# IN THE HIGH COURT OF MEGHALAYA AT SHILLONG

## : JUDGMENT :

**(1) WRIT APPEAL No.49 of 2010**

M/s Power Carriers (India) Pvt. Ltd. ….. Appellant

-Versus-

Shri G.M Lanong and others ….. Respondents

**(2) WRIT APPEAL No.6 of 2011**

The Meghalaya State Electricity Board
(now Meghalaya Energy Corporation Ltd.) ….. Appellant

-Versus-

Shri G.M Lanong and Another ….. Respondents

**Date of Judgment: :: 15th December, 2016**

**PRESENT**
**HON'BLE SHRI JUSTICE DINESH MAHESHWARI, CHIEF JUSTICE**
**HON'BLE SHRI JUSTICE S.R. SEN**

Shri HS Thangkhiew, Senior Advocate with Shri PN Nongbri for the appellant in WA No. 49 of 2010.
Shri KS Kynjing, Senior Advocate with Shri SM Suna
and Shri N Mozika for the appellant in WA No. 6 of 2011.
Shri S Chakrawarty, Senior Advocate with Ms. M Mahanta, for the respondent/writ petitioner in both the appeals.

**AFR** **BY THE COURT: (per Hon'ble the Chief Justice)**

**Preliminary**

These two appeals, directed against the same order dated 11.10.2010 as passed by the learned Single Judge in WP(C) No.295 (SH) of 2007, have been considered together; and are taken up for disposal by this common judgment.

The respondent of these appeals Shri G.M. Lanong [hereinafter referred to as 'the respondent' or 'the writ petitioner'] preferred the writ petition aforesaid while stating grievance against the actions of the appellant of Writ Appeal No. 6 of 2011, the Meghalaya State Electricity Board [now the Meghalaya Energy Corporation Limited – hereinafter referred to as 'the appellant-Board' or 'the Board'] and its officers, where they invited tenders for a civil works contract but later on, cancelled the tender process and then, awarded the contract to the appellant of Writ Appeal No.49 of 2010, Power Carriers (India) Pvt. Ltd. [hereinafter referred to as 'the appellant-Company'].

In the impugned order dated 11.10.2010, the learned Single Judge held that the Board and its officers had acted wholly unfair in cancelling the tender process and then, awarding the contract in question to the appellant-Company without inviting fresh tenders and thereby, denying the writ petitioner an opportunity to participate. However, in view of the fact that execution of the work under the contract in question was already over, the learned Single Judge found it illogical to set aside the decision of awarding the contract and, instead, considered it justified that the writ petitioner be compensated by the present appellants. Accordingly, the learned Single Judge held the present appellants jointly and severally liable to pay an amount of Rs.10,00,000/- (ten lakhs) as damages and further an amount of Rs.50,000/- (fifty thousand) towards costs of proceedings to the writ petitioner.

Aggrieved by the order so passed by the learned Single Judge, the respondents of the writ petition i.e., the contractor who was awarded the contract in question as also the principal who had awarded the contract, have preferred these two separate appeals.

**The background aspects; initial tender process**

The relevant background aspects of the matter could be taken note of in the following: By way of a Notice Inviting Tenders ('NIT') dated 01.03.2006, the appellant-Board invited sealed bids from reputed EHV (Extra High Voltage) Line Construction Contractors/Joint Venture Firms/Consortium of two or more Firms for 'Construction of 132KV Double Circuit Transmission Line on 220KV Towers from Myntdu-Leshka Stage-I HEP to the 132 KV substation at Khliehriat, Jaintia Hills, Meghalaya, India'. The tender process consisted of two-bid system, i.e., techno-commercial bid and financial bid. In response to this NIT, the appellant-Board received two offers, one by the writ petitioner and another by the appellant-Company.

The appellant-Board, however, took the view that the techno-commercial bid of the writ petitioner was not meeting with the criteria for consideration of the financial bid and hence, proceeded to open the financial bid of the appellant-Company, who was found to be fulfilling the requisite criteria. Having learnt that the financial bid of the appellant-Company had been opened on 13.11.2006, the writ petitioner sent a letter of protest dated 15.11.2006 to the Chief Engineer of the Board. In response to this letter of protest, the writ

petitioner was informed by way of a letter dated 01.12.2006 from the Superintending Engineer (G.T.) of the Board that his techno-commercial bid was not fulfilling the requisite criteria. However, the writ petitioner was called upon to submit certain documents for placing his matter before the Tender Evaluation Committee like: (i) Annual Turnover for last 5 years; (ii) Successful Commissioning Certificates; (iii) Particular Experience Record; (iv) Current Contract Commitments; and (v) Equipment Capabilities.

