from material facts or incorrect or misleading statements, Mr. Bhattacharyya submits that the petitioners still stand by their case that on 28.05.2007, the petitioner company's representative, Sri Indranil Gupta, had not been informed by the authority concerned as to why the tender papers were not being opened on 28.05.2007 and as to when the tender papers would actually be opened. According to Mr. Bhattacharyya, the tender papers were to be opened on 28.05.2007 at 3 pm and as the tender process consisted of two bids system, the tenderers were required to submit "technical bid" and "price bid" in two separate sealed envelopes and, then, these two envelopes were to be put inside a bigger envelope and sealed and, then, the said big envelope was to be put in the tender box, which was provided by the Directorate of Health Services in his office. No specific information, insists Mr. Bhattacharyya, was given, on 28.05.2007, to any of the tenderers as to when the tender papers would be opened, but a notice was found to be fixed on the notice board of the office of the Director of Health Services informing the tenderers that the last date and time of receipt of the tender papers stood extended up to 29.05.2007. However, even this notice, according to Mr. Bhattacharyya, was absolutely silent about the probable date and time of opening of the tenders. Though Mr. Bhattacharyya concedes, at the time of hearing of this writ petition, that the petitioner company's representative, Indranil Gupta, was present, on 29.05.2007, at the time of opening of the tender box and also the said bigger envelope, the learned Counsel, at the same time, contends that though the said bigger envelope was opened on 29.05.2007, the other two sealed envelopes, containing the "technical bid" and the "price bid", were not opened on 29.05.2007 and, on completion of the exercise of opening of the said bigger envelope (inside which were lying the other two separately sealed envelopes containing technical bid and price bid), the tenderers were informed, on 29.05.2007 itself, that they would be informed about the probable date and time of opening of the tender, namely, technical bid and price bid on a subsequent date.

22. The petitioners, therefore, according to Mr. Bhattacharyya, did not make any false statement, when they averred, in their writ petition, that they were told by the authorities concerned that the tenderers would be informed about the "probable date" of opening of the tenders, namely, "technical bid" and "price bid" on a subsequent date. Mr. Bhattacharyya further reiterates that the petitioner company was never informed about the date and time of opening of the technical bid and price bid. The tender papers, particularly, the technical bid, was, submits Mr. Bhattacharyya, not opened on 29.05.2007 and that it has been incorrectly contended by respondent No. 2 that not only the said bigger envelope, but even the envelope, containing the technical bid, was opened on 29.05.2007 itself to verify deposit of earnest money, etc.

23. Repelling the above submissions made on behalf of the writ petitioners, Mr. D Saikia, learned standing counsel for the State respondents, submits that a bare reading of the writ petition and the subsequent reply, which the writ petitioners

have filed following the filing of the affidavit-in-opposition of the State respondents, makes it clear that the petitioners' specific case, initially, was that on 28.05.2007, though the petitioners' representative was present at the office of the Director of Health Services, the authorities concerned did not open the tender papers, on 28.05.2007, at all without assigning any reason therefore and merely told the tenderers that the "probable date" for opening of the tenders would be intimated to the tenderers subsequently. Mr. Saikia further points out that according to the writ petitioner's case, as they had, originally, presented before this Court, the authorities had never informed the tenderers about the date of the opening of the tenders and it was, upon enquiry made by the petitioners from the office of the Director of Health Services, that they could learnt that the tender papers, in respect of the technical bid, had been opened on 02.06.2007 and the tender papers, in respect of price bid, was opened, on 06.07.2007, in absence of the representatives of the tenderers except the respondent No. 4. It can, thus, be seen, contends Mr. Saikia, that the petitioners deliberately made incorrect and false statements, in their writ petition, trying to falsely project as if they had remained ignorant, on 28.05.2007, about the fact that the tender papers would be opened on 29.05.2007 and as if they had remained ignorant that on 29.05.2007, tender papers had been opened. Mr. Saikia further submits that as against the case, so set up by the writ petitioners, they have subsequently, in the face of the confident assertions of the State respondents, resiled from their earlier stand and they have, now, come with a concocted story that only sealed single envelope was opened and nothing else was done on 29.05.2007, whereas the records, which were maintained in the form of a register, in this regard, clearly reveal that not only the said bigger envelope, but also the envelope containing "technical and price bid" opened and the contents thereof were examined, on 29.05.2007 itself, in presence of the tenderers and/or their representatives and it was for this reason that the records reveal that the Tender Opening Committee noted, in the said register, not only about the fact as to whether the Earnest Money had been deposited or not, but also the other defects in submitting the tenders by the bidders, in general. For instance, points out Mr. Saikia, the record reveals that it was specifically put on record, on 29.05.2007 itself, in the presence of the representatives of the tenderers, including Sri Indranil Gupta, that in the case of Advance Cardio Care, Guwahati, and Cannon Devices Pvt. Ltd. Kolkata, who were the bidders, the bid documents were defective inasmuch as in respect of Advance Cardio Care, Guwahati, the ground for rejection of the bid was that one bid in the big envelope and not sealed in the inner envelope and in respect of Cannon Devices Pvt. Ltd. Kolkata, the ground for rejection of the bid was that no paper in the envelope was found.

24. In the circumstances as indicated hereinabove, there can be no escape from the conclusion, contends Mr. Saikia, that the petitioners had not come, with clean hands, to this Court and obtained interim order(s) by misleading the Court. The writ petition may, therefore, be dismissed without entering into the merit thereof.

So contends Mr. Saikia.

25. Appearing on behalf of the respondent No. 4, Mr. PK Goswami, learned Senior counsel, submits that the chronology of events presented by the petitioners to this Court, before and after filing of the affidavit-in-opposition by the State respondents, clearly reveals that the petitioners had suppressed the facts and deliberately made incorrect, false and misleading statements in order to project a case, which was wholly untrue, and a person, who comes to a writ Court, which is essentially a Court of equity, with such a twisted and manipulated case, has no right to seek any relief. In support of this submission, Mr. Goswami places reliance on the famous case of R. v. Kensington ITC reported in (1917) 1 KB 486.

26. In the light of the submissions noted hereinabove, let me, now, determine if the writ petition suffers from suppression of material facts and whether the writ petitioners have made incorrect, false and misleading statements, in their writ petition, in order to project a case, which was not true, and if so, whether the writ petition needs to be heard, on merit, at all.

27. While considering the question as to whether the petitioners had misled the Court by falsely projecting a case of denial of opportunity to them to remain present at the time of the opening of the tender papers, it is extremely important to note that the specific case of the writ petitioners, as pleaded by them at para-7 of their writ petition, was that though their authorized representative, Indranil Gupta, was present on the scheduled date and time of opening of the tender papers, i.e., on 28.05.2007 at 3 pm, in the office of the Director of Health Services, not only Indranil Gupta, but the representatives of the other tenderers were merely informed by the authorities concerned that they (authorities concerned) were not in a position to open the tender papers on 28.05.2007. For not opening the tender papers on 28.05.2007, no reason, according to the writ petitioners' case at para-7, was assigned; rather, the authorities, according to the writ petitioners, told them that "probable date for opening of the tenders would be intimated to the tenderers subsequently". From the case, so pleaded by the writ petitioners at para-7 of their writ petition, three material aspects, which surface are : (i) petitioners' representative was not told as to why the tender papers were not being opened on 28.05.2007; (ii) no date for opening of the tender papers was announced on 28.05.2007; and (iii) the authorities concerned merely told the representatives of the tenderers that the "probable date for opening of the tenders would be intimated to the tenderers subsequently".

28. Thus, not even a hint was given by the writ petitioners, in para-7 of their writ petition, that it was due to bandh call that the tender papers could not be opened or were not opened on 28.05.2007 nor was it even hinted by the writ petitioners, in para-7, that not only Indranil Gupta, but even other representatives of the tenderers had come to know, on 28.05.2007 itself, that it was due to Kamrup Bandh that the tenders had not been opened on 28.05.2007 and that it was due to this "Bandh" that the date of receipt of the tenders had been extended up to

29.05.2007. In fact, the petitioners did not even remotely indicate, at para 7, that the authorities concerned had, indeed, informed them that except extension of the date of receipt of the tender papers, other terms and conditions of the NIT would remain unchanged meaning thereby that as the last date and time of receipt of the tenders, in terms of the notice, stood extended up to 2.00 pm of 29.05.2007, the date and time of opening of the tender papers had become 29.05.2007 at 3.00 pm. It is interesting to note that it was only when the respondent No. 2 annexed a copy of the said notice in his counter affidavit, dated 17.09.2007, that the writ petitioners, for the first time, conceded that a notice was, indeed, found affixed in the Notice Board of the office of Director of Health Services informing the tenderers that due to Kamrup Bandh on 28.05.2007, the last date and time of receipt of the tender papers stood extended up to 29.05.2007. Even in their affidavit-in-reply, submitted on 17.09.2007, the writ petitioners continued with their misrepresentation of facts by claiming that the said notice was absolutely silent about the date and time of the opening of the tenders, though, as already pointed out above, the said notice, dated 28.05.2007, clearly stated that except the change in the date and time of the receipt of the tenders, the other terms and conditions of the NIT would remain the same. That the writ petitioners' representative, Indranil Gupta, understood the notice clearly and knew, even on 28.05.2007, that the tender papers would be opened, on 29.05.2007 at 3 pm, is evident from the fact that in their affidavit-in-reply, dated 17.09.2007, the writ petitioners conceded that on 29.05.2007, the tender box was opened, in presence of Indranil Gupta and representatives of other tenderers. While conceding this much, contrary, of course, to what they had projected earlier before this Court, the writ petitioners' conscience could not compel them to concede to the truth completely. Consequently, the writ petitioners still continued with their concocted and coloured version of what had actually happened, on 29.05.2007, by asserting, in their affidavit-in-reply, filed as late as on 17.09.2007, that on 29.05.2007, only the big envelope (inside which lied the other two separately sealed envelopes containing technical bid and price bid), was opened meaning thereby that according to the writ petitioners, nothing, other than the said big envelope, was opened on 29.05.2007. There is not even an iota of assertion, even in the said affidavit-in-reply by the writ petitioners, that inside the said big envelope, they had given the proof of deposit of Earnest Money and/or other materials. This apart, if the writ petitioners' claim, in para-6 of their affidavit-in-reply, were true, even other tenderers' big envelopes would have contained nothing. Far from this, Annexures A, B and C to the counter affidavit, dated 12.11.2007 of respondent No. 2 clearly shows that Indranil Gupta had signed below the entries made in the register, which incorporated all the details of what had been found on opening of the tender papers on 29.05.2007. The correctness of the contents of the Annexures A, B and C are, it may be pointed out, has not been disputed.

