
(2002) 05 SHI CK 0015

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 247 of 2002

Techno Electric and Engineering Company Ltd. and Others	APPELLANT
Vs	
Nathpa Jhakri Power Corporation Ltd. and Others	RESPONDENT

Date of Decision : 24-05-2002

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 19G, 226, 298

Citation : (2003) 1 ShimLC 170

Hon'ble Judges : W.A. Shishak, C.J.; Lokeshwar Singh Pant, J

Bench : Division Bench

Advocate : M.L. Verma and Aruneshwar Gupta and Sunil Goel, for the Appellant; B. Dutta Sr. Advocate, K.D. Shreedhar and Ankush Sood, Additional Central Government, S.C. for Respondent No. 2 and Sanjay Karol, General and R.M. Bisht, A.A.G., for the Respondent

Judgement

Lokeshwar Singh Pant, J.—In this petition under Article 226 of the Constitution of India, Petitioners inter alia pray for issuance of a writ of mandamus or any other appropriate writ, directions or order to quash and set aside communication/order, dated 18.2.2002 and/or to treat the same as null and void ab-initio and issue a writ of certiorari calling for the records of the case and after going into the legality and validity of the communication and/or order dated 18.2.02 quash and set aside the same and to issue a Writ of prohibition restraining the Respondents; their officers; subordinates: agents; nominees; servants and persons claiming through or under them not to give effect to the impugned communication and/or order dated 18.2.02 in any manner whatsoever and to refrain them from interfering with the rights of the Petitioners in terms of the Letter of Intent dated 26.12.01 and the Letters of Award dated 15.1.02.

2. Petitioner No. 1 is a company incorporated under the Companies Act, 1956 having its registered office at P-46 A, Radha Bazaar Lane, Calcutta. Petitioner No. 2 is a member/shareholder and also Executing Director and Power of Attorney holder of Petitioner No. 1-Company Nathpa Jhakri Power Corporation Ltd. (for

short NJPC-Respondent No. 1-Corporation) is a Government Company being a joint venture between Union of India through Secretary Ministry of Power (Respondent No. 2) and Government of Himachal Pradesh through Secretary, Ministry of Power (Respondent No. 3). NJPC, is responsible for executing 6 x 250 MW Nathpa Jhakri Hydro Electric Power Project (for short NJHPP) which was sanctioned in 1989. The NJHPP envisaged to harness the hydropower potential in the upper reaches of river Setluj in the South West of Himalayas in District Shimla. The project was estimated to cost Rs. 7,666/- Crores. However, the current revised estimate is in the vicinity of Rs. 10,000/- Crores. In July 2000, Respondent No. 1 Corporation issued Notice Inviting Tender (NIT) marked as Annexure P-4 for International Competitive Bid for Package-IX relating to supply, erection and commissioning of cables, cabling and cable trays. The last date for submission of bids was 31.8.2000 (to remain valid upto 28.2.2001) and an Earnest Money Deposit (EMD) of Rs. 10 Lacs was to be submitted alongwith the bid with a validity period of 7 months i.e. upto 31.3.2001. On or about 11.7.2001 Petitioners requested Respondent No. 1 -Corporation for a complete set of bid documents. Complete set of bid documents with conditions of contract (Supply-cum-erection-ICB) Volume-I marked as Annexure P-5 were issued to the Petitioners on or about 25.7.2000. According to the Petitioners on or about 28.8.2000 as per the requirement they submitted their bid for package-IX in two parts i.e. (i) Techno Commercial bid and (ii) Price Bid. After opening the Techno Commercial Bid, Respondent No. 1 Corporation sought various clarifications and confirmations from the Petitioners on various points vide their letters dated 25.10.2000, 27.7.2001, 10.8.2001, 23.8.2001, 28.8.2001 and 6.9.2001, true copies whereof are filed with the petition and marked as Annexure P-6 (containing six pages). Petitioners by their letters dated 8.11.2000, 8.8.2001, 30.8.2001 and 7.9.2001 marked Annexure P-7 (containing 19 pages) replied and clarified all the points raised by Respondent No. 1-Corporation. Price bid was opened by Respondent No. 1 Corporation on or about 12.9.2001. The Petitioners have stated that on or about 11.12.2001 Respondent No. 1 Corporation requested them to hold a meeting for further discussions and clarifications and on or about 18.12.2001 further detailed discussions were held between tender committee and the Petitioners at the office of Respondent No. 1-Corporation at Shimla. After the meeting was over, the Petitioners conveyed their confirmations on the points discussed during the meeting on the same day.

3. According to the Petitioners on or about 26.12.2001 Respondent No. 1-Corporation confirmed having accepted their proposal for a total price of Rs. 6,17,33,113/- for package-IX and awarded the contract to them by issuing a Letter of Intent (LOI) dated 26.12.2001 which was accepted by the Petitioners. The contract schedule dated 26.12.2001 was linked with the LOI and the work had commenced from 26.12.2001 itself. On 15.1.2002 Letters of Award (LOA) was issued by Respondent No. 1-Corporation to the Petitioners which were duly accepted by them. The Petitioners stated that relying upon the representation, assurance, promises and understanding made by the Respondent No. 1-

Corporation while submitting and negotiating the bid in response to the NIT since July 2000 as contemplated and incorporated in the LOI dated 26.12.2001 and the LOA dated 15.1.2002, had changed their position to their detriment by taking various steps in furtherance thereof by incurring expenditure for preparation and submission of offer against the tender including the cost of bid bond, incurring expenditure for travelling and staying for holding meetings at Shimla with the officials of the Respondent No. 1 Corporation by officials from Calcutta office of the Petitioners including overhead expenses of such officials, undertaking Engineering activities, placing purchase orders for cables and cable trays dated 21.1.02 and 24.1.02 totalling to about Rs. 373 Lacs and accepting security deposit/Bank guarantees dated 30.1.2002 and 12.2.2002 from the respective vendors and submission of performance Bank Guarantees totalling to Rs. 61 lacs by them to Respondent No. 1 Corporation. Further, considering time being the essence of the contract, the Petitioners scheduled their other ongoing works/projects accordingly, by allocating the resources and manpower on that basis. True copies of the purchase orders dated 21.1.2002 and 24.1.2002 and Bank Guarantees dated 30.1.2002 and 12.2.2002 and the list of the ongoing projects of the Petitioners dated 1.2.2002 are annexed and marked as Annexure P-11 (containing 27 pages). On 17.1.2002 Deputy Chief Engineer (E) Design of Respondent No. 1 Corporation by letter marked as Annexure P-8 requested Petitioners to pre-pone the date of completion to which the Petitioners politely agreed. Petitioners furnished Bank Guarantees dated 21.1.2002 marked Annexure P-9 (Containing 6 pages) for a sum totalling to Rs. 61,73,311/- being 10% of the total amount of the contract. Petitioners stated that G.M. (ECD) of Respondent No. 1 Corporation to their real shock and surprise issued a letter dated 23.1.2002 marked as Annexure P-10 to them without any notice without any rhyme and reason and without giving the Petitioners an Opportunity of being heard directing them to keep the LOI dated 26.12.2001 and LOA dated 15.1.2002 in abeyance till further notice. Again, according to the Petitioners, they were further shocked and surprised to receive the letter dated 8.2.2002 of Respondent No. 1 Corporation on 13.2.2002 whereby it returned the Contract performance security for supply contract and the contract performance security for Erection Contract submitted by them alongwith the accepted copies of the LOI dated 26.12.2001 and the LOA dated 15.1.2002 informing them that the same has been returned in view of the letter/communication or order, dated 23.1.2002 issued by Respondent No. 1-Corporation. On or about 18.2.2002 Petitioners ultimately received the impugned letter/communication or order vide which Respondent No. 1 Corporation withdrew/terminated the contract awarded to them by withdrawing the LOI dated 26.12.2001 and LOA dated 15.1.2002 as per Clause 47.0 of conditions of contract, Section GCC (Termination of Contract on owner's initiative). The Petitioners stated that they made representations dated 24.1.2002, 7.2.2002 and 15.2.2002 marked Annexure P-12 (7 pages) requesting Respondent No. 1-Corporation to supply reasons to them and also requested to afford hearing but the same has been denied to them. On these premises the Petitioners filed this writ petition challenging the impugned communication and/

or order, dated 18.2.2002 issued by the Respondent No. 1-Corporation inter alia on the following grounds:

(a) that the impugned letter/order or directions in unreasonable, unjust, improper, unconstitutional, illegal, null and void ab-initio in violation of their fundamental rights under Article 14 of the Constitution of India;

(b) the impugned communication and/or order, and/or directions dated 18.2.2002 being in violation of the principle of Natural Justice i.e. *ad altrum partem* as the LOI dated 26.12.2001 and LOA dated 15.1.2002 created the vested rights in the Petitioners to carry on the contract in terms of the contract documents and the Respondents were bound to give an opportunity of hearing to the Petitioners before taking the decision of withdrawing the LOI dated 26.12.01 and LOA dated 15.1.02;

(c) the impugned communication violates the constitutional code of equality as enshrined in Article 14 of the Constitution of India as Respondent No. 1 - Corporation had issued the LOI and LOA to several other similarly situated persons in similarly situated position but no other similar order of withdrawal has been issued by the Respondent No. 1-Corporation in respect of them. Thus the Respondent No. 1 Corporation has picked and chosen the Petitioners and have discriminated with them by singling them out without any nexus with the objects sought to be achieved and in fact the action of Respondent No. 1 Corporation serves to defeat the very objective of the project being completed on time in the face of dire and urgent need of power in the area and the cost over runs that come with the delays, hence resulting in overall wastage of public funds;

(d) The impugned communication and/or order or directions dated 18.2.2002 is without jurisdiction and without authority of law, more particularly because neither any term of the NIT nor any terms of the general conditions of contract or any other terms or conditions authorizes and/or empowers the Respondent No. 1 Corporation to issue the impugned order of withdrawal;

(e) the Petitioners relying upon the representations, assurances, understandings, promises, that the contract will be awarded pursuant to the terms and conditions of the NIT, they had submitted their bid and had deposited the EMD of Rs. 10 Lacs alongwith the bid and had extended the validity of the bid and the EMD from time to time and had changed its position to its detriment and as such Respondents are bound by the doctrine of promissory estoppel to abide by the representations, assurances and promises made by them to the Petitioners and the Respondents are as such estopped to give effects to the impugned communication and/or order dated 18.2.2002.

4. The Writ Petition came up for admission before a Division Bench on 25.2.2002 on which date notices were ordered to be issued to the opposite parties which were accepted by their learned Counsel. One week's time to file reply affidavit(s) was granted to the Respondents and within four days thereafter rejoinder(s) was ordered to be filed. On interim application, the parties were directed to maintain

status quo as of the date i.e. 25.2.2002 in respect of the contract stated to have been awarded to the Petitioners. Affidavit-in-reply was filed by Respondent No. 1 Corporation and no counters were intended to be filed by Respondents 2&3 as represented by their learned Counsel on 13.3.2002. On CMP No. 236/2002 this Court after hearing the learned Counsel for the parties modified the interim order dated 25.2.2002 to the extent that Respondent No. 1 Corporation was allowed to issue fresh tender notice in respect of the cables, cabling and cable trays package-IX for Nathpa Jhakri Hydroelectric Power Project (NJHPP)(6 x 250 MW).

5. Counter to the writ petition on behalf of Respondent No. 1 Corporation is filed by Er. Pradeep Dube, General Manager (ECD) in which preliminary objection of the maintainability of the writ petition for the reliefs claimed therein was raised. It is submitted by Respondent No. 1 Corporation that the questions raised by the Petitioners relating to enforcement of contractual obligations arising out of LOA dated 15.1.2002 and matters pertaining to GCC terms and conditions accompanying the NIT inviting International Bids from qualified bidders for Package-IX to include complete co-ordination, management, design, engineering, manufacture, shop-testing, packing, handling, erection, testing and commissioning etc. cannot be decided by this Court in the writ petition. It is also submitted that Respondent No. 1 Corporation is within its right to cancel the LOI and the LOA dated 26.12.2001 and 15.1.2002 respectively in terms of Clause 47.0 of Conditions of Contract (Section GCC) on "Owner's Initiative". The Respondent No. 1 Corporation has proceeded to cancel the contract on the ground of improper evaluation of Bid Prices as advised by their Consultants i.e. National Hydro Power Corporation Limited (NHPC) a Government of India Undertaking charged with the duty of commissioning and setting of Hydro Electric Projects having the necessary technical know-how and expertise and who advised that Petitioners' bid has not been properly evaluated for the following reasons:

(a) Upward revision of the quoted Sales Tax amount of M/s NICOO in Schedule-7 of their Price Bid by the TEC of NJPC is not justified; and

(b) Loading on account of Excise Duty on the bought out items of M/s. NICCO is also not justified.

6. It is further submitted that on the above basis it was found that the Petitioners' bid was not the lowest (L-1) and the LOA had been wrongly issued to them. The Respondent No. 1 Corporation could only negotiate with the L-1 bidder and on account of this fundamental basic infirmity, the Respondent No. 1 Corporation had no other alternative except to withdraw the LOI/LOA issued to the Petitioners on "Owner's Initiative under Clause 47 of Conditions of Contract, (Section GCC)" and the said decision was taken keeping in view the settled law and guidelines issued by the Central Vigilance Commission titled "Improving Vigilance Administration" dated 18.11.1998 placed on record and marked as Annexure R-1. According to Respondent No. 1-Corporation this petition is also misconceived and incompetent as in the GCC terms and conditions Clauses No.

50 and 51 provide for Dispute Resolution between the Contractor and the Owner's Engineer by Arbitration redressal. It is further submitted that LOI/LOA has been cancelled at the very threshold and before the execution and signing of the formal contract in prescribed performa accompanying the bid documents (Annexure-VI), a copy of which is placed on record as Annexure R-2. All jurisdictional and factual matters arising in the present writ petition can only be decided by the Arbitrators in Arbitration specifically governed by the Arbitration and Conciliation Act, 1996 (Clause. 51.4 of GCC). The writ petition is thus barred by the alternative remedy agreed to by the parties.