In response to the communication aforesaid, the writ petitioner allegedly furnished all the requisite particulars under his letter dated 11.12.2006; and, while expressing concern that he had been asked to provide certain particulars after a lapse of about seven months since the date of opening of the techno-commercial bid and had not been given any other information about the fate of its tender, the writ petitioner reiterated the request for opening of his financial bid. Thereafter, the said Superintending Engineer (Trans) issued a letter dated 23.03.2007, addressed to both the writ petitioner as also the appellant-Company, to the effect that due to unavoidable circumstances and in accordance with Clause (10) of the General Conditions of Contract, the tender process had been cancelled and the earnest money, amounting to Rs.6,00,000/-, was being returned to each of them. As shall be noticed hereafter, this termination of tender process under the NIT dated 01.03.2006 was not the end but was the origination of dispute involved in this matter.

**Award of contract to the appellant-Company**

Even when the aforesaid tender process had been scrapped and no new tenders had been invited, the appellant-Board proceeded to award the contract for construction of towers and transmission line to the appellant-Company. This led to the grievance of the writ petitioner who, in the first place, instituted Title Suit No.19 (T) of 2007 in the Court of Assistant to Deputy Commissioner, Shillong for declaration and injunction with an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, seeking temporary injunction that the appellant-Company be restrained from executing the work in question. While accepting this application for temporary injunction [Misc. Case No.46(T) of 2007] by the order dated 30.05.2007, the learned Trial Court restrained the appellant-Company from carrying out the construction work of '132 KV double circuit transmission line on 220 KV tower from Myntdu-Leshka Stage-I HEP to the 132 KV Sub-station at Khliehriat, Jaintia Hills, Meghalaya'.

Aggrieved by the aforesaid order dated 30.05.2007, the appellant-Company preferred an appeal [FAO 2(T) of 2007] while contending that the work so allotted to it was different from the one in respect whereof the said NIT dated 01.03.2006 was issued in the past and which was later on cancelled. It was also contended in the appeal so filed against the order of temporary injunction that since the work, which had been allotted to the appellant-Company, was a new work and the allotment of the new work was not under challenge, the question of granting injunction against execution

thereof did not arise. In this appeal, the learned Additional Deputy Commissioner, Shillong, accepted the contention that the work allotted to the appellant-Company was different from the one covered by the earlier tender process and hence, by the order dated 26.07.2007, set aside the impugned injunction order dated 30.05.2007.

Assailing the aforesaid order dated 26.07.2007, the writ petitioner preferred a revision petition in this Court [CR(P) No.49(SH) of 2007] with the submissions, inter alia, that except change of the capacity of towers, all other features of the work as awarded remained the same as that of the work mentioned in the earlier NIT dated 01.03.2006. In the order dated 21.09.2007, a learned Single Judge of this Court, even while expressing doubts on the fairness of the procedure adopted by the Board, observed that the petitioner had not challenged the work order dated 16.05.2007, whereby the contract was awarded in favour of the appellant-Company and, hence, the said work order could not have been interfered with by way of an injunction. The learned Single Judge did observe that prima facie, the appellant-Board appeared to have adopted the backdoor policy to allot the contract to the appellant-Company without floating the tender but declined to interfere because the writ petitioner had not challenged the work order issued to the appellant-Company and because there was a ‘marginal difference’ in the work that had been allotted to the appellant-Company and the one which was in dispute in the suit. The learned Single Judge, while dismissing the revision petition, of course, observed that the writ

petitioner could be suitably compensated in terms of damages, if succeeding in the suit. The relevant part of the order dated 21.09.2007 reads as under:-

> "I have already noted earlier that there is a minor change in the Work Order. Since the petitioner did not challenge the Work Order allotted to the respondent No.1 on 16.05.2007, there is no scope for this Court to interfere with the impugned order passed by the learned Additional Deputy Commissioner. No doubt, prima facie, it appears to me that it is a case of showing undue favour to the respondent No.1, inasmuch as, the original tender has been cancelled/withdrawn after processing the same for long one year. The grounds for scrapping the earlier tender also did not appeal to me. It is also appears to me that the MeSEB has adopted a backdoor policy to award the contract to the respondent No.1 without floating tender. Despite these facts, the impugned order cannot be interfered with since there is marginal difference in the Work Order, which has been allotted to respondent No.1 and the one under dispute in civil suit. Hence, proper remedy for the petitioner is to approach the Civil Court for seeking damages or for any other appropriate relief.
>
> Since the Work Order of the respondent No.1 is not materially the one which has been challenged in the suit, it cannot be said that the petitioner has a strong prima facie case. Besides this, the petitioner can also be suitably compensated in terms of damages, if he succeeds in the suit. Hence it is not a fit case to restore the injunction order at this stage."