29. In fact, the register, in question, has been produced by the State respondents at the time of hearing of the writ petition and has been examined in

the open Court. The relevant materials, contained in the register, are extracted hereinbelow:

TENDER OPENING FOR PERMANENT PACING SYSTEM VIDE N.I.T. NO. HSPB/5/PACEMAKER/2007/480 DATED 03.05.07.

The following tenders are received on 29.05.2007.

Earnest money deposit 1. India Metronics Rs. 4,80,000/- Pvt. Ltd., Mumbai. (Rupees four lakh eighty thousand) only. 2. Shree Pace Tronic Ltd., Rs. 3,36,000/- Pithanpur, Dist. Dhar. (Rupees three Lakhs thirty-six thousand) only. 3. Standard Pharmaceutical Not manufactur- Ltd., Kolkata. (Not ers (They have opened because they mentioned that have submitted EMD Technical Bid in Rs. 5,60,000/- duplicate and Price bid but not seen. are also in the same envelope, hence it will be opened by the B.E.C.). 4. Advance Cardio Care, Rejected, as Guwahati. one bid in the big envelope and not sealed in the inner envelope. 5. St. Jude Medical India Rs. 4,82,560/- Pvt. Ltd., Kolkata. (Rupees four lakhs eighty-two thousand five hundred and sixty) only. 6. Cannon Devices Pvt. No papers in Ltd., Kolkata. the envelope. Hence rejected. Received the original unopened tender copy.

30. The extracts, placed above, clearly show that on 29.05.2007 itself, the tender papers were opened and having found the bids of some of the tenderers, namely, Advance Cardio Care, Guwahati, and Cannon Devices Pvt. Ltd., Kolkata, not in tune with the requirements of the NIT, entries, in this regard, had been duly made in the said register. It is not the case of the writ petitioners that Indranil Gupta had to put his signature(s) on a blank sheet of paper or when Indranil Gupta had signed, nothing stood mentioned in the register, in question. This shows that Indranil Gupta did sign the register after the entries, which stand extracted above, had already been made in the said register. These entries leave no room for doubt that contrary to what the writ petitioners have been insisting till the hearing of the writ petition, the tender papers were, indeed, opened, on 29.05.2007, in presence of Indranil Gupta and the representatives of other tenderers. In the face of such cogent, precise and clear materials, there can be no escape from the conclusion that the writ petitioners and their authorized representative, Indranil Gupta, have made incorrect, false and misleading statements before this Court and they have thereby committed perjury by knowingly making false statements.

31. Moreover, the materials, submitted by the petitioner company, pursuant to the NIT, show that the petitioner company had submitted its bidding papers/ documents by way of three different envelopes. In one of the envelopes, the petitioner submitted its "price bid". On this envelope are written the words, "Price Bid". This envelope has till date remained sealed. On another envelope, what is written is this, "Technical arid Commercial Bid", and, on the third envelope, which is the biggest envelope, as pointed out by Mr. Bhattacharyya, what stands written is, "Tender For Supply of Permanent Pacing System". It is,

thus, clear that inside the envelope on which stands written the words "Technical and Commercial Bid", not only the papers/documents relating to technical bid were enclosed, but stood also enclosed therein all papers and documents relating to the petitioner company's eligibility, such as, proof of earnest money, statement of annual turnover for the last three years with balance sheets, sales tax clearance certificate, income tax return certificate, etc. All these papers/documents were submitted through a forwarding letter, dated 25.05.2007, addressed to the office of the Director of Health Services, Assam.

32. In such circumstances, when the entries made in the register, in question, are taken into account, there remains no room for doubt that it was on opening of the envelope, which mentioned "Technical and Price Bid", that the entries with regard to earnest money deposit and other deficiencies or defects of the tenderers were made, in the said register, on 29.05.2007.

33. What crystallises from the above discussion is that the writ petitioners, in their writ petition, gave no indication at all that Indranil Gupta had attended the office of the respondent No. 2 on 29.05.2007 and/or that he was present at the time of opening of the tender-box on 29.05.2007. The purpose of not giving any such indication, in the writ petition, was, obviously, to mislead the Court and create an impression as if the writ petitioners had not known, or were not informed about, the date on which the tender-box were to be opened. No wonder, therefore, that the writ petitioners' assertions, in their writ petition, were to the effect that on 28.05.2007, the authorities concerned merely informed them that the tenders would not be opened, but, for not opening the tenders, the authorities assigned no reason whatsoever and that it was only at a much later stage, when they made enquiries from the office of respondent No. 2 that they came to know that the papers, relating to the technical bid, were opened on 02.06.2007 and the papers, relating to price bid, were opened on 06.06.2007. The respondent No. 4, in tune with the case of the respondent No. 2, has asserted that the reasons for postponement was announced on 28.05.2007 and that the tender papers were accordingly opened, on 29.05.2007, in presence of the representatives of the tenderers. These assertions, on a dispassionate analysis of the facts pleaded by the parties concerned and in the face of the materials on record, must be held to stand proved. Notwithstanding the fact that the writ petition was, thus, woven with conscious efforts to not only suppress facts, but make inaccurate, misleading and, at times, even false statements, the petitioners have still insisted, at the time of hearing of the writ petition, by drawing attention of this Court to the fact that in the letter, dated 31.07.2007, issued by the respondent No. 2, it was mentioned that the petitioner company's tender papers were not in order. This letter, I must say, cannot be construed literally or hyper-technically. All that this letter, dated 31.07.2007, aforementioned, issued by the respondent No. 2, meant was to inform those tenderers including the petitioner company, whose tenders had not been accepted, that they should collect their earnest money. The letter, dated 31.07.2007, cannot be considered divorced from, or independent of, the facts as

already discussed hereinabove.

34. In *R v. V. Kensington*, I.T.C. reported in (1917) 1 KB 486, the Court summed up the law relating to inappropriate conduct in presenting a writ petition in the following words:

the prerogative writ is not a matter of course, the applicant must come in the manner prescribed and must be perfectly frank and open with the Court. It has been for many years, the rule of the Court and one which it is of greatest importance to maintain that where an applicant comes to the Court to obtain relief on an *ex parte* statement, he should make full and fair disclosure of material facts - facts not law. He must not mistake the law if he can help it - the Court is supposed to know the law. But it knows nothing about the facts and the applicant must state fully and fairly the facts and the penalty, by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect.

35. The decision, in *Kensington*, I.T.C (supra), has been followed in many Indian decisions. The exercise of jurisdiction, under Article 226, is substantially equitable in nature. One, who does not come to the Court of equity with clean hands, is not entitled to obtain equitable relief. When a writ petition makes false or misleading statement or when a writ petitioner deliberately suppresses the material facts, such a writ petition may be dismissed at the very threshold.

36. In *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, , the Apex Court held that the petitioner has no right to move the Court under Article 32 of the Constitution for enforcement of his fundamental rights on a petition containing misleading and inaccurate statement and the Court must dismiss such a petition. In *State of Haryana v. Karnal Distillery* AIR 1977 SC 718, the Apex Court refused to grant relief on the ground that the applicant misled the Court. The purpose of prerogative writ is to remedy a wrong and not promote one. It will not be granted in the aid of those, who do not come to the Court with clean hands.

37. In the present case, there is not even an iota of doubt in the mind of this Court that the writ petitioners have suppressed the truth, made misleading, incorrect and, at times, even false statements in their writ petition and affidavit-in-reply, dated 17.09.2007. It was on the basis of such averments that the writ petitioners have succeeded in stopping till now the State respondents from obtaining the pacemakers, which are meant, naturally, for a person, who cannot afford to pay and have to per force depend on the Government to provide the same to him. In a case of present nature, when a medical appliance, which can save a human life, was the subject-matter of the NIT and when, even in such a case, the writ petitioners have, by suppressing the truth, projected a substantially false case before this Court and obtained interim order(s) resulting into stoppage of supply of the pacemakers, the writ petitioners deserve no

compassion and their case need to be dismissed at the very threshold with exemplary costs.

38. There is yet another reason, which does not entitle the writ petitioners to seek consideration of their case that the selection of the pacemakers, in question, needs to be interfered with. Resisting the writ petition, respondent No. 2 has contended that the petitioner company's product did not meet the specifications mentioned in the NTT and as the petitioner company's product did not meet the required specifications, the petitioner company should be held to be ineligible to participate in the tender process. Controverting the submissions so made, the writ petitioners have contended that the product, which the petitioner company had offered, was not taken into consideration at all by the Technical Committee and what the Technical Committee had actually examined was a product, other than one, which the petitioner company had offered.

39. In support of their case that the Technical Committee did not examine the product, which the petitioner company had offered and had, instead thereof, examined a model, which had not been offered by the petitioner company, the petitioners have averred, in para 10 of their affidavit-in-reply, dated 17.08.2007, inter alia, thus:

10. That while countering some of the statements made in paragraph 10 of the Affidavit, the deponent emphatically states that the petitioner company quoted for the model No. 3851 VU/3851 VB (Unipolar/Bipolar) in respect of Permanent Pacing Lead. However, the petitioner Company has never quoted to supply Unipolar Lead 3852VU which was examined and analysed by the Technical Committee on its own. The deponent emphatically states that the Technical Committee has not examined and considered the specification of Model No. 3851 VU/3851 VB (Unipolar/Bipolar) which was sought to be supplied by the petitioner company. The Technical Committee rejected the model sought to be supplied by the petitioner company on the basis of the specification available in Model No. Unipolar Lead 3852 VU with steroid eluting tip. This is a manifest error apparent on the face of the record committed by the Technical Committee on the basis of a non-existing fact in re-aspect of Permanent Pacing Lead.