7. The Respondent No. 1 Corporation further submitted that besides Clause 47.00 that provides for a self-contained remedy, that is, in the event of termination of the contract on the "Owner's Initiative", the Contractor shall be paid equitable and reasonable compensation, as dictated by the circumstances prevailing at the time of termination and in the event of disagreement between the parties, Clauses 50 and 51 shall come into play, if so invoked by the aggrieved party. The cancellation of the Petitioners' bid after erroneous issue of LOA dated 15.1.2002 is in accord with the principles of evaluation of bid as found by the answering Respondent's Consultant (NHPC) who opined that the Petitioner had been erroneously adjudged as L-1. It further stated that LOA becomes effective only after signing of the Contract Agreement as per Annexure VI of Conditions or Contract and no concluded contract arises between the parties until signing and execution of formal Agreement. Even assuming that binding contract comes into existence (which is not admitted) no writ lies to enforce contracts by writs of mandamus and/or other writs, directions or orders. All factual matters raised in the writ petition are disputed questions of facts which cannot be agitated in writ jurisdiction. Respondent No. 1 Corporation prays for dismissal of the writ petition with costs.

8. On merits it is denied that the work had commenced from 26.12.2001 itself and that a binding and concluded contract came into existence between the parties by the issue of LOA dated 15.1.2002. The allegations that the Respondent No. 1 Corporation acted arbitrarily, illegally or erroneously are denied. It is also denied that the Petitioners should have been afforded an opportunity of hearing and giving 30 days notice before the cancellation of their LOI/LOA as they had not mobilized the work at site at all nor carried out any steps altering their position to their disadvantage as alleged in the petition and by letter dated 23.1.2001, the LOI/LOA were kept in abeyance, the answering Respondent has refunded the earnest money/CPG of the Petitioners vide letter No. A/II/BKG/02/7931-32 dated 20.2.2002 and NJPC/ECD/PKG -DC/02-2191 dated 8.2.2002 respectively. It is also stated that there is no question of violation of Article 14 of the Constitution of India in matters pertaining to contracts governed by agreed terms and conditions forming part of Bid documents. As submitted in the Preliminary Objections, the Petitioners have an adequate, alternative and efficacious remedy under Clauses 50 and 51 of GCC and that this Court cannot in exercise of its extra-ordinary writ jurisdiction enforce contractual rights and

obligations. The Respondent No. 1 Corporation has rightfully and lawfully taken decision to withdraw the LOA in the public interest. The Petitioners cannot claim an absolute right to the award of contract to them. It is also stated that the question regarding preponement of Units 5 and 6 by December, 2002 and July, 2003 and last units by December, 2003 are matters of contract depending upon the award of work on the basis of proper evaluation of bids in the light of the guidelines of International Competitive Bidding and of the Central Vigilance Commission. The allegations of the Petitioners that there is wastage of public funds are denied being wild and completely unsubstantiated.

9. The Petitioners in their rejoinder denied the averments made by Respondent No. 1 Corporation in its preliminary objections. They have denied that Clause 47.0 is applicable to the dispute raised by them in the writ petition. They stated that NHPC has no power or right as a Consultant to advise the cancellation of LOI and LOA issued to the Petitioners. They have submitted that the expert high power Tender Evaluation Committee (TEC) set-up for this tender after following all the procedures of the General Conditions of Contract had in fact as per the Final Evaluated Bid Price found the Petitioners to be L-1 and thereafter with the valid approval of the Competent Authority LOI dated 26.12.2001 and thereafter LOA dated 15.2.2002 were issued to them. Petitioners have denied that their bid was not the lowest (L-1) or there was any infirmity, fundamental or otherwise in issuing the LOA to them. Petitioners submitted that it appears from the reply of Respondent No. 1-Corporation that due to some extraneous reasons Respondent No. 1. Corporation after award of the contract has tried to revise the bid submitted by M/s. Nicco by taking resort to some post price bid opening letter submitted by M/s. Nicco, whereunder they have sought to raise the price taking advantage of read out prices which in itself otherwise merits out right rejection of their bid. NICCO had not included the excise duty and sales tax on excise duty which according to the NIT and EXIM policy had to be included in their quoted prices to arrive at the correct "Final Evaluation Bid Price" as was done by the Expert Committee. The Petitioners' bid has been finally evaluated and accepted as the lowest bid as per Respondent No. 1's own Tender Committee Evaluation and after subsequent approval of the Competent Authority LOI dated 26.12.2001 and LOA dated 15.1.2002 have been issued to them and the price bid could not be allowed to be unscrambled again by Consultant advice to take into account some alleged letter of the unsuccessful bidder which had been dealt "with in detail in evaluation report and considered before according approval. Alleged letters tantamount to alteration of price bid and as such strikes at the very root of tendering process which has to be sacrosanct as once a bid is opened it cannot be allowed to be changed or altered or amended at all, as such, the action of the Respondent No. 1 Corporation of altering the price bid being based on extraneous consideration is completely mala fide and beyond the pale of law being unfair, arbitrary, unlawful and illegal and hence null and void ab initio.

10. The Petitioners also submitted that the decision to cancel the contract on the ground of "Improper Evaluation of Bid Price" has been taken merely on the

advice of consultant and not on the advice of High Power Tender Committee that was specially constituted to evaluate this tender and which after detailed deliberations for over 14 months had been completely by passed. It appears that the advice given by NHPC has been accepted completely ignoring the detailed evaluation carried out by NJPC. Instead of evaluating advice of the Consultants, and following the due process, Competent Authority in NJPC (CMD NHPC in this case as he is holding charge of CMD NJPC), has rushed to the conclusion that evaluation done was wrong and mala fidly resorted to unfair, and unlawful cancellation of order. Revising its own decision, therefore, appears to be motivated and with mala fidly intentions. The guidelines issued by the Central Vigilance Commission first of all enjoin complete transparency in the process of tender evaluation and the same transparency was meticulously observed during the process of evaluation of bids spanning over a period of 14 months when the Petitioners' bid was considered along with the other bid submitted in response to the NIT issued by the Respondent No. 1 Corporation for Package IX and after thorough and comprehensive process of evaluation by a duly constituted Tender Committee of experts who interacted, held discussions and negotiated with all the bidding parties and only thereafter adjudged and declared the bid submitted by the Petitioners as the lowest bid in terms of the finally evaluated bid price. The Petitioners have stated that uptil the point of issuing the LOI and LOA to them full and complete transparency was observed and it is only afterwards that out of the blue the Petitioners started receiving communications from the Respondent No. 1 Corporation, first being letter 23.1.02 cryptically conveying them that the LOI and LOA issued to them have been kept in abeyance and no reasons) were given nor it was mentioned under whose authority it has been issued and no hearing was given to them prior to issuance of the said letter. The Petitioners sent representations/Demand of Justice letter dated 24.1.2002 and 7.2.2002 asking for reasons and hearing but to no avail and instead vide communication dated 8.2.2002 again in the most cryptic manner the contract performance guarantees submitted by the Petitioners alongwith the accepted copies of the LOI and LOA were returned to them simply recording therein that the same have been returned in view of the Communication dated 23.1.2002 of the Respondent No. 1-Corporation. Then finally, vide its letter dated 18.2.2002, LOI and LOA were withdrawn simply in view of the communication dated 23.1.2002 and 8.2.2002 by citing Clause 47 of the Conditions of Contract.