**The writ petition in this Court**

Faced with the position that the Court had expressed the view, though on an application for temporary injunction, that the work, which had been allotted to the appellant-Company was different from the one which had been covered by the tender process, the respondent (writ petitioner) approached this Court by way of the writ petition under Article 226 of the Constitution of India with the prayers that the allotment of the new work to the appellant-Company be set aside; and the appellant-Board be directed to float the tenders in respect of the new work that had been allotted to the appellant-Company. It was contended in the writ petition that cancellation of

the earlier tender process was illegal, arbitrary, mala fide and without any justifiable reason; that the allotment of new contract work with marginal changes had only been in order to favour the appellant-Company; and that such an allotment, having been made without inviting offers from all the interested eligible persons, was wholly illegal and mala fide.

The appellant-Company contested the matter, inter alia, with the submissions that the petition suffered from delay and laches inasmuch as, the work in question had been allotted to it as back as on 16.05.2007 whereas, the writ petition was filed only on 26.11.2007; and during this period of 5 months from the date of allotment, substantial work had already been executed and any interference by the Court in the ongoing work at the belated stage would lead to enormous hardship. It was further contended that the work allotted under the work order dated 16.05.2007 was different from the one that had been abandoned after inviting tenders. In support of this contention that the two works had been different, it was alleged that the NIT dated 01.03.2006 had been floated for construction of '220 KV towers' and drawing of 'transmission line of 132 KV on the said 220 KV towers' but later on, the Board took a policy decision to construct the towers of '132 KV' instead of '220 KV' and to draw '132 KV transmission line on 132 KV towers'; and that the technical specifications and the cost of construction of 220 KV towers were significantly different from that of 132 KV towers. It was also contended that the Board, in its written statement filed in T.S. No.19 (T) of 2007, had categorically stated that the work order

dated 16.05.2007 was for construction of '132 KV Double Circuit line on 132 KV Towers' and not for construction of '132 KV Double Circuit Line on 220 KV Towers'. The appellant-Company further elaborated that a comparative analysis of technical data sheet of 220 KV towers and 132 KV towers would show that the height, weight, base area, foundation depth, pit size, excavation volume, concreting volume of the two types of towers were significantly different; and that the tendered cost of construction of the super structures of 220 KV towers was about Rs. 3.59 Crores, whereas the tendered cost of construction of 132 KV towers was 2.23 Crores. The appellant-Company stated that by 25.11.2007, it had incurred the expenditure under various head of accounts to the tune of Rs.60,33,793/- and at the given juncture, the writ petitioner was not entitled to seek interference in the ongoing work.

In regard to the Board's decision to allot the work without inviting fresh tenders, it was contended that the work allotted was a part of the Myntdu-Leshka Hydel Project, which had to be commissioned by the month of June, 2008; and since calling for the tenders was likely to delay the project, the policy decision was rightly taken by the Board to allot the work to the appellant-Company on the approved rates. It was also submitted that the appellant-Company was the only technically and financially competent EHV contractor in the State of Meghalaya with requisite experience for the work in question. It was emphasized that the work in question related to a major public utility project for generation and transmission of power that was required to be completed within time;

and hence, the Board was justified in taking into consideration the interest of public and to allot the same to the appellant-Company instead of going for the tender process afresh. It was also submitted that the writ petitioner was not even qualified to execute the work in question, as was found in the earlier tender process, because he did not fulfill the eligibility criteria and had failed to furnish the relevant documents when called upon to do so and hence, he had no *locus standi* to challenge the allotment of work to the appellant-Company.

The appellant-Board and its officers, who were arrayed as respondents No. 1, 2 and 3 in the writ petition, contended while opposing the writ petition that the bid submitted by the writ petitioner was not accepted due to his lack of experience and for his failing to satisfy the requisite eligibility criteria. While justifying the allotment of work to the appellant-Company, it was contended on behalf of the Board that: (a) the project in question was a time bound one and going for the fresh tender process would have taken excessive time and thereby, the entire Hydel project, involving about Rs.600 crores, would have been jeopardized; (b) that the appellant-Company was the only EHV contractor in Meghalaya that was registered with the Board and was having a long working experience with the Board since the year 1988 and had successfully completed a number of such works; and (c) that the work in question had been allotted to the appellant-Company at the approved rates of the Board. It was also contended that the final allotment of the construction work pursuant to the tender process that was initiated by the NIT dated

01.03.2006 came to be abandoned due to the change in technical specifications.