40. Reacting to the averments made above, respondent No. 2 has, in para 8 of his affidavit-in-reply, replied, inter alia, as under:

8. That as regards the statements made in paragraph 10 of the affidavit in reply, the deponent begs to state that the petitioner has offered Pinnacle + 8819/8820 in the category of Permanent Pulse Generator (main instruments). The Technical Committee had duly evaluated Pinnacles + 8819/8820 model of the petitioner and found its sensitivity - 0.5 to 4.0 MV; whereas required sensitivity was, at least, up to 8 MV and thus opined that it was far below the norms asked for.

In the category of Permanent Pulse Lead, the petitioner has furnished a booklet, wherein different models of leads: 3851-VU, 3852-VU, 3851-AU, 241-VD, 242-VD, 243-VD, 3851-VV and 3852-vv are mentioned. But interestingly, the

petitioner, in his technical bid, has not specifically indicated which Permanent Pulse Lead he actually had offered in the tender. However, the Technical Committee found that amongst all the aforementioned models of leads, offered by the writ petitioner, only one lead i.e. 3852-VU fulfils the basic requisite criteria viz Steroid Eluting Tip and therefore the Technical Committee had no alternative but prudently evaluated this particular lead. On examining the said Permanent Pulse Lead i.e., unipolar rate 3852 VU with Steroid Eluting features, the Technical Committee found that it required introducer size of 8F/9F whereas specification asked the smallest lead with introducers size with 7F or below. Thus, the only model of Permanent Pulse Lead that fulfills the basic requisite criteria of steroid eluting tip of the tender also fails to fulfill other specifications notified in the tender.

Although the petitioner had not indicated in its technical bid that it had offered Model 3851 VU and not Model 3852Vu which was considered by the Technical Committee in its analysis, even if it is considered for arguments sake that the petitioner company had quoted for the model 3851VU, 3851W (Unipolar or Bipolar) in respect of Permanent Pacing Lead, then the said model of permanent pulse lead has to be out rightly rejected for the simple reason that it had failed to meet the basic desirable features mentioned under the heading Permanent Pacing Lead at Clause 2(IV) Steroid Eluting Tip or other technical improvisation to achieve low chronic threshold, as mentioned in the list of items with specifications and quantity in the tender dated 03.05.2007. Thus, on this very ground only that the Permanent Pacing Lead offered by the writ petitioner which fails to meet the basic required specifications, the tender is liable to be rejected. It is worth mentioning that the Technical Committee had evaluated the Permanent Pulse Lead 3852 VU after finding that all other leads mentioned in the booklet fail to fulfill the basic specifications i.e. Steroid Eluting Tip.

41. While considering the petitioners' case that their offered model had not been examined and/or that a model, which had not been offered by them, had actually been examined by the Technical Committee, one needs to take into account the reasons as to why the Technical Committee did not recommend any of the models of the petitioner Company.

42. When the averments and counter-averments made by the parties concerned are considered in the light of the specifications mentioned in the NIT and the findings of the Technical Committee, what transpires to be the controversy is this: The petitioner company's offered model, in respect of Permanent Pulse Generator, which is the main instrument, was Pinnacle 8819/8820. The Technical Committee found its sensitivity lower than what had been sought for. Thus, both these models could not satisfy the required specifications under the label basic component, namely, Permanent Pulse Generator. Hence, rejection of the petitioner company's model 8819/8820 by the Technical Committee cannot be interfered with.

43. Yet another basic component of the pacemaker, as sought for by the NIT, was

Permanent Pacing Lead and one of the required features of the lead was that it must have had Steroid Eluting Tip or other technical improvisation. The third basic component, sought for by the NIT, was the appropriate size of the Pacing Lead Introducer (PLI). The State respondents claim that the petitioner company did not clearly state, in its bidding papers/documents, as to which model of lead it had sought to offer. However, according to the State respondents, in the light of the petitioner company's booklet, the only model in respect of Permanent Pacing Lead, which was closer to the specifications, was 3852 Vu inasmuch as it was only the model 3852 Vu, which, among the models of leads, with the petitioner company produces, has Steroid Eluting Tip; but even the model 3852 Vu did "not meet the specifications inasmuch as the size of the introducer was far above the required specifications. On the basis of these findings, the petitioner company's offered model, namely, Pinnacle 8819/8820, was rejected by the Technical Committee. As against the reason, so assigned by the State respondents for rejection of the petitioner company's model of pacemaker, the petitioner contend that in respect of Permanent Pacing Lead, it had not offered the model 3852 Vu; rather, its offered model was 3851 Vu.

44. What is, now, extremely important to note is that at the time of hearing of the writ petition, the petitioners could not show that its product in respect of Permanent Pacing Lead, namely, 3852 Vu, satisfied the specifications mentioned in the NIT. Hence, rejection of the petitioner company's model 3852 Vu in respect of Permanent Pacing Lead cannot be said to be incorrect or illegal. This apart, at the time of hearing, the petitioners could produce nothing before this Court to show that its offered model in respect of Permanent Pacing Lead was the model 3851 Vu. In such circumstances, when the only product of the petitioner company, in respect of Permanent Pacing Lead, which had Steroid Eluting Tip, was the model 3852 Vu, the Technical Committee cannot be said to be wholly wrong in examining this model to test if it satisfies the requirements in terms of the specifications in the NIT. The findings of the Technical Committee show that the model 3852 Vu did not satisfy the requisite specifications inasmuch as the size of the introducer in respect of this model of lead was far above the requisite specifications. Coming to the model 3851 Vu, which the petitioner company claims to have had offered, the question, which arises for consideration is this: Were the requirements of the NIT satisfied by petitioner company's model 3851 Vu? In this regard, it is worth noticing that though there is no clear material on record to show that the petitioner company's offered model, in respect of Permanent Pacing Lead, was 3851 Vu (unipolar/bipolar), the fact remains that the averments made by the respondent No. 2, in para 18 of his affidavit-in-reply, clearly show that the said basic desirable features mentioned under the heading "Permanent Pacing Lead at Clause 2(iv)" were not satisfied even by the petitioner company's said model. In fact, the booklet, which the petitioner Company had furnished along with its tender papers, has been produced before the Court and this booklet shows that in respect of Permanent Pacing Lead, (even if the offered model was 3851 Vu and/or 3851 VB), neither the model 3851 Vu nor the model

3851 VB has Steroid Eluting Tip and, in fact, it is only the model 3852 Vu, which has Steroid Eluting Tip. These facts are not in dispute. In the face of these undisputed facts, the model 3851 Vu or model 3851 VB could have, by no means, been considered as a product, which satisfies the specifications. Hence, even if it is assumed for a moment that model 3851 Vu in respect of Permanent Pacing Lead had not been considered by the Technical Committee, no prejudice can be said to have been caused to the petitioner Company, particularly, because of the fact that if this Court, now, sets aside the selection of the product of the respondent No. 4 and remands back the matter to the authorities concerned, the Technical Committee would not be able to clear the petitioner Company's offered model 3851 Vu or 3851 VB in respect of Permanent Pacing Lead, which the petitioner Company, in terms of the booklet manufactures, for, it is only model 3852 Vu, which has Steroid Elution Tip. Viewed thus, it is clear that respondent No. 2 is not incorrect, when it avers that model 3852 Vu was considered only because it was closest to the specifications asked for. The proceedings of the Technical Committee show that even model 3852 Vu was not found to satisfy the other specifications, which the NIT had sought for inasmuch as Steroid Eluting Tip of the petitioner Company's model 3852 Vu needs introducer of the size 8F/9F; whereas the specifications, asked for, was for the smallest lead with introducer size 7F or less. This apart, in respect of sensitivity, under the Permanent Pulse Rater, the petitioner Company's product was found to be below the norms specified inasmuch as the sensitivity is 0.5 to 4.0 Mv; whereas the required sensitivity was, at least, up to 8 Mv. The Technical Committee is, therefore, not wrong in taking the view that on this ground too, the petitioner Company's product does not satisfy the specifications asked for.

45. What is extremely important to note is that the finding of the Technical Committee that the petitioner Company's product, which was examined, was far below the specifications asked for, could not be assailed before this Court. In the face of this unavoidable facet of the present case, one has to really examine if the petitioner company can be said to have been prejudiced even if one were to assume, for a moment, that its offered model, namely, model 3851 Vu, in respect of Permanent Pacing Lead, had not been considered by the Technical Committee. As already indicated hereinbefore, it clearly emerges that even if the Technical Committee had examined model 3851 Vu in respect of Permanent Pacing Lead, the petitioner company's product could not have withstood the test of specifications sought for.

46. What emerges from the above discussion is that even if the product, which the petitioner company claims to have offered, had been considered by the Technical Committee, the said product could never have satisfied the specifications contained in the NIT and in such circumstances, the petitioner company's product could not have been selected at all. When the petitioner company has not offered any product, which could satisfy the specifications, the Technical Committee's finding that none of the products of the petitioner company deserved to be recommended for selection cannot be said to be

incorrect. In such circumstances, it is completely irrelevant as to what the price was at which petitioner company had offered to supply its pacemakers.

47. Before proceeding further, it is of immense importance to note that the petitioner Company has not contended that their pacemaker's model 8819/8820 meet the minimum criteria asked for by the NIT. This apart, the findings of the Technical Committee with regard to petitioner company's model 8819/8820 is that none of these two models satisfy the minimum criteria asked for by the NIT inasmuch as the pacemaker and lead are below the specifications in respect of sensitivity, polarity, lead and PLI size.

48. Let me, now, deal with another ground of challenge posed to the selection of the pacemaker, which the respondent No. 4 had offered. Mr. Bhattacharjee contends that the terms and conditions of an NIT cannot be deviated from, particularly, when a given term or condition is mandatory in nature. In the present case, contends Mr. Bhattacharjee, there has been deviation in the eligibility conditions specified in the NIT inasmuch as the State respondents have selected VVI (R) Mode of pacemaker, though the NIT stipulated selection of only VVI Mode of pacemaker. Such a deviation, according to Mr. Bhattacharjee, is wholly arbitrary, irrational and may, therefore, be interfered with.

49. Reacting to the submissions so made, Mr. PK Goswami as well as Mr. D. Saikia contend that there has been no deviation from the eligibility conditions specified in the NIT inasmuch as a VVI (R) pacemaker is a pacemaker of VVI Mode with an additional feature of Rate Response. When the NIT itself, point out Mr. Goswami as well as Mr. Saikia, stipulates offer of a pacemaker with wider range of programmability, the selection of the pacemaker, in question, which is of VVI Mode with Rate Response, cannot be said to be illegal, irrational or arbitrary, particularly, when the Government's decision to accept the same is a conscious decision taken in public interest and were permitted by the terms and conditions of the NIT itself.