11. The Petitioners have denied the averments of the Respondent No. 1-Corporation that any clause of the Conditions of Contract pertaining to the settlement of dispute or Arbitration will be applicable to the contentions raised by them in the writ petition. The issues raised in the writ petition pertain to the illegalities and arbitrariness committed by Respondent No. 1 Corporation during the process of evaluation of tender and Respondent No. 1 being a Government Company is fully amenable to the writ jurisdiction for violating Fundamental Right under Articles 14, 19G and 300A of the Constitution of India and as such as per the settled law the process of evaluation of tenders is amenable to judicial

interference if it is found to be arbitrary and illegal and thereby impinging on the Fundamental Rights guaranteed by the Constitution of India. According to the Petitioners Package IX is fully financed from the domestic funding and is not covered by any bilateral or multilateral funding agencies such as World Bank. The disputes raised by the Petitioner in the Writ Petition pertain to the tendering process and are therefore not covered by the agreement in terms of alternative dispute resolution clauses in the contract which govern and pertain to the disputes arising out of the execution of the contract or in the working of the contract whereas the disputes regarding the process of awarding tenders by a Government Company would be covered under judicial scrutiny as by awarding such contracts the Government company is distributing public largesse and is bound to observe the principles of equality, fairness and natural justice and therefore, the tender process can be gone into by the Courts of law and as such do not at all get barred by any agreement between the parties in terms of alternate remedy/disputes resolution process that comes into play subsequently only during execution of the Contract. The Petitioners further submitted that they have not raised any claim for compensation/damages etc. against the Respondent No. 1 Corporation and, therefore, Clause 47.0 of the Conditions of Contract (GCC) is not at all applicable to the contentions raised by the Petitioners in the writ petition. The Petitioners have denied that the alleged Consultant (NHPC) of Respondent No. 1 Corporation had any right/power/authority, to advice for cancellation of the Petitioners contract when it has become final after a thorough and rigorous process of evaluation spanning over 14 months carried out by a duly authorised and competent body in the form of tender Committee of Experts and the alleged Consultant has no authority/right in any manner whatsoever to substitute its own evaluation for the valid and lawful evaluation of the tender committee as per the Conditions of Contract. The Petitioners have reiterated and re-asserted that it is a well settled law that the principles of promissory estoppel equally apply to the matters of contract awarded by Government or any other Agency controlled by it and this Court has power to scrutinise the process of award to tender to find out whether the same has been vitiated on account of arbitrariness, mala fide or denial of principles of natural justice, unfairness and inequity as it has been held and affirmed in a catena of judgments of the Hon''ble Supreme Court of India that while awarding such tenders the Government or any Agency controlled by it is distributing public largesse and as such they are bound to observe the constitutional norms in terms of the Fundamental Rights and other legal and vested rights.

12. Additional affidavit was filed on behalf of Respondent No. 1 Corporation stating therein that after modification of the earlier interim order by this Court Respondent No. 1-Corporation proceeded with the finalization; of limited tenders in two parts i.e. (I) Procurement of Power and Control Cables; and (II) Procurement of Cable Trays, Racks and ladders and Laying of Cables upto erection, testing and commissioning. After evaluation of the above said limited tenders, the total cost of both the L-1 tenders works out to approximately Rs.

5.17 Crores which is 1.00 Crore (approximately) lower than the earlier price quoted/negotiated by M/s. Techno Electric & Engineering Co. Ltd. (Petitioners Co.) of Rs. 6,17,33,112/- for the composite package. Respondent No. 1 Corporation is World Bank project and is required to be commissioned within specified time frame. The testing and commissioning of the project is dependent upon the cabling work which is the subject matter of the controversy in the Civil Writ Petition. It was, therefore, essential for the Corporation to complete tendering process within the shortest possible time and now further steps for the procurement of material and erection thereof are required to be taken without further delay and that the delay in commissioning of the project will result in huge financial loss to the Central Government as also the State Government to the extent of Rs. 5.0 crores per day.

13. Petitioners have also filed affidavit-in-reply to the additional affidavit of Respondent No. 1 Corporation stating inter alia that the Respondent No. 1 Corporation after having been told by this Court to provide copies of the documents sought for by them, had learnt that all the irregularities and mala fides committed by the authorities in the process of terminating the contract validly awarded to the Petitioners have come out in open and under no circumstances now they could have openly favoured NICCO, the unsuccessful bidding party at whose behest, the cancellation of Petitioners' contract had been done. They have stated that it is out of fear that the additional affidavit has been filed by the Respondent No. 1 Corporation to hide its sins behind a cleverly created subterfuge of saving public money by managing to procure bids lower than the ones which were adjudged to be L-1 earlier because already the value of quotations of previous bids were known to the fresh bidders and also that tender was also bifurcated, in a manner that reduction of cost was a natural corollary because of the v financial burden as also the responsibility and liability in terms of quality and performance procured now would rest with NJPC directly instead of the Petitioners under the Scheme of July, 2000 NIT. They further stated that the qualification criteria adopted in NIT of July 2000 have been completely dispensed with and tenders have been issued to a few hand picked parties in violation of order dated 13.3.2002 of this Court, some of whom have little or no experience of undertaking work of this magnitude resulting in lower quotations from such parties. The Petitioners also stated that the argument of saving public money has been taken by Respondent No. 1-Corporation in conjunction with the submissions that delay in commissioning of the Project will cost 5 crores per day and in this manner a loss of Rs. 450 crores has already been caused to Public Exchequer by Respondent No. 1 Corporation by arbitrarily keeping the Petitioners contract in abeyance since January 23, 2002 and by cancelling it later on 18.2.2002. They further submitted that the submission of loss of Rs. 1 crore will be saved by awarding the contract to the new L-1 bidder is very strange as the same has been obtained by arbitrary criteria from the new bidders and considering the critical importance of the cabling package-IX to the entire project awarding it to L-1 party which has never dealt with a Project of this scale or any where near the

scale, itself puts the entire Project in a precarious position. According to the Petitioners, this entire exercise of hand picking the parties diluting the qualification/eligibility has been done not to save money but for collateral purposes of justifying the wrong, illegal, mala fide and arbitrary action taken by the Respondent No. 1-Corporation to withdraw the contract validly awarded to the Petitioners, an action because of which the Respondent No. 1 Corporation has itself caused irreparable damages and huge loss to the public exchequer in comparison to which their claim of saving 1 crore of public money is highly incongenous. They have also stated that even the fresh tendering process reveals the determined arbitrariness and mala fide being practised by the Respondent No. 1 Corporation as the bids of reputed manufacturers in fresh tenders are quite high resulted in total cost equal to or even higher than that of which LOA was issued to them.

14. When the writ petition was listed for admission Mr. B. Dutta, learned Senior Advocate appearing on behalf of Respondent No. 1 Corporation vehemently contended that this Court should first decide the preliminary objections raised by the Corporation in its counter affidavit in regard to alternative and efficacious remedy of arbitration as contained in Clauses 50.02, 51.7 of General Conditions of Contract (Section GCC) as well as the question whether the writ petition under Article 226 of the Constitution of India is maintainable for enforcing contractual obligations for granting relief in case of alleged breach of contract. He contended that NIT inviting competitive International Bids from qualified bidders in respect of Package-IX was issued by Respondent No. 1 Corporation. The Petitioners submitted their tenders which were accepted and LOI and LOA were issued to them. NHPC Government of India undertaking the Consultant of Respondent No. 1 Corporation advised that Petitioners bid has not been properly evaluated as it was not the lowest (1-1) and the LOI had been wrongly issued to them. He also contended that on account of fundamental basic infirmity, the Respondent No. 1 Corporation had no other alternative except to withdraw the LOI and LOA issued to the Petitioners on Owner's initiative under Clause 47 of Conditions of Contract (Section GCC). If the Petitioners are aggrieved against any decision of Respondent No. 1 Corporation withdrawing LOI/LOA issued to them, an alternative and efficacious remedy is provided under Clauses 50 & 51 of GCC terms and conditions accompanying the NIT inviting competitive International Bids for redressal of their grievances.