**The observations, findings and directions in the order impugned**

The learned Single Judge, however, rejected all the aforesaid contentions of the present appellants and found no justifiable reason for cancelling the earlier tender process and awarding of the contract to the appellant-Company while observing, inter alia, as under:-

> "35. The State respondents merely contend that the MeSEB decided to change the specifications of the work and this was a policy decision. Even if policy decision may not be open to judicial review, the fact of the matter remains that when the tender had already been floated for allotment of specified work, and the same was, subsequently, abandoned, the State respondents ought to have given satisfactory reasons, when questioned, before this Court, as to why they had abandoned the tender process, and, when no satisfactory and acceptable reason could be assigned by the State respondents, then, the abandonment or cancellation of the tender process must be held, and is hereby held, to be motivated and arbitrary.
>
> 36. The only reason, as already indicated above, assigned by the State respondents for abandoning the tender process, was change in the policy. The State respondents have not assigned any reason, far less convincing, as to why they changed the policy at all; what was wrong with the earlier tender, which had been floated on 01.03.2006? The State respondents have also miserably failed to show as to why the work, which has come to be, eventually, awarded to the private respondents, was not the work in respect whereof the earlier tender had been floated and at what stage and on what consideration, it was decided that instead of pursuing the project, covered by the earlier notice, it is the latter project, which needs to be pursued. The cancellation of the tender process, without any convincing reason having been assigned therefor, cannot but be treated as arbitrary and denial of equal opportunity to the petitioner, who has been alleged to have been found to be unqualified in the earlier tender process, though no cogent reason could be assigned for disqualification of the petitioner in the earlier tender process too.
>
> ….. ….. …..
>
> 38. Thus, the case of **Raunaq International** (supra), in no way, applies to the facts of the present case inasmuch as **Raunaq International** (supra) is a case, which arose out of a tender process, where there were two bidders. In the present case, no process of selection was adhered to by the State respondents.

> Thus, the allotment of contract, in the present case, is nothing, but arbitrary inasmuch as not even a semblance of selection process was resorted to before the contract was awarded in favour of the private respondent. This apart, the State respondents have also not been able to lay before this Court any convincing reason, far less convince, as to why they, initially, did not float Notice Inviting Tender for the contract work, which has been subsequently awarded to the private respondent. Strictly speaking, in the present case, the State respondents excluded the petitioner from the purview of consideration on the ground that in the previous tender process, the petitioner had allegedly been found not technically qualified, though, as already indicated above, no reason whatsoever has been assigned by the State respondents for branding the petitioner as a technically unqualified bidder. …"

The learned Single Judge also found that the alleged changes in specifications were made only in order to award the contract in favour of the appellant-Company and not in the interest of public; and that there was nothing on record to justify the departure from the normal rule of awarding of public contract by open invitation and sustainable selection process. The learned Single Judge observed and held as under:

> "44. There is, therefore, clear room for taking the view that in the facts and attending circumstances of the present case, changes, in the specifications of the contract work, were made so as to award the contract in favour of the private respondents and not in the interest of the public, for, had the award of contract been in the interest of public, the State respondents would have been able to disclose as to why the notice inviting tenders had not been issued, on 01-03-2006, for the work, which came to be subsequently allotted to the private respondent.
>
> 45. In short, thus, no such fact has been disclosed by the respondents, or discernible from the materials on record, which can justify departure from the normal rule of awarding of a public contract on the basis of sustainable selection process. There may be extra-ordinary situations, which may require some departure from the norms, but the authorities, under such circumstances, are obliged to disclose to the Court the compelling circumstances/reasons, which necessitated exercise of discretion contrary to the normal requirement of Article 14 of the Constitution of India.
>
> 46. In the case at hand, the State respondents, having not been able to assign, as already discussed above, reasons for holding the petitioner technically disqualified and they, having failed to assign the reason as to why, on what consideration, on what date and at what stage, making of changes, in the specifications of the contract

> work, were found to be necessary, and, further, why, while issuing notice, on 01-03-2006, tenders were not invited for the work, which has, eventually, come to be allotted to the private respondent or, in other words, what had restrained the State respondents from floating notice inviting tenders on 01-03-2006 itself in respect of the contract work, which has been subsequently awarded to the private respondent, one has no option but to hold that the State respondents' action in changing the specifications of the contract work is not bona fide and they failed to maintain the transparency, required to be maintained by them, while awarding the contract to the private respondent.
>
> 47. As stated above, in the instant case, the justification, offered for not calling tender by the Meghalaya State Electricity Board, is no justification in the eye of law.