50. The contours of a writ Court's power of judicial review in matters of grant of contract by Government and its instrumentalities stand, by and large, well-defined and well-settled. In case after case, the Apex Court has pointed out that judicial review is directed not against the decision, but against the decision-making process. If the decision-making process shows that a decision has been arrived at by taking into account all factors, which were relevant, and by excluding from the purview of consideration all those factors, which were irrelevant, the decision-making process would not be, ordinarily, interfered with. This apart, even when a decision-making process suffers from lack of consideration of relevant factor or suffers from consideration of a factor, which was, otherwise, irrelevant, the decision-making process would not be interfered with unless the decision is mala fide and/or not in public interest. The terms and conditions of an invitation to tender are not open to judicial scrutiny unless the terms and conditions are themselves arbitrary, mala fide and in colourable exercise of powers.

51. Ordinarily, therefore, in a commercial contract, when selection of a tender is challenged on the ground that there has been deviation in the terms and conditions of the tender notice, the Court has to determine if there has really been deviation from the terms and conditions specified in the tender notice and if such a deviation is noticed, the Court has the obligation to further determine if such deviation is in respect of a term or condition, which was mandatory in nature, could not have been relaxed and have not been relaxed in public interest. To put it a little differently, though sanctity of a tender process does not permit any deviation from the terms and conditions embodied in the NIT, the Court is still bound to examine and satisfy itself if the term and condition, which have been deviated from, were bound to be followed, could not have been departed from, have not been departed from in public interest and such deviation has caused miscarriage of justice. Lest the State and its instrumentalities go wayward and become unbridled, judicial precedents warrant : the State and its instrumentalities to adhere to the norms secured and procedures laid down by the tender notice and not to depart therefrom arbitrarily. Normally, therefore, the tender of each party must be considered on the basis of the conditions specified in the NIT and no departure, unless permitted by the NIT, can be sustained.

52. Bearing in mind the parameters of the powers of judicial review in contractual matters, let me, now, proceed to examine if there has been deviation from the terms and conditions specified in the NIT, while selecting the pacemaker, which the State respondents have, eventually, selected.

53. As regards the allegation made by the petitioners that there is major deviation from the specifications sought for in respect of the selected pacemaker of respondent No. 4, it needs to be noted that according to the petitioners, the mode specified in the NIT was VVI, whereas the mode of the pacemaker, which has been selected, is VVI(R). As against this case of the writ petitioners, the respondents contend to the effect that a pacemaker of VVI(R) indicates rate response meaning thereby (R) represents an additional feature to the basic mode of VVI. The respondent No. 2 also contends that the basic feature of a VVI mode is that it has a single chamber pacing and single chamber sensing and that there are two other modes of pacemakers, which are VDD and DDD. It is further pointed out by the official respondents that if a pacemaker of the mode of VDD and/or DDD has rate response as its feature, then, it will be termed as VDD(R) and DDD(R).

54. In short, thus, what the respondents contend is that there is no deviation from the NIT, while selecting the pacemaker, in question, inasmuch as VVI(R) is nothing, but VVI with an additional feature of rate response.

55. In the light of the rival submissions noted above, when I revert to the Technical Committee's findings, what transpires is that the Technical Committee had recommended five models in order of preference, which are as follows:

1. St Judes Regency 2400L - which has Autocapture and Rate Responsive Mode

as two additional features. Technically this is the Best Qualified Pacemaker Quoted.

2. Metronik Sigma 300 SR which has one additional Rate Responsive Feature, but no Autocapture facility and 303 SR.

3. Vitatron Model C10A2 with rate Responsive mode as additional feature but no Autocapture Facility.

4. St Jude's Varity ADXL SC 5056 - it has Autocapture as additional feature but no RATE Responsive Mode.

5. St Jude's Regency SCX2408-which is the base model without additional features mentioned above.

56. The Technical Committee's findings also show that the respondent No. 4's product, namely, St. Jude's Regency 2400L, is technically best qualified pacemaker quoted. The fact that technically, this was the best qualified pacemaker is not in dispute and it is this pacemaker, which has been selected, eventually, by the State respondents. It is the case of the State respondents that the Government wanted to provide best quality pacemaker within its affordable price and it is for this reason that St. Jude's Regency 2400L has been selected. It is also noteworthy that St. Jude's Regency 2400L has Auto Capture and Rate Response Mode as its additional features. In such circumstances, when there is nothing to show on record that this selection was not made in public interest, the decision, taken by the State respondents, to obtain St. Jude's Regency 2400L cannot be said to be illegal, mala fide and/or on extraneous considerations. This apart, the Technical Committee's findings also reveal that respondent No. 4's product, namely, St Jude's Varity ADXL 5056, satisfies all the minimum criteria asked for and that it has auto capture facility, which has additional effect in considerably prolonging the battery life. The NIT, in no uncertain words, had clarified that wider range of programmability was welcome.

57. It is Pointed out by respondent No. 2 that the respondent No. 4's offered model, namely, St Jude's Varity ADXL 5056, which is the pacemaker of VVI mode, satisfies all the minimum criteria asked for. This assertion is not disputed. Hence, it is clear that the Technical Committee could have very well selected, as rightly contends by the respondent No. 2, St Jude's Varity ADXL 5056. In view, however, of the fact, contends respondent No. 2, that since St. Jude's Regency 2400L was found to be technically best pacemaker, the Government decided to buy this pacemaker. This decision, according to the official respondents, has been taken in public interest and that such selection does not suffer from any arbitrariness or favouritism. The State respondents further contend that since pacemakers are meant for cardiac patients, Government is willing to give them the best pacemaker.

58. In support of the selection of the pacemaker having Rate Response Mode, it is pointed out by the respondents that the NIT itself clearly states that wider

range of programmability is welcome.

59. The above submissions, made on behalf of the respondents, could not be assailed. Thus, it is clear that a tenderer could have offered a pacemaker of VVI mode with as many additional features as were possible.

60. I have already pointed out above that in the very order, dated 17.09.2007, while modifying the interim directions, the Court had pointed out that the Technical Committee, in question, consisted of three eminent cardiologists of the State. The competence and bona fide of the persons, who constituted the Technical Committee, is not in dispute in the present writ petition. In other words, the capacity of the members of the Technical Committee to select a pacemaker, in terms of the NIT, is not under challenge in the present writ petition. When it could not be shown by the writ petitioners that the Technical Committee has made the recommendations on extraneous consideration, the selection cannot be said to be illegal, particularly, when the selection relates to such a sensitive appliance as a pace-maker.

61. In the backdrop of the terms and conditions of the NIT, it becomes abundantly clear that the tenderers had been left free to offer pacemakers of VVI mode with as many additional features as they could have offered. In such circumstances, when the Government selects a pacemaker having auto capture and rate response, it cannot be said to have deviated from the terms and conditions of the NIT.

62. What clearly follows from the above discussion is that none of the models, offered by the petitioner company, having met the minimum required criteria set by the NIT, the rejection of its product cannot be said to be illegal or incorrect. As against this, when the product, offered by the respondent No. 4, satisfied all the minimum criteria asked for and had additional features, the selection of the pacemaker made by the Government cannot be said to be illegal requiring interference by this Court in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India.

63. Let me, now, turn to the contention of the writ petitioners that respondent No. 4 is not a manufacturer of pacemakers and was, therefore, not eligible, in terms of Clause 2 of the N.I.T., to participate in the tender process. In order to appreciate this grievance of the writ petitioners, one has to, first, understand as to what, on this aspect of the case of the writ petitioners, respondent No. 4, contends. The case of the respondent No. 4, as pleaded, in this regard, in paragraph 20 of their counter affidavit, reads thus:

20.?The deponent Company St. Jude Medical India Private Limited is a wholly owned subsidiary of the holding company, St. Jude Medical Holdings BV. The Netherlands which is also a wholly owned subsidiary of the ultimate parent company, namely, St. Jude Medical Inc., USA. St. Jude Medical Inc., USA owns subsidiary companies across the entire globe. St. Jude Medical AB, Sweden similarly is a wholly owned subsidiary of the aforesaid American company. The

parent company has manufacturing units in the U.S. and Sweden. The control of all these subsidiary companies remains with the parent company i.e. St. Jude Medical Inc., USA. Two of the products offered by the deponent company namely, Regency SCX 2408 and Varsity ADXL SC 5056 are manufactured both at U.S. and Sweden and the third product, namely, Regency SR 2400L is manufactured in Sweden. All these products carries warranty certificates. In addition, in India, under the Life Time Replacement Policy an undertaking has to be given to replace the pacemaker during the lifetime of the patients if such an occasion arises and the requisite undertaking in the subject tender has also been given by the deponent company. Therefore, the deponent company being a wholly owned subsidiary of a manufacturing company is eligible and qualifies as a tenderer. In fact, St. Jude Medical Inc., USA, is operating in India through its wholly owned subsidiary i.e., St. Jude Medical (India)/respondent No. 4 herein. The manufacturing certificate with respect to the product approved together with a certification of quality and the letter of Authorisation from the Parent Company to the deponent to participate in the subject bidding process and supply the subject equipments are already enclosed in the bid documents submitted to the respondent authorities. Thus, the deponent company being a wholly owned subsidiary of St. Jude Medical Holdings BV, the Netherlands, which is a subsidiary of St. Jude Medical Inc., USA, it is deemed under the provisions of the Companies Act, 1956 to be a subsidiary of St. Jude Medical, USA, and as such would be treated as one economic entity for the purposes of the subject tender and hence the contention of the petitioner that the deponent company is not a manufacturer is absolutely untenable and unsustainable in law. Further, it is not understood as to why the petitioner at the time of opening the technical bid did not object to the fact that all other tenderers are not manufacturer if the same is to be accepted to be correct. Hence, such belated pleas of the petitioner is not to be accepted by this Court to stall a tender process undertaken by the Government of Assam in the interest of below poverty line heart patient and more so when the entire process have been open, transparent and fair.