15. In support of his submission on the preliminary objection of maintainability of the writ petition Mr. B. Dutta, learned Senior Counsel has relied upon the following decisions of the High Court and Apex Court.

16. In *Mahesivari Metals and Metal Refinery Bangalore v. The Madras State Small Industries Corporation Ltd.* AIR 1974 Mad 39, the question before the learned single Judge in an Appeal against the decree of a City Civil Court was whether the tender document Ext.B-1 was a concluded contract or not. The learned single Judge held that Ext. B-1 required the tenderer to quote the rates and make a

deposit, and under Clause 9 once the Defendant accepted the tender there would be a concluded contract, because all the material terms would become settled by that stage itself.

17. In *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, their Lordships had dealt with question of jurisdiction of the High Court under Article 226 to resolve disputes arising out of the contracts between the State and a citizen, and held as under: (SCC P.463 Para 112)

11. In the cases before us the contracts do not contain any statutory terms or obligations and no statutory power or obligation which could attract the application of Article 14 of the Constitution is involved here. Even in cases where the question is of choice or consideration of competing claims before an entry into the field of contract facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness or which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. Such proceedings are summary proceedings reserved for extra-ordinary cases where the exceptional and what are described as, perhaps not quite accurately, "prerogative" powers of the Court are invoked. We are certain that the cases before us are not such in which powers under Article 226 of the Constitution could be invoked.

18. In *Killipara Sriramulu v. T. Aswathanarayana and Ors.* (1968) 3 S.C.R. 387, the facts of the case were that an oral agreement to sell land was entered into between the parties but formal document was to be executed later and not actually executed and mode of payment of price not settled. The question thus was whether such contract was binding between the parties or not. The Apex Court has held that on the facts of the case, the High Court was right in holding that there was an agreement to sell 137 share in the site to Respondent No. 1 and a mere reference to a future formal contract did not prevent the existence of a binding agreement between the parties unless a reference to a future contract was made in such terms as to show that the parties did not intend to be bound until a formal contract was signed. It is said that the question depends upon the intention of the parties and the special circumstances of each particular case. In that case the evidence did not show that the drawing of a written agreement was a pre-requisite to the coming into effect of the oral agreement.

19. In *Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd.*, the facts of the case were that the Respondent-Company tried to enforce through writ petition the right to remove timber without the liability to pay royalty. Their Lordships held that the Company was not enforcing its right under Rule 37 of the Assam Land and Revenue and Local Rates Regulation and was seeking to enforce a contractual right under a specific terms of contract of lease agreed to between the Company and the Government, such contractual right, therefore, could not

be enforced in writ petition.

20. In *Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others*, briefly the facts were that the Appellant-authority undertaking construction of dwelling house issued Brochures indicating estimated cost and other terms of allotment issued and a fact that actual cost be increased or decreased was clearly indicated in the Brochure. In the facts of that case it was held that when the contract entered into by the State was non-statutory and purely contractual, the relations were no longer covered by the constitutional provisions but by the legally valid contract which determined the rights and obligations of the parties inter se and in this sphere the parties could only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority in the said contractual field. Further it was held that no writ or order could be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy the breach of contract pure and simple.

21. In *Tata Cellular Vs. Union of India*, scope of judicial review in regard to Government contracts, the decision/action of the State under Article 14 of the Constitution of India came for consideration and their Lordships have held:

The duty of the Court is to confine itself to the question of legality. Its concern should be:

- (1) Whether a decision-making authority exceeded its powers,
- (2) committed an error of law,
- (3) committed a breach of the rules of natural justice,
- (4) reached a decision which no reasonable tribunal would have reached or,
- (5) abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) **Illegality:** This means the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it;
- (ii) **Irrationality, namely, Wednesbury unreasonableness;**
- (iii) **Procedural impropriety.**

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.

22. In *Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others*, the Supreme Court reiterated the principle of judicial review settled in *Tata Cellular v. Union of India* (supra).

23. In *State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.*, their Lordships while considering the writ jurisdiction of the High Court under Article 226 of the Constitution of India have held as under: (AIR P. 3520 para 21)

21. There is yet Anr. substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia, for settlement of disputes by reference to arbitration (Clause 67 of the Contract). The Arbitrators can decide both questions of fact as well as question of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt the remedy and invoke the extra-ordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy in this case, provided in the contract itself is a good ground for the Court to decline to exercise its extra-ordinary jurisdiction under Article 226. The said Article, was not meant to supplant the existing remedies at law but only to supplement them in certain well recognized situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the Respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the Appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction was misconceived for the reasons mentioned supra.

24. In *Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others*, their Lordships while deciding a question whether dispute arising out of the terms of contracts or alleged breaches have to be settled by the ordinary principles of law of contract or by the High Court under Article 226 of the Constitution of India have held : (AIR p. 2576 para 11)

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not of itself affect the principles to be applied. The disputes about the meaning of covenant in a contract or its enforceability have to be determined according to the usual principles of Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a Civil Court or in Arbitration if

provided for in the contract. Whether any amount is due and if so, how much and refusal of the Appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have been relegated to other remedies.

25. In *Netai Bag and Others Vs. The State of West Bengal and Others*, the issue for their Lordships consideration was whether the State can distribute their state largesse without inviting tender or public auction and whether such act of the State does amount to arbitrariness under Article 14 of the Constitution of India in all cases. In the facts and circumstances of the case it is held: (SCC page 274 para 19)

19. Though the State cannot escape its liability to show its actions to be fair, reasonable and in accordance with law, yet wherever challenge is thrown to any of such action, initial burden of showing the prima facie existence of violation of the constitution lies upon the person approaching the court. We have found in this case, that the Appellants have miserably failed to place on record or to point out to any alleged constitutional vice or illegality. Neither the High Court nor this Court would have ventured to make a roving inquiry particularly in a writ petition filed at the instance of the erstwhile owners of the land, whose main object appeared to get the land back by any means as, admittedly, with the passage of time and development of the area, the value of the land had appreciated manifold. It may be noticed that in the year 1961 the erstwhile owners were paid about Rs. 5.5 lacs and the State Government assessed the market value of the property which was paid by Respondent 5 at Rs. 71,59,820/-. The Appellants had themselves stated that the value of the land round about the time, when it was released to Respondent 5 was about Rs. 11 Crores. There cannot be any dispute with the proposition that generally when any State land is intended to be transferred or the State largesse decided to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. That would be a sure method of guaranteeing compliance with the mandate of Article 14 of the Constitution. Non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner. Making an exception to the general rule could be justified by the State executive, if challenged in appropriate proceedings. The constitutional courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality nor the courts can substitute their opinion for the bona fide opinion of the State executive. The courts are not concerned with the ultimate decision but only with the fairness of the decision making process.