While referring to several decisions and reiterating the basic principles of the requirements of just, fair and transparent method for awarding of the public contract, the learned Single Judge found that the case at hand was disclosing rather disturbing features and the alleged delay and laches were not the factors sufficient to decline the writ jurisdiction in the matter while observing as under:-

> "58. The law, relating to award of contract, by the State, its Corporation and bodies, acting as the instrumentalities and agencies of the Government, are more or less settled by judicial pronouncements. The State can choose its own method in arriving at a decision for awarding contract and it can fix its own terms of invitation to tender. What is required is that while awarding the contract or granting any right or privilege to others, it must be just, fair, transparent, free from the vice of arbitrariness and in tune with Art.14 of the Constitution. In a given case, the State can award contract by negotiation, but such decision has to be free from bias, discrimination and favouritism.
>
> 59. In the case at hand, the facts are really disturbing to say the least. The State respondents issued tender, wherein both the petitioner and the respondent No.4 (i.e., the private respondent) participated. There is nothing on record to show that the technical bid of the private respondent was opened for consideration. Without disclosing any reason whatsoever as to why the private respondent was disqualified, the authorities clandestinely awarded the contract in favour of the private respondent and even when the petitioner questioned the fairness, transparency and legality of the awarding of contract in favour of the private respondent in this writ proceeding, the State respondents have not been able to assign any reason as to why the petitioner was held to be technically not qualified. This apart, and as already indicated above, the State respondents are also completely silent as to why they had not floated tender, on 01-03-2006 itself, in respect of the contract work, which came to be allotted subsequently to the private respondent.

> 60. It has also been contended, while resisting this writ petition, by the respondents that the writ petition suffers from delay and latches. When the contract has been awarded to the private respondent without informing any one and even when the petitioner had instituted the suit, the State respondents did not come forward to contest the suit by disclosing that the contract had been awarded on changed specification, the writ petition cannot be said to have been suffering from delay and latches particularly, when the allotment of contract was not publicly made known nor was the petitioner informed about the allotment of the contract to the private respondent. Later on, when the petitioner learnt that the contract had stood awarded to the respondent No.4, the petitioner filed a suit. The suit was dismissed, because there were some changes made in the subject matter of the contract, which was not under challenge in the suit. Thereafter, the petitioner filed the present writ petition. In the face of these facts and attending circumstances, the decisions, cited by the respondents, are of no help."

After having, thus, found in no uncertain terms that the procedure adopted by the Board was entirely illegal, mala fide and arbitrary, with denial of opportunity to the writ petitioner, the learned Single Judge observed that in the given circumstances, the award of contract was required to be set aside. However, the other factors given out before the Court at the time of hearing were that the execution of the contract work was over and thus, the learned Single Judge observed that it would be illogical to set aside the award of contract at the given stage. The learned Single Judge, nevertheless, observed that for having been kept out of selection process in an unfair and illegal manner, the writ petitioner was required to be compensated for the loss suffered. Thereafter, even while finding that the writ petition may not be the appropriate proceeding for awarding of damages, the learned Single Judge observed that the respondents of the writ petition cannot be exonerated and they need to be directed to pay, apart from the cost of proceedings, some amount as public law damages to the writ petitioner, while referring

to the decision of the Hon'ble Supreme Court in the case of ***Subhash Projects and Marketing Ltd. vs. West Bengal Power Development Corporation Ltd.: (2008) 3 SCC 438***. With these observations, the learned Single Judge proceeded to award an amount of Rs.10,00,000/- (ten lakhs) to the writ petitioner while holding the respondents of the writ petition jointly and severely liable for the same and also awarded another amount of Rs.50,000/- (fifty thousand) towards the costs of proceedings. The learned Single Judge finally observed, held and directed as under:

> "61. Because of what have been discussed and pointed out above, I find that the decision making process of awarding the contract, in question, was arbitrary and denial of opportunity to the petitioner to participate in the tender process was wholly illegal, mala fide and arbitrary. In such circumstances, the award of the contract needs to be set aside. However, considering the fact that the execution of the contract is over, it would be illogical to set aside the awarding the contract to private respondent.
>
> 62. Considering, however, the fact that the petitioner was kept out of the selection process of the contract, in question, by adopting means, which were wholly unfair, illegal and arbitrary, the petitioner deserves to be compensated of the loss, which the petitioner may have suffered. This Court is, of course, required to determine of the quantum of loss, which the petitioner might suffered. The present writ petition is not the appropriate proceeding for awarding of damages to the petitioner for the loss, which the petitioner has suffered. He must, however, be compensated for denying him the right to equal treatment under Article 14 of the Constitution. Neither the State respondents nor can the private respondents be, therefore, completely exonerated and they need to be directed to pay, apart from the cost of the proceeding, some amount as a public law damages to the petitioner. (See **Subhas Projects and Marketing Ltd. Vs. West Bengal Power Development Corporation Ltd.,** reported in **(2008) 3 SCC 438**).
>
> 63. In the result and for the reasons discussed above, while awarding of the contract, in question, to the private respondent is not interfered with, this writ petition is disposed of with direction that the petitioner be paid a sum of Rs.10,00,000/- (Rupees ten lakhs) as damages. The damages, so directed, shall be payable by the State respondents as well the private respondents. The State respondents as well as the private respondents, who are jointly and severely liable, shall also pay a sum of Rs.50,000/- as cost of the proceeding.

64. With the above observations and directions, this writ petition shall stands disposed of."

Aggrieved by the order so passed by the learned Single Judge, the respondents of the writ petition i.e., the contractor as also the principal have preferred these two separate appeals.

**Rival contentions in appeals**

Before taking note of the rival contentions, it may be indicated that these appeals were heard on several occasions before different Division Benches but were adjourned, while granting time to the parties to make an endeavour to reach to an amicable settlement. Lastly, on 31.03.2016, it was frankly given out by the learned counsel for the parties that despite efforts, they had not been able to reach to the negotiated settlement. Having regard to the circumstances, we had proceeded with the hearing of the matter. Of course, during the course of hearing, learned counsel for the appellants have submitted in writing their offers for settlement without prejudice to the submissions sought to be made in these appeals. We shall refer to these proposals a little later and only after examining the other contentions on the merits of the case.

Questioning the order impugned, learned counsel for the appellant-Company has strenuously argued that the learned Single Judge has erred in attaching illegitimacy to the contract awarded to the appellant-Company though such a decision was taken by the authorities of appellant-Board in fair discharge of their public duties, particularly because of the urgency of execution of the public utility project. With reference to the opinion of the Hon'ble Supreme Court

in **Special Reference No. of 1 of 2012: (2012) 10 SCC 1** and the decision in **Villianur Iyarkkai Padukappu Maiyam Vs. Union of India and Ors: (2009) 7 SCC 561**, the learned counsel would argue that award of contract only after floating tenders is not the mandate of law; and a contract awarded without open invitation to offer is not to be regarded as unfair or arbitrary in every case. According to the learned counsel, in the present case, the project in question being of immense public utility and the matter being of urgency, the Chairman had validly taken the decision to get the same executed by the appellant-Company, the only qualified EHV contractor in the State of Meghalaya; and the decision of the Chairman was duly ratified by the Board. The learned counsel has also referred to the decision in **Raunaq International Ltd. Vs. IVR Construction Ltd. and others: (1999) 1 SCC 492** to submit that even the relaxation of qualifying criterion in the matter of award of contract has been held justified when departure from the norms was made on valid principles and overwhelming public interest.

Learned counsel for the appellant-Company has further argued that the appellant did execute the work in question as awarded to it in public interest by the appellant-Board on the scheduled rates; and there had neither been any allegation of collusion nor there was any ill-intent or motive on the part of the appellant-Company so as to be penalized in this matter by award of compensation to the respondent. Learned counsel has yet further contended that the respondent was found disqualified even in the earlier tender process for construction of towers and laying of 132

KV double circuit transmission line, and hence, as observed in *Raunaq International* (supra), he could not have made any legal grievance against the award of contract to the appellant-Company and in any case, was not entitled to claim any compensation.

The learned counsel also submitted in the alternative that without prejudice to its other submissions but looking to the nature and quantum of contract and going by the method of quantification in the case of *Subhash Projects* (supra), there was no justification in awarding any compensation beyond a sum of Rs.4.34 lakhs, which represents about 15% of the expected profit in the contract in question; and the appellant-Company has, accordingly, made the offer for settlement, which may be considered if at all its other contentions are not accepted by the Court.