Further, St. Jude Inc., USA is an internationally reputed manufacturer of the products in question. In the context of a global economy, such a company has to operate in different countries consistent with the laws of the said countries. The deponent company is a subsidiary of the aforesaid Netherlands company which is a wholly owned subsidiary of the American company and as such the deponent company is also a wholly owned subsidiary of the aforesaid American company. In substance, the said parent company operates through the deponent company in India for which all the requisite legal requirements have been already complied with. There is, thus, global unity in manufacturing, distribution and operations amongst the aforesaid companies and this picture of economic unity is a significant feature of a globally evolving economy. Furthermore, the respondent company is the alter-ego of the parent company in India and the said companies present a single economic entity. The deponent company is duly authorized by the parent company to participate in proceedings like the one in question and to

act on its behalf in India. In pith and substance, therefore, the parent company is in the field through the deponent company. Accordingly, the tender submitted by the deponent company is entirely valid and the contention of the petitioner is that the deponent company is not a manufacturer is manifestly erroneous. The terms of the tender clearly contemplates submission of tender by a company like the deponent company and the plea of the petitioner that the deponent company is ineligible to submit its bid is erroneous and unsustainable in law. It may also be mentioned that under the Memorandum of Association and Articles of Association of the deponent company, one of the objects of the respondent company is also manufacturer of medical products.

64. From the averments, made in para 20 of the counter-affidavit of respondent No. 4, what appears to be the case of the respondent No. 4, on the question as to whether respondent No. 4 is or is not a manufacturer of pacemakers, is, in brief, thus:

St. Jude Medical Inc., USA, is the holding company and St. Jude Medical A.B., Sweden, is a wholly owned subsidiary of the said American company, namely, St. Jude Medical Inc., USA (hereinafter referred to as "the parent American company"), and that the parent company has manufacturing units in the United States and Sweden and, further, that St. Jude Medical Holdings, A.B., Netherlands, too is a wholly owned subsidiary of the parent company, namely, St. Jude Medical Inc., USA, and respondent No. 4, namely, St. Jude Medical (India) Ltd., being a wholly owned subsidiary company of St. Jude Medical, A.B., Netherlands, is the subsidiary of the parent company, namely, St. Jude Medical Inc., USA. Thus, the respondent No. 4, being a wholly owned subsidiary of the parent manufacturing company, namely, St. Jude Medical Inc., USA, was eligible and qualified, in terms of the NIT, to bid in the tender process. According to respondent No. 4, St. Jude Medical Inc., USA, has been operating, in India, through its wholly owned subsidiary, namely, respondent No. 4.

65. Without disputing the correctness of the averments made by respondent No. 4 that it is a wholly owned subsidiary of St. Jude Medical Holdings, A.B., Netherlands, which, in turn, is the wholly owned subsidiary of the parent American company, namely, St. Jude's Medical Inc., USA, which manufactures pacemakers, in question, the writ petitioners, at para 22 of their affidavit-in-reply, dated 08.11.2007, merely contend that respondent No. 4 is not a manufacturer and as the tenders, according to the writ petitioners, had been invited from only the manufacturer of pacemakers, respondent No. 4 was not entitled to participate in the tender process.

66. Mr. Bhattacharjee submits that respondent No. 4, even as a subsidiary of the parent American Company, represents an independent legal entity and merely because of the fact that the holding company is "manufacturer" of pacemaker, respondent No. 4 cannot be regarded as a manufacturer or the pacemaker, for, there is nothing on record to show that respondent No. 4 manufactures pacemakers in India. Support for his submission is sought to be derived by Mr.

Bhattacharjee from the cases of *Turner Morrison and Co. Ltd. Vs. Hungerford Investment Trust Ltd.*, , and *Oriental Industrial Investment Corpn. Ltd. v. Union of India* reported in (1981) 51 Comp. Case 487.

67. Controverting the above submissions, made on behalf of the petitioners, Mr. PK Goswami submits that the NIT, in question, envisages making supply of pacemakers by a subsidiary company provided that the subsidiary company produces a lifetime warranty from the parent company. In the backdrop of this fact, contends Mr. Goswami, when it is taken into account that respondent No. 4 is, admittedly, a subsidiary of the parent American company and when the parent company, as the manufacturer of the product, has given a lifetime warranty in the present case, respondent No. 4 must be treated as manufacturer of the pacemaker, which it sought to supply and, hence, in the face of the terms and conditions of the NIT, respondent No. 4 was entitled to be considered for allotment of the contract. Mr. Goswami refers to the decisions, in *State of U.P. and Others Vs. Renusagar Power Co. and Others*, and *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, , to indicate that in the days of globalization of economy, it is quite possible for the Court to look into the realities of the situation and determine for itself as to who shall be regarded as a manufacturer in a case, wherein a tenderer, as a subsidiary, seeks to supply a product, which has been manufactured by its holding company, particularly, when the holding company is one, which wholly owns the subsidiary and controls the functions of the subsidiary.

68. Before I proceed further, it needs to be clarified that the submissions of the respondent No. 4 that it is a wholly owned subsidiary of St. Jude Medical Holdings, AB, Netherlands, and that St. Jude Medical Holdings, AB, Netherlands (hereinafter referred to as "the Netherlands company") is, in turn, a wholly owned subsidiary of St. Jude Medical Inc., USA, are not in dispute. The further assertion of respondent No. 4 that the control of all the subsidiary companies, including respondent No. 4, is with the parent company, namely, St. Jude Medical Inc., USA, has also not been disputed by the petitioners. This apart, the writ petitioners have themselves stated, in paragraph 2 of their writ petition, that respondent No. 4 is a company having its office at Kolkata. Further-more, respondent No. 4 has produced a certificate of incorporation as a company under the provisions of the Companies Act, 1956. Thus, the fact that respondent No. 4 is a company registered under the Companies Act, 1956, in India, is, in the light of the averments noted above, an admitted fact. It is also an admitted fact that respondent No. 4 is a wholly owned subsidiary of the Netherlands company and the Netherlands company is, in turn, a wholly owned subsidiary of the parent American company.

69. The question, therefore, is this: Can, in law, a subsidiary of a subsidiary of a holding company be treated as the subsidiary of the holding company even if the holding company is not registered in India, but functions through its Indian subsidiary? This question is fully answered by Section 4. For the sake of clarity,

Section 4 of the Companies Act, 1956, with its illustration, is reproduced hereinbelow:

Section 4. Meaning of "holding company" and "subsidiary". - (1) For the purpose of this Act, a company shall, subject to the provisions of Sub-section (3), be deemed to be a subsidiary of another if, but only if,

(a) that other controls the composition of its Board of Directors; or

(b) That other -

(i) Where the first-mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting rights in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company;

(ii) Where the first-mentioned company is any other company, holds more than half in nominal value of its equity share capital; or

(c) The first-mentioned company is a subsidiary of any company which is the other's subsidiary.

Illustration

Company B is a subsidiary of Company A, and Company C is a subsidiary of Company B. Company C is a subsidiary of Company A, by virtue of Clause (c) above. If Company D is a subsidiary of Company C, Company D will be a subsidiary of Company B and consequently also of Company A, by virtue of Clause (c) above, and so on.

70. The illustration, appended to Section 4, clearly shows that a subsidiary of a subsidiary of the holding company becomes, by virtue of Clause (c) of Section 4, a subsidiary of the holding company. Thus, in the light of the provisions of Section 4 of the Companies Act, 1956, respondent No. 4 cannot but be treated as the subsidiary of the parent American company, namely, St. Jude Medical Inc., USA.

71. Now, in the face of the fact that the parent American company is a manufacturer of the pacemakers, which respondent No. 4 had offered and, which stand, eventually, selected, whether respondent No. 4, being subsidiary of the parent American company, be treated as manufacturer of the pacemakers aforementioned?

72. The question, posed above, necessarily brings us to the expanding horizon of corporate world and the concept of lifting the corporate veil or piercing the corporate veil in case of necessity. Though each company, in a group of companies, even if bound to-, gether as subsidiary and a holding company, is, in law, generally, treated as a separate entity, yet when a subsidiary is a wholly owned subsidiary of the holding company, can the law ever treat the activities, acts or omissions of the subsidiary as the activities, acts or omissions of the

holding company? This is the precise question, which one has to answer in the present writ petition.

73. In the well-known case of Aron "Salomon v. A. Salomon & Co. Ltd. reported in 1897 AC 22, the law laid down was that a company is an entity, which is separate and distinct from its shareholders. The principle of law, so propounded, in Salomon's case (supra), by the House of Lords, held the field for a long time. Ordinarily, even today, a company is a legal entity, different from its shareholders, and, consequently, a subsidiary of a holding company is a legal entity distinct and different from the holding company. To this extent, therefore, Mr. Bhattacharjee is not incorrect in referring to Turner Morrison & Co. Ltd. (supra). This principle has, however, not remained invariable or a principle of universal application. With passage of time, when a company, taking advantage of its independent legal entity from that of its holding company, was found indulging in activities aimed at evading legal obligations, pecuniary or otherwise, the courts discarded the concept of separate legal entity of a company, whenever it was found that the company stood, constituted, formed or used, for the purpose of facilitating evasion of legal obligations. (See Pennington's Co. Law 4th Edition-Page 50-51).

74. Thus, there have been inroads into the doctrine of corporate personality propounded in Salomon's case(s) by statutory provisions as well as by judicial pronouncements. By a process, commonly known as "lifting the veil", the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. This principle is resorted to, when it is found that the principle of corporate personality, as propounded in Salomon's case (supra), is too flagrantly opposed to justice, convenience of the interest of the revenue. (See Gowers Principles of Modern Company Law, 4th Edition. P.112). This concept, which is described as "piercing the veil" in the United States, has been described by Sanborn, J. in US v. Milwaukee Refrigerator Transit Co. reported in (1905) 142 Fed 247, 255, in the following words:

When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

75. State of U.P. and Others Vs. Renusagar Power Co. and Others, and New Horizons Limited and Another Vs. Union of India (UOI) and Others, , are the two important cases, which point out how judicial pronouncements have departed from the narrow legalistic view, taken in Salomon's case (supra), in order to take note of the realities of the situation.