26. Per contra Mr. M.L. Verma, learned senior Counsel appearing on behalf of the Petitioners has made the three fold submissions to counter the contentions of the learned Senior Counsel for Respondent No. 1 Corporation on the question of maintainability of the writ petition. Firstly he submitted that there exists no concluded contract in the present case between the Petitioners and Respondent

No. 1-Corporation and the lowest bid of the Petitioners, was accepted by the Respondent No. 1-Corporation on the recommendations of the Tender Evaluation Committee as per the advice of NHPC (Consultants), withdrawal of the LOI dated 26.12.2001 and LOA dated 15.1.2002 in the most arbitrary, unjust and illegal manner vide non-speaking order, issued without any basis and without disclosing any reason whatsoever will amount to violation of Article 14 of the Constitution of India. He submitted that even if for the sake of arguments there are some elements of contractual obligations on the Petitioners declining to award contract to them is in the realm of administrative action of the Respondent No. 1 Corporation which is open for judicial review. In support of this submission he has relied upon a number of judgments of the High Courts and Supreme Court. We may with advantage refer to some of them for our consideration and decision on the question of maintainability of the writ petition for the relief(s) sought for by the Petitioners.

27. The action or the procedure adopted by the State or other authority which can be held to be State within the meaning of Article 12 of the Constitution while awarding contracts in respect of properties belonging to the State can be judged and decided in the light of Article 14 of the Constitution of India, is settled by the judgments of the Supreme Court in the cases of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, ; *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, 1; *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others*, ; *Ram and Shyam Company Vs. State of Haryana and Others*, ; *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, ; *Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation*, ; *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, ; *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, ; *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, ; *Air India Statutory Corporation, etc. Vs. United Labour Union and others [overruled]*, ; *Hindustan Petroleum Corporation Ltd. and Another Vs. Dolly Das*, ; *Life Insurance Corporation of India and Others Vs. Smt. Asha Goel and Another*, ; *Biman Krishna Bose Vs. United India Insurance Co. Ltd.*, ; *Common Cause, A Registered Society Vs. Union of India and Others*, and *Bhoruka Power Corporation Ltd. Vs. State of Haryana and Others*,

28. The second contention was that once the Petitioners are considered L-1 by the Tender Evaluation Committee (TEC) set up by the Respondent No. 1-Corporation the withdrawal of LOI and LOA, on the complaint of their trade rivalry "NICCO" without giving 30 days notice to the Petitioners under Clause 47 of the Tender Documents will amount to violation of principle of natural justice.

29. The third submission was that the Petitioners have altered their position to their detriment after acceptance of their bid by Respondent No. 1-Corporation by depositing advance payment to it, placed orders for supply of Cables and Cable Trays dated 21.1.2002 and 24.1.2002 totalling to about Rs. 373 lacs and

accepting security deposit/Bank Guarantees from the respective vendors and submission of performance of Bank Guarantees totalling to Rs. 61 lacs by Petitioners to Respondent No. 1-Corporation etc. etc. We in support of contentions No. 2 and 3 do not consider them to be referred to at this stage, as we are only deciding the question of maintainability of the writ petition. Both these contentions are left open for consideration when the writ petition shall be heard on merits. Now we proceed to deal with and consider the relevant judgments of the High Court and the Apex Court.

30. In *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, the petitions filed by the Appellants under Article 226 were directed against the orders of the State Government revising the rate of royalty payable by them under the lease granted to them by the State, through its Forest Department, permitting them to collect Sal seeds from the forest area. The subsequent cancellation of lease was also challenged. The Petitioners raised the question of breach of contract and mala fides for the action taken. In the facts and circumstances of the case the Supreme Court has held that it is true that Article 14 of the Constitution imports a limitation or imposes an obligation upon the State's executive power under Article 298 of the Constitution. All constitutional powers carry corresponding obligations with them. This is the rule of law which regulates the operation of organs of Government functioning under a Constitution. But the discrimination complained of must be involved right at the threshold or at the time of entry into the field of contract regarding consideration of person with whom the Government would contract. At this stage no doubt, the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

31. In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, their Lordships held that decision making process is open to judicial review though Court cannot act an appellate authority but if the process is violative of Article 14 the Court can strike down the decision and action taken pursuant thereto.

32. In *Biman Krishna Bose Vs. United India Insurance Co. Ltd.*, it has been held that even in an area of contractual relations, the State and its instrumentalities are enjoined with the obligation to act with fairness and in doing so can take into

consideration only the relevant materials. They must not take any irrelevant and extraneous consideration while arriving at a decision. Arbitrariness should not appear in their actions or decisions.

33. In *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, : *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, the view taken is that at P. 1424 of AIR:

102. For example, if the action of the State is political or sovereign in character, the Court will keep away from it. The Court will not debate academic matters or concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligations or obligations arising out of the tort, the Court may not ordinarily examine it unless the actions have some public law character attached to it. Broadly speaking, the Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances.

(Emphasis supplied)

34. The question was also examined by the Apex Court in the background of Article 14 of the Constitution of India in *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, It was held as follows at pp.549-550 of AIR:

22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also, on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other

right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

(Emphasis supplied)

It was further held that (at p. 550 of AIR):

24...The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters.

(Emphasis supplied)

35. Regarding the public law element in contractual matters, the Court settled the position in the case as follows *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*,

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.

36. Thus, the position is clear that once the State action is attacked to be unreasonable, unfair and against public interest irrespective of the sphere, the State action is amenable to judicial review. In the words of Verma, J. in *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*,

The basic requirement of Article 14 is fairness in action by the State and we find it difficult to accept that the State can be permitted to act otherwise in any field of its activity, irrespective of the nature of its functions when it has the uppermost duty to be governed by the rule of law. Non-arbitrariness, in substance, is only fair play in action. We have no doubt that this obvious requirement must be satisfied by every action of the State or its instrumentality in order to satisfy the test of validity.

37. It is also now a well-settled position following *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, that an executive authority must be vigorously held to the standards by which it processes its action to be judged. In judging the State action thus, the Court can even review whether the State demonstrates its actions to its professed standards.

38. In *Air India Statutory Corporation, etc. Vs. United Labour Union and others* [overruled], it was observed as follows (Paras 59, 60 at p. 630 of AIR):

Founding Fathers placed no limitation or fetters on the power of the High Court

under Article 226 of the Constitution except self-imposed limitations. The arm of the Court is long enough to reach injustice wherever it is found. The Court as sentinel on the qui vive is to mete out justice in given facts....

The public law remedy given by Article 226 of the Constitution is to issue not only the prerogative writs provided therein but also any order or direction to enforce any of the fundamental rights and "for any other purpose.

39. Yet Anr. decision referring to interference in contractual matters is one reported in Hindustan Petroleum Corporation Ltd. and Another Vs. Dolly Das, wherein it is held as follows:

9. We may now advert to the contention that the writ remedy is not appropriate in this case. Where interpretation of a contract arises in relation to immovable property and in working such a contract or relief thereof or any other fallout thereto may have the effect of giving rise to an action in tort or for damages, the appropriate remedy would be a civil suit. But if the facts pleaded before the Court are of such a nature which do not involve any complicated questions of fact needing elaborate investigation of the same the High Court could also exercise writ jurisdiction under Article 226 of the Constitution in such matters. There can be no hard and fast rule in such matters. When the High Court has chosen to exercise its powers under Article 226 of the Constitution we cannot say that the discretion exercised in entertaining the petition is wrong.