The learned counsel appearing for the appellant-Board has further elaborated on the submissions that the work in question was required to be executed due to urgency and else, the entire time bound project would have been jeopardized; and in the given circumstances, after scrapping of the earlier tender process, when little or rather no time was left for floating of fresh tenders, a reasonable decision was taken for getting the work executed from the appellant-Company only on approved rates. According to the learned counsel, the appellant-Company was rightly awarded the contract in question for being the only qualified EHV line contractor in the State of Meghalaya, who had executed various similar contract works with the appellant-Board; and such a decision was

rightly ratified by the Board. Apart from the decisions cited by the counsel for the other appellant, the learned counsel for the appellant-Board has referred to and relied upon the decision in **Ravi Development Vs. Shree Krishna Prathisthan and Ors: (2009) 7 SCC 462**. The learned counsel has yet further contended that even on the principles as available in the case of *Subhash Projects* (supra), there was no justification for awarding any amount of compensation against the appellants. Apart from the foregoing, learned counsel has made similar submissions in the alternative, while placing on record the offer that was made by the appellant-Board for amicable settlement with the respondent (writ petitioner).

While opposing the contentions urged on behalf of the appellants, learned counsel for the respondent (writ petitioner) has emphasized on the submissions that there had not been any so called urgency or emergency as sought to be canvassed before this Court so as to award of contract in question to the appellant-Company without inviting offers. Learned counsel would submit that in the earlier tender process, the bid of respondent was unfairly avoided from consideration and upon his making representation and answering to all the requirements, the tender process was cancelled after about one year of issuance of NIT. Thus, according to the learned counsel, there was no urgency in the matter and yet, without inviting fresh offers and after some artificial changes in the specifications, the work was awarded to the appellant-Company in a wholly clandestine manner. The learned counsel has strenuously argued that the submissions about ratification by the Board are of no

effect because the relevant facts pertaining to the contract in question were not placed before the Board, as is evident from the document Annexure-5 sought to be relied upon by the appellants. Learned counsel has referred to the observations made by the Hon'ble Supreme Court in *Special Reference No.1 of 2012* (supra) to submit that the ordinary rule of public auction or tender cannot be deviated at the whims of the authorities. Learned counsel submitted that the allegation about his disqualification is entirely baseless because even in the earlier tender process, the Board never held him disqualified; and no tender was invited after scrapping of the earlier tender process and thereby, he was deprived of the chance to make his offer. The learned counsel has argued that the respondent, who was deprived of the chance to submit his bid for the contract in question, has rightly been awarded compensation and costs of proceedings from the appellant-Company as also the appellant-Board; and has referred to the decision of the Hon'ble Supreme Court in the case of **U.P. State Electricity Board and another Vs. OM Metals & Minerals (P) Ltd.: (2002) 9 SCC 512** to submit that the compensation as awarded in the present case to the tune of Rs.10 lakhs remains justified.

Having given thoughtful consideration to the rival submissions and having examined the record, we are clearly of the view that the learned Single Judge has rightly pronounced against the process as adopted by the appellant-Board in awarding the contract in question to the appellant-Company without floating tenders and without inviting open offers; but, the amount of

compensation as awarded by the learned Single Judge would call for interference, for the reasons indicated infra.

**The Scope of judicial review and legality of the action in question**

Apparent it is that the writ petition leading to this appeal was filed by the respondent herein on his basic grievance that the NIT for the work of erection of towers and laying of transmission lines from Myntdu-Leshka Stage-I HEP to the 132 KV substation at Khliehriat, Jaintia Hills, Meghalaya was earlier issued wherein, he too offered the bids and submitted the documents as required but, the said tender process was cancelled and then, with a slight modification of the specification of towers, the same work was awarded to the appellant-Company without inviting tenders.

It remains trite that the judicial review of such an administrative action of award of contract is essentially intended to prevent irrationality, arbitrariness, unreasonableness and mala fides. In such a matter, the Court is primarily concerned with the decision making process and not the merits of the decision itself. In the case of **Jagdish Mandal Vs. State of Orissa and others: (2007) 14 SCC 517**, the Hon'ble Supreme Court, after a survey of some of the celebrated decisions like those in *Sterling Computer Limited: (1993) 1 SCC 445, Tata Cellular: (1994) 6 SCC 651 and Raunaq International* (supra), has summed up the principles as follows:-

> "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be

> borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:
>
> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;
>
> OR
>
> Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";
>
> (ii) Whether public interest is affected.
>
> ….."

It is noticed that in the present case, learned Single Judge has, in fact, examined only the decision making process and has found that no justification whatsoever was available on record for abandoning the process under the NIT dated 01.03.2006 and for later awarding of the contract to the appellant-Company without open invitation to offer. In *Special Reference No.1 of 2012* (supra), the Hon'ble Supreme Court has referred to the requirements of procedural fairness, rationality and reasonableness in the matters of State action related with grant of contract or distribution of largesse in the following:-

> "107. From scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as McDowell case has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the Mandate of Article 14 of the Constitution of India."