76. Dealing with the doctrine of lifting the "corporate veil" and thereby looking into the real situation in a given case and ignoring thereby, to a great extent, the principle that every company is an independent legal entity and it can be bound for its own action and not for the action of anyone else or to look into the

question as to which one, between two or more companies, is the one that controls the affairs of the other companies, in order to fasten with legal liability the company, which controls the activities of the other company or companies, the Supreme Court, in *State of U.P. and Others Vs. Renu Sagar Power Co. and Others*, , observed, at paragraph 53, by referring to the comments in *Pennington's Co. Law*, thus:

53. The learned editor of *Pennington's Company Law*, 5th Edition at page 49 has recognized that this principle has been relaxed in subsequent cases. He states that the principle of company's separate legal entity has on the whole been fully applied by the courts since *Salomon* case. Corporate veil has been lifted where the principal question before the court was one of company law, and in some situations where the corporate personality of the company involved was really of secondary importance and the application of the old principle has worked hardship and injustice. In England, there have been only a few cases where the court had disregarded the company's corporate entity and paid attention to where the real control and beneficial ownership of the company's undertaking lay. When it had done this, the court had relied either on a principle of public policy, or on the principle that devices used to perpetrate frauds or evade obligations will be treated as nullities, or on a presumption of agency or trusteeship, which at first sight *Salomon* case seems to prohibit. Again at page 36 of the same book, the learned author notes a few cases where the courts have disregarded separate legal entity of a company and investigated the personal qualities of the shareholders or the persons in control of it because there were overriding public interests to be served by doing so.

77. From the observations, made in paragraph 53 of *Renu Sagar's* case (*supra*), it becomes clear that when the question of fraud having been committed by a company is raised or when a question of legal obligation arises, the courts have, acting under the principle of public policy or, on the principle that the device, used for perpetrating frauds or evading legal obligations, shall be treated as nullities, lifted the corporate veil and looked behind the company to find out as to who the real player in the game is. Elaborately dealing with the development of the doctrine of lifting the corporate veil or piercing and penetrating a corporate veil, the Court, in *Renu Sagar's* case (*supra*), at paragraph 55, referring to the popular observations made by Lord Denning, as Master of the Rolls in *DHN Food Distributors Ltd. v. London Borough of Tower Hamlets* reported in (1976) 3 All ER 462, quoted, with approval, the following passages:

55...Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower. in his book on company law says: "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group.

This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies*. So here. This group is virtually the same as a " partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

I realize that the President of the Lands Tribunal, in view of previous cases, felt it necessary to decide as he did. But now that the matter has been fully discussed in this Court, we must decide differently from him. These companies as a group are entitled to compensation not only for the value of the land, but also compensation for disturbance. I would allow the appeal accordingly.

(Emphasis is supplied)

78. The observations, made by Lord Denning in *DHN Food Distributors Ltd.* (supra), clearly show that when a parent company owns all the shares of the subsidiaries so much so that it can control every movement of the subsidiaries, these subsidiaries are bound, hand and foot, to the parent company and must do what the parent company says; such a corporate company is nothing, but a kind of partnership entity, wherein the companies concerned would be regarded as partners and they cannot, in such a case, be treated as separate entities. Thus, in *DHN Food Distributors Ltd.* (supra), though the subsidiary company was a separate entity, the parent company was held entitled to claim compensation for acquisition of the land of the subsidiary company. In other words, the companies, which were involved in *DHN Food Distributors Ltd.* (supra), were treated as a group entitled to compensation.

79. In the light of the conclusions, reached in *DHN Food Distributors Ltd.* (supra), let me, now, decide if the respondent No. 4 can be treated as the manufacturer of the pacemaker, which has been offered for supply? In this regard, it needs to be pointed out that the NIT reads, "Lifetime warranty from the principal company (parent co.) is a must." Thus, the NIT itself stipulates that when a pacemaker is manufactured by the principal company, lifetime warranty has to be submitted by the subsidiary if the subsidiary offers for supply the pacemaker, which has been manufactured by its parent company. In fact, acting upon the said condition mentioned in the NIT, the respondent No. 4 had, admittedly, submitted a lifetime warranty from its parent company in respect of the pacemakers, which respondent No. 4 had offered to supply.

80. In the backdrop of the observations made by Lord Denning in *DHN Food's*

case (supra) and in the light of the eligibility criteria mentioned in the NIT, it logically follows that in the present case too, when respondent No. 4 is, admittedly, a wholly owned subsidiary of the parent American company, there is no reason as to why the respondent No. 4 cannot be, as a wholly owned subsidiary of the parent American company, be regarded as manufacturer, when the NIT itself stipulates that a subsidiary company's offer to supply pacemaker, which is manufactured by its principal company or the holding company, shall be accepted as legal if the lifetime warranty, in respect of the offered pacemaker, is given by the parent company. In the face of such a condition in the NIT itself, it cannot be said that the subsidiary has to be independently a manufacturer of the pacemaker, which the subsidiary offers to supply. In any case, in the facts of the present case, it is clear that the respondent No. 4 has to be regarded as manufacturer of the pacemakers, which its holding company manufactures.

81. Moreover, in DHN Food's case (supra), Justice Goff, while deciding to pierce the corporate veil and looking into the realities of the situation, proceeded with great caution and made it clear that it was, in the context of the facts of the DHN Food's case (supra), that such piercing of veil is necessary and appropriate. The observations of Lord Goff have been considered by the Supreme Court in Renu Sagar's case (supra). The relevant observations of Lord Goff are reproduced hereinbelow:

Secondly, on the footing that that is not in "" itself sufficient, still, in my judgment, this is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil. I wish to safeguard myself by saying that so far as this ground is concerned, I am relying on the facts of this particular case. I would not at this juncture accept that in every case where one has a group of companies one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned; further, they had no separate business operations whatsoever; thirdly, in my judgment, the nature of the question involved is highly relevant, namely whether the owners of this business have been disturbed in their possession and enjoyment of it. I find support for this view in a number of cases, from which I would make a few brief citations, first from *Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies* (1955) 1 All ER 725 where Lord Reid said:

It was argued that the subsidiary companies were separate legal entities, each under the control of its own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent.

My Lords, in my judgment, this is too technical an argument. This is an agreement in re mercatoria, and it must be construed in the light of the facts and realities of the situation. The appellant company owned the whole share capital of British Textile Mfg. Co. and, under the agreement of 1947, the directors of this

company were to be the nominees of the appellant company. So, in fact, the appellant company j could control the internal management of their subsidiary companies, and, in the unlikely event of there being any difficulty, it was only necessary to go through formal procedure in order to make the decision of the appellant company's board fully effective.

That particular passage, is I think, especially cogent having regard to the fact that counsel for the local authority was constrained to admit that in this case, if they had thought of it soon enough, DHN could, as it were, by moving the pieces on their chess board, have put themselves in a position in which the question would have been wholly unarguable.

I also refer to *Scottish Cooperative Wholesale Society Ltd. v. Meyer*. That was a case u/s 210 of the Companies Act, 1948 and Viscount Simonds said:

...I do not think that my own views could be stated better than in the late Lord President Cooper's words on the first hearing of this case. He said:

In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view.

My third citation is from the judgment of Danckwerts, L.J. in *Merchandise Transport Ltd. v. British Transport Commission* where he said that the cases--

Show that where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance.

The third ground, which I place last because it is longest, but perhaps ought to come first, is that in my judgment, in truth, DHN were the equitable owners of the property. In order to resolve this matter, it will be necessary for me to refer in some detail to the facts.

82. In *Renusagar (supra)*, the Supreme Court also referred to the observations made by Shaw, J, in *DHN Food Distributors Ltd. (supra)*, which read as follows:

Even if this were not right, there is the further argument advanced on behalf of the claimants that there was so complete an identity of the different companies comprised in the so-called group that they ought to be regarded for this purpose as a single entity. The completeness of that identity manifested itself in various ways. The directors of DHN were the same as the directors of Bronze; the shareholders of Bronze were the same as in DHN, the parent company, and they had a common interest in maintaining on the property concerned the business of the group. If anything were necessary to reinforce the complete identity of commercial interest and personality, Clause 6, to which I have referred already, demonstrates it, for DHN undertook the obligation to procure their subsidiary company to make the payment which the bank required to be made.

If each member of the group is regarded as a company in isolation, nobody at all could have claimed compensation in a case which plainly calls for it. Bronze would have had the land but no business to disturb; DHN would have had the business but no interest in the land.

83. Let me, at this stage, pause and refer to the case of Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies reported in (1955) All ER 725, wherein Lord Reid, at pp. 737-38, observed as follows:

It was argued that the subsidiary companies were separate legal entities, each under the control of own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent.

My Lords, in my judgment, this is too technical an argument. This is an agreement in re mercatoria. and it must be construed in the light of the facts and realities of the situation. The appellant company owned the whole share capital of British Textile Manufacturing Co. and, under the agreement of 1947, the directors of this company were to be the nominees of the appellant company. So, in fact, the appellant company could control the internal management of their subsidiary companies, and, in the unlikely event of there being any difficulty, it was only necessary to go through formal procedure in order to make the decision of the appellant company's board fully effective.

60. In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view. The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary.

At the opposite pole to this standard may be put the conduct of a parent company which says "our subsidiary company has served its purpose, which is our purpose. Therefore let it die" and, having thus pronounced sentence, is able to enforce it and does enforce it not only by attack from without but also by support from within. If this section is inept to cover such a case, it will be a dead letter indeed. I have expressed myself- strongly in this case because it appears to me to be a glaring example of precisely the evil which Parliament intended to remedy.

(Emphasis is added)

84. The observations of Lord Reid, in Harold Holdsworth & Co. (supra), clearly show that when the parent company owns the subsidiary's major shares, the business realities may, in a given case, require the court to treat the parent company and its subsidiary as one, although each of these companies is,

ordinarily, a separate legal entity.

85. In *Renusagar (supra)*, the Apex Court referring to *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, , pointed out thus:

65. Mr. Justice O. Chinnappa Reddy speaking for this Court in *LIC v. Escorts Ltd* had emphasised that the corporate veil should be lifted where the associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected. After referring to several English and Indian cases, this Court observed that ever since *A. Salomon & Co. Ltd.* case a company has a legal independent existence distinct from individual members. It has since been held that the corporate veil may be lifted and corporate personality may be looked in. Reference was made to *Pennington and Palmer's Company Laws*.