(Emphasis supplied)

40. In Life Insurance Corporation of India and Others Vs. Smt. Asha Goel and Another, it was observed as follows at p. 553 of AIR:

10. Article 226 of the Constitution confers extra-ordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the fundamental rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extra ordinary jurisdiction. It is left to the discretion of the High Court. Therefore, it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance policy. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can or cannot be enforced by filing a writ petition. The determination of the question depends on consideration of several factors like, whether a writ Petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues, the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute etc. The matter is to be considered in the facts and circumstances of each case. While the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be denied altogether, Courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights

and obligations which involve disputed question of facts. The Courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire into facts for determination of which it may become necessary to record oral evidence a proceeding under Article 226 of the Constitution, is not the appropriate forum. The position is also well settled that if the contract entered between the parties provide an alternate forum for resolution of disputes arising from the contract, then the parties should have approached the forum agreed by them and the High Court in writ jurisdiction should not permit them to by pass the agreed forum of dispute resolution. At the cost of repetition it may be stated that in the above discussions we have only indicated some of the circumstances in which the High Court have declined to entertain petitions filed under Article 226 of the Constitution for enforcement of contractual rights and obligation: the discussions are not intended to be exhaustive. This Court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligation particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts.

(Emphasis supplied)

41. Brief facts in *Bhoruka Power Corporation Ltd. v. State of Haryana and Ors.* AIR 2000 P & H 245, were that the State of Haryana issued advertisement confined to private sector for allotment of sites for setting up Mini Hydro Projects on canal. Site was allotted to the Petitioner-Corporation who took various steps for award of contract and had spent considerable amount after issuance of letter of intent. Subsequently, decision to allot said site to private sector was reversed and direction to allot the site to Public Sector Government Company in name of public interest was taken. The Division Bench in the facts held that the decision of the State was arbitrary and violative of Article 14 of the Constitution and further cancellation of allotment made in favour of Petitioner-Corporation without giving it notice or opportunity of hearing was also held violative of Principles of Natural Justice. This judgment of the Punjab and Haryana High Court was challenged before the Apex Court in SLP (C) No. 17798/2000 which came up for hearing on 19.4.2002 and the same was dismissed. A photo copy of the order of the Hon'ble Apex Court was produced before us by the learned senior Advocate for the Petitioners.

42. In the light of the above raised contentions of the learned Senior Counsel and aforesaid settled proposition of law we have to examine the factual situation of the present case.

43. Admittedly notice inviting tender (NIT) in respect of Package-IX (Cables, cabling and cable trays) was issued by the Respondent No. 1 Corporation in July, 2000, marked as Annexure P-4 to the Petitioners relating to supply, erection and commissioning of cables, cabling and cable trays. The last date for submission of bids was 31.8.2000 (to remain valid upto 28.2.2001 and an Earnest Money

Deposit (EMD) of Rs. 10 lacs was to be submitted alongwith the bid with a validity period of 7 (seven) months i.e. upto 31.3.2001. On 11.7.2000 Petitioners requested Respondent No. 1 Corporation for a complete set of bid documents. Complete set of bid documents was issued to the Petitioners by Respondent No. 1 Corporation on or about 25.7.2000, true copies of General Conditions of Contract are marked as Annexure P-5. On 28.8.2000 as per the requirement the Petitioners submitted their bid for package-IX in two parts i.e. (i) Techno Commercial bid, and (ii) Price Bid. After opening the Techno Commercial Bid, Respondent No. 1 Corporation sought various clarifications and confirmations from the Petitioners on various points vide their letters dated 25.10.2000, 27.7.2001, 10.8.2001, 23.8.2001, 28.8.2001 and 6.9.2001 marked as Annexure P-6. Petitioners by their letters dated 8.11.2000, 8.8.2001, 30.8.2001 and 7.9.2001 marked as Annexure P-7 replied and clarified all the points raised by Respondent No. 1 Corporation to its satisfaction. On or about 12.9.2001 price bid was opened by Respondent No. 1 Corporation. According to the Petitioners on 11.12.2001 Respondent No. 1 Corporation requested them to hold a meeting for further discussions and clarifications. Detailed discussions and meetings were held between tender committee and Petitioners at the Respondent No. 1's office at Shimla on 18.12.2001. The Petitioners conveyed their confirmations on the points discussed during the meeting on the same day. Respondent No. 1 Corporation on or about 26.12.2001 confirmed having accepted the proposal of Petitioners, for a total price of Rs. 6,17,33,113/- for package-IX and awarded the contract to them by issuing LOI dated 26.12.2001 which was accepted by them. As per the contract schedule linked with the LOI dated 27.12.2001 the work commenced from the same day. On 15.1.2002 LOA was also issued by Respondent No. 1 Corporation to the Petitioners which was duly accepted by them.

44. On 17.1.2002 by letter marked Annexure P-8 Respondent No. 1 Corporation requested Petitioners to pre-pone the date of completion to which the Petitioners readily agreed. On 22.1.2002, Petitioners furnished Bank Guarantees dated 22.1.2002, true copies whereof are marked as Annexure P-9, for a sum of Rs. 61,73,311/being 10% of the total amount of the contract. According to the Petitioners, letter dated 23.1.2002 marked as Annexure P-10 to their real shock and surprise without any notice or without any rhyme and reason and without giving them an opportunity of being heard, Respondent No. 1 Corporation issued a communication/order directing the Petitioners to keep the LOI dated 26.12.2001 and LOA dated 15.1.2002 in abeyance till further notice. On 13.2.2002, the Petitioners received letter dated 8.2.2002 of the Respondent No. 1 Corporation whereby it returned the contract performance security for supply contract and the contract performance security for Erection Contract submitted by them along with the accepted copies of LOI and LOA. The said letter was received by Petitioners on or about 18.2.2002 vide which Respondent No. 1-Corporation withdrew/terminated the contract awarded to them by withdrawing the LOI dated 26.12.2001 and LOA dated 15.1.2002 taking shelter under Clause

47.0 of conditions of contract, Section GCC (Termination of Contract on owner's initiative). The Petitioners have challenged the action of Respondent No. 1 Corporation on the touch stone of Article 14 of the Constitution of India being arbitrary unjust, improper, unreasonable, illegal and null and void ab initio and without disclosing any reason whatsoever and without even giving the mandatory notice of 30 days as per Clause 47.0 of GCC and also without hearing of the Petitioners before taking the decision in violation of principles of natural justice and involvement of promissory estoppel as the Petitioners relying upon the representation assurance, promise and understanding made by Respondent No. 1-Corporation while submitting and negotiating the bid in response to NIT since July 2000 as contained in LOI dated 26.12.2001 and LOA dated 15.1.2002, they had changed their position to their detriment by taking various steps in furtherance thereof and had changed their position incurring expenditure for preparation and submission of offer against tender including the costs of bid bond, incurring expenditure for travelling, staying and for holding meetings at Shimla with the officials of Respondent-Corporation by officials of the Petitioners from Calcutta office including sub-head expenses of such officials; undertaking Engineering activities, placing purchase orders for cables and Cable trays dated 21.1.2002 and 24.1.2002 totalling to about Rs. 373 Lacs and accepting security deposit/Bank guarantees dated 30.1.2002 and 12.2.2002 from the respective Venders; submission of performance Bank guarantees totalling to Rs. 61 lakhs by them to Respondent No. 1 Corporation and further time being essence of the contract, they scheduled their other ongoing works/projects accordingly by allocating the resources and manpower on that basis.