86. Referring to the development of the concept of lifting of corporate veil" from the narrow legalistic view, as had been taken in *Salomon's case (supra)*, the Apex Court, in *Renusagar (supra)*, further observed:

66. It is high time to reiterate that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The horizon of the doctrine of lifting of corporate veil is expanding. Here, indubitably, we are of the opinion that it is correct that *Renusagar* was brought into existence by *Hindalco* in order to fulfil the condition of industrial licence of *Hindalco* through production of aluminium. It is also manifest from the facts that the model of the setting up of power station through the agency of *Renusagar* was adopted by *Hindalco* to avoid complications in case of take over of the power station by the State or the Electricity Board. As the facts make it abundantly clear that all the steps for establishing and expanding the power station were taken by *Hindalco*, *Renusagar* is wholly owned subsidiary of *Hindalco* and is completely controlled by *Hindalco*. Even the day-to-day affairs of *Renusagar* are controlled by *Hindalco*. *Renusagar* has at no point of time indicated any independent volition. Whenever felt necessary, the State or the Board have themselves lifted the corporate veil and have treated *Renusagar* and *Hindalco* as one concern and the generation in *Renusagar* as the own source of generation of *Hindalco*. In the impugned order the profits of *Renusagar* have been treated as the profits of *Hindalco*.

67. In the aforesaid view of the matter we are of the opinion that the corporate veil should be lifted and *Hindalco* and *Renusagar* be treated as one concern and *Renusagar's* power plant must be treated as the own source of generation of *Hindalco* and should be liable to duty on that basis. In the premises the consumption of such energy by *Hindalco* will fall u/s 3(1)(c) of the Act. The

learned Additional Advocate-General for the State relied on several decisions, some of which have been noted.

68. The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence. The ghost of Salomon case still visits frequently the hounds of Company Law but the veil has been pierced in many cases. Some of these have been noted by Justice P.B. Mukharji in the New Jurisprudence.

69. It appears to us, however, that as mentioned the concept of lifting the corporate veil is a changing concept and is of expanding horizons. We think that the appellant was in error in not treating Renusagar's power plant as the power plant of Hindalco and not treating it as the own source of energy. The respondent is liable to duty on the same and on that footing alone; mis is evident in view of the principles enunciated and the doctrine now established by way of decision of this Court in Life Insurance Corpn. of India that in the facts of this case Sections 3(1)(c) and 4(1)(c) of the Act are to be interpreted accordingly. The persons generating and consuming energy were the same and the corporate veil should be lifted. In the facts of this case Hindalco and Renusagar were inextricably linked up together. Renusagar had in reality no separate and independent existence apart from and independent of Hindalco.

70. In the aforesaid view of the matter we are of the opinion that consumption of energy by Hindalco is clearly consumption by Hindalco from its own source of generation. Therefore, the rates of duty applicable to own source of generation have to be applied to such consumption, that is to say, 1 paisa per unit for the first two generating sets and nil rate in respect of third and fourth generating sets. It is appropriate to refer that having regard to the conduct of the State the power cuts matter and also the present proceedings the State should not be permitted to treat consumption of Renusagar's energy by Hindalco as anything other than (sic or) different from consumption of energy by Hindalco from its own source of generation. We are, therefore, of the opinion that in the facts of this case the corporate veil must be lifted and Hindalco and Renusagar should be treated as one concern and if that is taken the consumption of energy by Hindalco must be regarded as consumption by Hindalco from its own source of generation.

87. From the observations made in para 66 to 70 of Renusagar's case (supra), it becomes clear that in a given case, it is permissible for the Court to "lift the corporate veil" and look into the realities of the situation to determine if a subsidiary is so much bound by the decision of its parent company that notwithstanding its independent juristic existence, it, as subsidiary, is merely a reflection of the actions or omissions of its parent company.

88. Ordinarily, therefore, the question as to whether a subsidiary can or cannot be treated as an independent legal entity is a question of fact; but, in a given case, it may be a mixed question of fact and law. In the present case, since the

averments of the respondent No. 4 to the effect that it is a wholly owned subsidiary of the parent American company is not in dispute and when the NIT itself permits a subsidiary to participate in the tender process for supply of pacemakers if its parent company, which manufactures the pacemakers, gives lifetime warranty for the product to be supplied, there can be no escape from the conclusion that in the facts and circumstances of the present case, respondent No. 4 must be regarded as a manufacturer.

89. In *New Horizons Ltd.* (supra) too, the Apex Court has taken note of not only the decision rendered in *Ramsagar's case* (supra), but also of the other cases, namely, *DHN Food Distributors Ltd* (supra), *Scottish Co-operative Wholesale Society Ltd., v. Meyer* reported in (1958) 3 All ER 66, and *Harold Holdsworth & Co. (Wakefield) Ltd.* (supra).

90. Referring to the cases of *Scottish Cooperative Wholesale Society Ltd* (supra) and *Harold Holdsworth & Co.* (supra), the Apex Court, in *New Horizons Ltd.* (supra), observed, at para 29, 30, 33, 34, 35, 36 and 37, thus:

29. In *Scottish Coop. Wholesale Society Ltd. v. Meyer*, a case u/s 210 of the Companies Act, 1948, Viscount Simonds has quoted with approval the following observations of Lord President Cooper:

In my view, the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view.

30. Similarly in *Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies* it was argued that the subsidiary companies were separate legal entities each under the control of its own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies, and that, therefore, the agreement cannot be construed as entitling them to assign any such duties to the respondent. The argument was rejected by Lord Reid with the observation: "This is too technical an argument." The learned law Lord went on to hold: "This is an argument in re mercatoria, and it must be construed in the light of the facts and realities of the situation.

33. This Court in *Juggi Lal Kamlatpat v. CIT* has laid down that "in certain exceptional cases the court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade". (SCR p.995).

34. In *State of U.P. v. Renusagar Power Co.* this Court lifted the veil to hold that Hindalco, the holding company, and Renusagar Power Co., its subsidiary, should be treated as one concern and the power plant of Renusagar must be treated as the own source of generation of Hindalco and Hindalco would be liable to payment of electricity duty on that basis. It was observed:

It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation.... The

horizon of the doctrine of lifting of corporate veil is expanding.

35. There are cases where the court has looked behind the facade of the company and its place of registration in order to determine its residence and for this purpose the test laid down is the place of the central management and control. (See: *De Beers Consolidated Mines Ltd. v. Howe.*) Similarly the Court has looked at the incorporators in order to determine the character of the corporation as an enemy alien or as a British resident (See: *Daimler Co. Ltd. v. Continental Tyre and Rubber Co. Ltd.*). According to Professor Gower this does not involve breach of the principle laid down in *Salomon* case. (See: Gower's *Principles of Modern Company Law*, 4th Edn., p. 136.)

36. After making a special study of this branch of the law, a learned scholar has discerned four different attitudes towards the company injudicial pronouncements. According to him these categories, in progressive order, are (i) peeping behind the veil; (ii) penetrating the veil; (iii) extending the veil; and (iv) ignoring the veil. The decisions relating to determination of residence or enemy status of a company have been placed by him in the category of "peeping behind the veil" where the court peeps behind the veil and concludes from the shareholders or from the people in control of the company, something about the nature of the company. (See S. Ottolenghi: *From Peeping Behind the Corporate Veil to Ignoring it Completely.*)

37. This Court has adopted a similar approach and in some cases it has seen through the corporate veil. In *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly* the Court was considering the question whether the appellant company was an agency or instrumentality of the State for the purpose of Article 12 of the Constitution. It was said:

For the purpose of Article 12 one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the State.

So also in *State of U.P. v. Renusagar Power Co.* it has been observed:

The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence.

91. In the light of the observations made in *New Horizons Limited* (supra), it is clear that when a subsidiary is an alter ego of its principal or holding company, because of the fact that the activities of the subsidiary are controlled by the holding company, the court may regard, in public interest or as a matter of public policy, the two separate legal entities as one either for the purpose of imposing legal obligations on them or for the purpose of giving them legally due benefit. In the present case, when respondent No. 4 is, admittedly, a wholly owned subsidiary of its holding company, namely, the parent American company and all that the NIT needs is a lifetime warranty from the principal company in respect of the pacemakers, which may be supplied by a subsidiary, such as, respondent

No. 4, there can be no escape from the conclusion that in the facts and circumstances of the present case, the Court will not be wrong in looking into the realities of the situation and in treating the respondent No. 4 eligible to supply the products manufactured by its holding company in terms of the NIT.

92. For a moment, even if one were to assume that the respondent No. 4 is not manufacturer of the pacemaker, which stands selected, the fact remains that the NIT itself stipulated bidding by a subsidiary for a product, which is manufactured by its parent company, provided that the subsidiary can offer a lifetime warranty of the product, which is sought to be supplied. In the present case, there is no dispute that lifetime warranty in respect of the pacemaker, in question, issued by the parent company, was furnished by the respondent No. 4 as the subsidiary. In such circumstances, respondent No. 4 cannot be treated to be ineligible to participate in the tender process.

93. In *G.E. Engineering Works Ltd. v. Oil India Ltd. and Ors.* reported in (2007) 3 GLR 899, while considering the question of experience acquired by a firm or a company, which has merged into, or amalgamated in, any other firm or company, whether the experience of the firm or company before Such merger or amalgamation can be taken into account in favour of the newly born firm or company, this Court pointed out, referring to *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, , thus:

17. It may, now, be pointed out that when the owner of a proprietary concern decides, in order to expand his business, to form a partnership firm with some others, strictly speaking, a new entity is born in the form of a firm. The firm, which may be so born, could not have had any experience in its own name. This does not mean that a businessman would not take into consideration the earlier experience of one of the partners of such a firm for the purpose of determining the capability of the firm to execute a contract if allotted to them. Similarly, a firm may consist of two persons as partners and in order to expand their business, they may bring in some new partners and a new firm, in a new name, may be organized and formed. Though the newly born firm may not have any experience in its own name, would the experience of those, who had been carrying on the business of the type, which the newly born firm is required to do, not be, counted by a prudent businessman for determining the technical experience of the newly born firm to do the business? It is not uncommon that a company, on account of merger or amalgamation, undergoes a re-organization and a tender may be submitted in the name of such a re-organized company. Shall the experience of the company, which has merged into re-organized company, not be taken into consideration, because the tender has not been submitted in the name of the company, which has merged, but has been submitted in the name of a re-organized company, which has no experience, in its own name? Similarly, there may be a split in a company and the persons, who had been looking after a particular field of the business of the company, may form a new company after leaving the earlier company. The new company,

though have persons with experience in the field, may not have experience in its own name; while the original company would have experience in its own name, but it would lack persons with experience, who had done work in the field. The requirements, regarding experience, cannot mean that the offer of the original company must be considered, because it has experience, in its name, though it does not have any experienced person with it to carry on the work and ignore the offer of the new company on the ground that it has no experience in its own name, though it has persons having experience in the field and also capability to undertake and execute the work. A tender process, in such a case, is nothing, but a commercial transaction. The terms and conditions of the bidding documents have to be, therefore, construed, from the standpoint of a prudent businessman. When a businessman enters into a contract, whereunder some work is required to be performed, he would seek to assure himself about the credentials of the person whom he has to choose for the purpose of performance of the work. If such credentials are to be examined from a commercial point of view, it logically means that if the contract is to be entered into, a company, as a prudent person in business, will look into the background of the entity, be it a company or firm, and the persons, who are in control of the same and capable to execute the work. A businessman would not go by the name of the company alone, but by the persons behind it, who have experience to do the work; Similar has to be approach of the State and its instrumentalities, while considering the eligibility of a tenderer, as is the case at hand, I for the purpose of awarding the contract.

94. Thus, the yardstick to be applied in determining the selection of a product by a State or its instrumentality in a commercial contract or transaction has to be that of a prudent businessman, for, a prudent businessman is not expected to select a product irrationally, arbitrarily, illegally and/or dishonestly. The selection of the product, in the present case, could not be proved to be irrationally, arbitrarily, illegally and/or dishonestly done.

95. In Gower's Principles of Modern Company Ltd. (6th Edition, at page 166 to 170), the leaned author has dealt with the concept of treating many independent legal entities as a single economic unit for the purpose of a given case. The observations make interesting reading and, are, therefore, reproduced hereinbelow:

The "single economic unit" argument

The first of these, described as the "single economic unit argument" proceeded as follows: Admittedly there is no general principle that all companies in a group of companies are to be regarded as one; on the contrary, the fundamental principle is unquestionable that "each company in a group of companies...is a separate legal entity possessed of separate rights and liabilities". Nevertheless, it was argued, the court will, in appropriate circumstances, ignore the distinction between them, treating them as one. For this proposition a number of authorities were cited.

The first of these was *The Roberta*, in which bills of lading had been signed on behalf of a subsidiary company but a concession was made at the trial that the parent company was responsible for the bills. The judge described the concession as properly made since the subsidiary was a separate entity from the parent (which owned all its shares and supplied two out of three directors) "in name only and probably for the purposes of taxation". The second was *Holdsworth & Co. v. Caddies* in which it had been argued that Caddies, who had been appointed managing director of Holdsworth, the parent company of the group, could not be ordered to devote his whole time solely to duties in relation to the affairs of the subsidiaries since these were separate legal entities under the control of their own boards of directors. This argument was "an agreement in remercatoria and must be construed in light of the facts and realities of the situation". The third authority was *Scottish Co-operative Wholesale Society Ltd. v. Meyer*. In that case it had been argued that the appellant could not be said to have conducted the affairs of the company in a manner oppressive to some part of the members within the meaning of Section 210 of the Companies Act 1948 since it was not that company which had acted oppressively but a subsidiary which it had formed. The House of Lords had no hesitation in rejecting this argument since "every step taken by the subsidiary was determined by the policy of the parent" and "the section warrants the courts in looking at the business realities of the situation and does not confine them to a narrow legalistic view."

The above three authorities related exclusively to the interpretation of statutes or documents, an area in which further authority to the like effect can be found. The fourth case relied on in support of the "single economic unit argument", *DHN Food Distributors Ltd. v. Tower Hamlets LBC* was rather different. DHN had two wholly owned subsidiaries, in one of which the landed property of the group was vested, while DHN carried on the business of the group, occupying the property as a licensee. According to the decision of the Lands Tribunal, on the compulsory purchase of the land, negligible compensation only was payable since DHN had been deprived merely of a revocable license and the subsidiary had had no business to lose. The Court of Appeal reversed that decision on the three grounds, the one relevant here being expressed thus by Lord Denning MR.:

This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point.... They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one and the parent company, DHN, should be treated as that one.

This, and the way in which it was put by Goff LJ, namely that "This is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil", show, surely, that the Court did not regard itself as construing a document or statute but was relying on what, in the judgment in *Cape*, is dealt

with under its next head, "the corporate veil" point. And, surely, it was on that assumption that in the later case of *Woolfson v. Strathclyde Regional Council*, Lord Keith of Kinkel said, in reference to *DHN* case,

I have some doubts whether...the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts.

In none of the cases considered under the present heading was the company concerned a "mere facade concealing the true facts". It is only when that is so that the court, in construing a document or statute, could have regard to the economic realities there would be very few such cases.

It is therefore somewhat puzzling that the Court of Appeal in *Cape*, said:

the relevant parts of the judgments in the *DHN* case...must, we think, likewise be regarded as decisions on the relevant statutory provisions for compensation even though these parts were somewhat broadly expressed and the correctness of the decision was doubted by the House of Lords in *Woolfson*....

The true position, it is submitted, is that a facade concealing the true facts is not an essential element in interpretation cases; it is this which distinguishes them from the "corporate veil" cases considered under the next heading.

The fifth and sixth cases prayed in aid of the "single economic unit" argument clearly were cases of interpretation. In the first, *Revlon Inc. v. Cripp & Lee Ltd.*, the question arose as to whether goods were "connected in the course of trade with the proprietor of the trademark", within the meaning of Section 4(3) of the Trade Marks Act 1938. The proprietor of the trade mark was not *Revlon Inc* (*Revlon*) but *Revlon Suisse S.A.* (*Suisse*). In holding that the goods traded by *Revlon* were collected with *Suisse*, Buckley J., said:

Since...all the relevant companies are wholly owned subsidiaries of *Revlon*, it is undoubted that the mark is, albeit remotely, an asset of *Revlon* and its exploitation is for the ultimate benefit of no one but *Revlon*.... The mark is an asset of the *Revlon* group of companies regarded as a whole, which all belong to *Revlon*. This view does not, in my opinion, constitute what is sometimes called piercing the corporate veil; it recognizes the legal and factual position resulting from the mutual relationship of the various companies.

The sixth authority considered by the Court was the advice of Advocate General Warner in two related cases before the European Court of Justice (an illustration of the growing influence of E.C. law on English Law) on the question whether a parent company and its subsidiary were separate "undertakings" within the meaning of the competition Articles 85 and 86 of the Treaty. He pointed out that neither article referred to "persons" but to "undertakings, a much wider and looser concept" and said that this is "what one would expect, because it would be inappropriate to apply rigidly in the sphere of company law the doctrine referred to by English lawyers as that of *Salomon v. Salomon & Co. Ltd.*" In his

view that doctrine existed basically in order to preserve the principle of limited liability although it had been applied, "with more or less happy results in other spheres". But "to export it blindly into branches of the law where it had little relevance could serve only to divorce law from reality". If a company, established outside the European Community, it would be amenable to the jurisdiction of the E.C. Commission and Court; it should make no difference if it did so through a subsidiary company whether wholly owned or not. He therefore concluded that:

(i) there is a presumption that a subsidiary will act in accordance with the wishes of its parents because according to common experience they generally do so act;
(ii) unless the presumption is rebutted, it is proper for the parent and the subsidiary to be treated as a single undertaking for the purposes of articles 85 and 86....

After reviewing these authorities the Court in *Cape* expressed some sympathy with the plaintiffs' submissions and agreed that:

To the layman at least the distinction between the case where a company trades itself in a foreign country and the case where it trades in a foreign country through a subsidiary, whose activities it has power to control, may seem a slender one.

It also accepted that the wording of a particular statute or document may justify the court in interpreting it so that a parent and subsidiary are treated as one unit at any rate for some purposes. It seems therefore that in aid of interpretation the court may have regard to the economic realities in relation to the companies concerned. But that now seems to be the extent to which the "single economic unit" argument can succeed. The narrowness of this proposition needs to be appreciated. It does not say that the court, when construing a statute or document, must treat all the companies in a group as a single legal entity. Whether the court does so will depend upon its conclusion as to whether such a step is needed to effect the underlying purpose of the statute or transaction.

96. From the observations made above on the concept of single economic unit by Professor Gower, it clearly follows that a facade, concealing the true state of affairs, is not a condition precedent for lifting of a corporate veil. In a given case, the principle of single economic unit can be taken into account in determining the economic reality in the expanding horizon of global economy. There is a presumption that a subsidiary will act in accordance with law, but according to the conscience of its parents. Unless, therefore, this presumption is rebutted, it is proper for the parent and the subsidiary to be treated as single economic unit. Considered thus, there can be no escape from the conclusion that the conditions, stipulated by the NIT, made the respondent No. 4 eligible to offer the products of its parent company.

97. What crystallizes from the discussions held, as a whole, is that this writ petition suffers from suppression of material facts, contain consciously made incorrect, false and misleading statements in order to persuade the Court to

interfere with the selection process and even when the writ petitioners were pointed out to have suppressed material facts, made incorrect, coloured, false and misleading statements, the writ petitioners remained unrepentant and continued to pursue their line of action by offering explanations, which the materials on record do not support; rather, clearly belie. The writ petitioners were also ineligible to participate inasmuch as the pacemaker, which they claim to have offered, did not meet the specifications contained in the NIT. No deviation, going to the root of the selection process, could be shown to have taken place in the act of selecting the pacemaker, in question. The writ petitioners have also failed to show that in the context of the facts and circumstances of the present case, respondent No. 4 was not manufacturer of the pacemaker, which has been selected. Even if one were to assume, for a moment, that respondent No. 4 is not a manufacturer of the pacemaker aforementioned, the writ petitioners failed to show that in the light of the terms and conditions, specified in the NIT, respondent No. 4 was not eligible to bid in the tender process as a subsidiary of its holding company.

98. For the reasons aforesaid, I do not find any merit in this writ petition. This writ petition, therefore, fails and shall stand dismissed. Taking into account the matter in its entirety and in the interest of justice, the petitioners are directed to pay a cost of Rs. 10,000/.

99. With the above observations and directions, this writ petition shall stand disposed of.

100. Return back the records.