45. Petitioners bid was accepted by Tender Evaluation Committee (TEC) constituted by Respondent No. 1 Corporation holding Petitioner No. 1 Co. L-1 and thereafter LOI and LOA were issued to them. It appears that "NICCO" Corporation Ltd. whose tender was not accepted by the "TEC being higher had submitted some complaint against the Petitioners alleging that Petitioners' tender was wrongly accepted being not L-1 and thereafter NHPC (Consultants) advised Respondent No. 1 Corporation to review the final evaluated price. Central Vigilance Commission issued instructions dated 18.11.1998 on the subject of Improving Vigilance Administration vide Annexure R-1. In regard to tenders it has said:

Tenders are generally a major source of corruption. In order to avoid corruption, a more transparent and effective system must be introduced. As post tender negotiations are the main source of corruption, post tender negotiations are banned with immediate effect except in the case of negotiations with L-1 (i.e. lowest tenderer).

46. Section INB deals with instructions to bidders marked as Annexure P-5. Reference to the relevant clauses of the General Conditions of Contract (Section-GCC) will be apposite here. Clause 1.1 defines. The Contract to mean the agreement entered into between Owner and Contractor as per the Contract

Agreement signed by the parties, including all attachments and appendices thereto and all documents incorporated by reference therein. Under Clause 1.15 "Notice of Award of Contract/Letter of Award" means the official notice issued by the Owner notifying the Contractor that his bid has been accepted. "Date of Contract shall mean the date on which both the parties have signed the Contract Agreement. Effective date of Contract means the date of notification of Award/Letter of Award issued by the Owner under Clause 1.17. Contract documents are defined under Clause 6.0. Clause 9.0 deals with Manner of Execution of Contract under Clause 9.1 the Contract as per proforma annexed is to be signed within sixty (60) days of the date of the LOA, on a date and time to be mutually agreed and at the office of the Owner unless otherwise agreed to. The Contractor shall provide for signing of the Contract, appropriate Power of Attorney and the requisite documents. Till such time a formal contract is prepared and executed, the Letter of Award read in conjunction with the Contract Documents will continue to constitute a binding Contract. The Contract shall be considered as having come into force from the date of Notification of Award unless otherwise provided in the Notification of Award under Clause 15.0. Clause 47.0 deals with termination of Contract on Owner's initiative. Clause 47.1 of GCC says that the Owner reserves the right to terminate the Contract either in part or in full due to reasons other than those mentioned under Clause entitled Contractor's Default and "Outbreak of War". The owner shall in such an event give thirty (30) days notice in writing to the Contractor of his decision to do so. Under Clause 47.2 the Contractor upon receipt of such notice shall discontinue the work on the date and to the extent specified in the notice, make all reasonable efforts to obtain cancellation of all orders and contracts to the Owner; stop all further sub-contracting or purchasing activity relating to the work terminated, and assist the Owner in storage, maintenance, protection and disposition of the Works acquired under the Contract by the Owner. Under Clause 47.3 in the event of such termination, the Contractor shall be paid equitable and reasonable compensation, as dictated by the circumstances prevalent at the time of termination.

47. Undisputedly, before the LOI and LOA issued to the Petitioners were withdrawn by Respondent No. 1 Corporation no notice of 30 days in writing as per the condition of Clause 47.1 was issued to the Petitioners.

48. Clause 50.0 deals with Settlement of Disputes. If any dispute(s) or difference(s) arising out of or in connection with the Contract shall, to the extent possible in the first instance be resolved amicably between the contractor and the "Owner's Engineer" under Clause 50.1. Under Clause 50.2 if any dispute or difference of any kind whatsoever between the Owner and the Contractor, arising out of the Contract for the performance of the Works whether during the progress of the Works or after its completion or whether before or after the termination, abandonment or breach of the Contract, shall, in the first place, be referred to and settled by the Engineer, who, within a period of thirty (30) days after being requested by either " party to do so, shall give written notice of his decision to the Owner and the Contractor. Under Clause 50.3, such decision in

respect of every matter so referred shall be final and binding upon the parties until the completion of the entire work under the Contract and shall forthwith be given effect to by the Contractor who shall comply with all such decisions, with all due diligence, whether he or the owner requires arbitration as hereinafter provided or not. Under Clause 50.5 in the event of the Engineer failing to notify his decision within thirty(30) days after being requested as aforesaid or in the event of either the owner or the contractor being dissatisfied with any such decision or within thirty (30) days after the expiry of the first mentioned period of thirty (30) days, as the case may be, either party may require, by written notice to the other party, that the matters in dispute be referred to Arbitration as hereinafter provided.

48-A. Clause 51.0 deals with Arbitration. Under Clause 51.1, all disputes or differences in respect of which the decision, if any, of the Engineer has not become final or binding as aforesaid shall be settled by arbitration in the manner hereinafter provided. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification thereof as provided under Clause 51.4.

49. A plain reading of Clauses 50.0 to 51.4 shows that it has two limbs: (i) the settlement of disputes by the "Owner's Engineer" arising out of or in connection with the Contract for the performance of the works during the progress of the works or after its completion or whether before or after termination, abandonment or breach of the Contract shall be resolved by the Owner's Engineer, and (ii) the arbitration clause will only apply where all disputes or differences in respect of decision, if any, of the Engineer has not become final or binding and the unsettled dispute shall be referred to arbitration.

50. Admittedly, no concluding contract between the Petitioners and Respondent No. 1 Corporation as per proforma of agreement Annexure-VI marked as Annexure R-2 with the reply of Respondent No. 1-Corporation has been executed. LOI and LOA issued in favour of the Petitioners were withdrawn before the agreement came to be executed between the Petitioners and Respondent No. 1 Corporation. In the absence of the concluded contract, the conditions imposed in Clauses 50.0 to 51.4 of conditions of Contract are not applicable at the initial stage of issuance of LOI and LOA as no dispute as yet has arisen between the Petitioners and Respondent No. 1-Corporation in terms of alternative dispute resolution clauses in the unexecuted Contract which govern and pertain to the disputes arising out of the execution of the contract or in the working of the Contract whereas the dispute involves in the present case pertains to regarding the process of inviting tenders and awarding contract and would be covered by constitutional obligations as by awarding such contracts the Respondent No. 1 Company is distributing public largessees and is bound to observe the principles of fairness, equality and reasonableness. The Petitioners in this writ petition have not claimed any relief arising out of the contract. The challenge to the withdrawal of LOI and LOA issued in favour of the Petitioners is based on the ground of

violation of Article 14 of the Constitution by alleging that the impugned act is arbitrary, unfair or unreasonable. The action of Respondent No. 1-Corporation would not be relevant for its obligation to comply with the basic requirements of Article 14 of the Constitution. Thus, the contentions of learned senior Counsel for Respondent No. 1-Corporation that the writ petition is not maintainable and the Petitioners have got efficacious alternative remedy as prescribed under Clauses 50.0 and 51.0 are not sustainable.

51. In the light of the above factual situation and well settled proposition of law, we are of the view that the writ petition is maintainable. We -may make it clear that any observation made by us in this order will not be construed an expression of opinion on the merits of the case.