In the said case, the Hon'ble Supreme Court has, however, examined the question as to whether the process of auction could be held as being mandatory for disposal of natural resources; and, even while holding in the negative, has explained the parameters for deviation from the process of public auction in the following:-

> "129. Hence, it is manifest that there is no constitutional mandate in favour of auction under Article 14. The Government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions. The Judiciary tests such deviations on the limited scope of arbitrariness and fairness under Article 14 and its role is limited to that extent. Essentially, whenever the object of policy is anything but revenue maximization, the executive is seen to adopt methods other than auction.
>
> …. …. ….
>
> 146. To summarise in the context of the present Reference, it needs to be emphasized that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources. The Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate. We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires ad intra vires the

> provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking down.
>
> 149. Regard being had to the aforesaid percepts, we have opined that auction as a mode cannot be conferred the status of a constitutional principle. Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximising private entrepreneurs, adoption of means other than those that are competitive and maximise revenue may be arbitrary and face the wrath of Article 14 of the Constitution. Hence, rather than prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution."

In the case of *Raunaq International* (supra), the concerned State Electricity Board had awarded the works contract to the appellant who was the lowest tenderer after relaxing the requisite qualifying criteria as permissible under the terms of tender. However, the respondent, who was another tenderer but who did not fulfill the requisite qualifying criteria and whose tender was not preferred by the experts, filed a writ petition in which, the High Court granted an interim stay over issuance of letter of intent in favour of the appellant. In the given fact situation and looking to the public interest, the Hon'ble Supreme Court found no justification for such an interim stay. The Supreme Court also found that it was not a case of mala fides of any member of the Board nor there was any allegation of collateral motive; and that the relaxation was granted by the Board on valid principles. It was further found that even if the criteria could be relaxed both for the appellant and the respondent,

the offer of the appellant being the lower one, the decision of the Board was not unjustified. The said decision has been considered by the learned Single Judge and it has rightly been observed that the said case fundamentally stand at a different footing because in the present case, there was no invitation to offer at all.

Learned counsel for the appellant-Company has also relied upon the following passages in the case of *Villianur Jyarkkai Padukappu Maiyam* (supra):-

> "164. The plea raised by the learned counsel for the appellants that the Government of Pondicherry was arbitrary and unreasonable in switching the whole public tender process into a system of personal selection and, therefore, the appeals should be accepted, is devoid of merits. It is well settled that 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.
>
> … … …
>
> 171. In a case like this where the State is allocating resources such as water, power, raw materials, etc. for the purpose of encouraging development of the port, this Court does not think that the State is bound to advertise and tell the people that it wants development of the port in a particular manner and invite those interested to come up with proposals for the purpose. The State may choose to do so if it thinks fit and in a given situation it may turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to develop the port, the State would not be committing breach of any constitutional obligation if it negotiates with such a party and agrees to provide resources and other facilities for the purpose of development of the port."

Noticeable it is that in the aforesaid case of *Villianur Jyarkkai Padukappu Maiyam* (supra), selection of a developer by the Government of Pondicherry for development of Pondicherry Port on BOT basis was sought to be questioned in High Court but therein, the writ petitioners (appellants before the Supreme Court) had conceded that they were not assailing the selection of the developer but were concerned with possible environmental effect of the project. In the circumstances, the Hon'ble Supreme Court though found the

appeals not maintainable but, looking to the issues involved, still considered the matter on merits; and after examining all the facts and the relevant factors, held as under:-

> "173. The terms and conditions of the contract entered into with Respondent 11 as well as the surrounding circumstances show that the State has acted bona fide and not out of improper or corrupt motive or in order to promote the private interest of Respondent 11 at the cost of the State. Therefore, it is difficult to interfere and strike down the State action as arbitrary, unreasonable or contrary to public interest.
>
> 174. It is true that one of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. But as noted earlier, this is not a case of sale of property by the State. Though public auction or inviting of tenders is the ordinary rule in case where the State Government proposes to dispose of a property, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule, the reasons indicated in this case for the departure are shown to be rational and are not suggestive of discrimination."

Apparent it is that in the aforesaid decision, in the given facts situation, the Hon'ble Supreme Court found no reason to interfere when the State had acted bona fide and not out of improper motive or to promote the private interest of the developer.

In the case of *Ravi Development* (supra), the Hon'ble Supreme Court approved the methodology of award of an innovative project plant to the originator of proposal by 'Swiss Challenge Method' whereby, the originator of the proposal is given the benefit of matching the highest bid submitted. Finding the method as adopted to be otherwise not against the Government revenue and being transparent, the Hon'ble Supreme Court found no reason that such an executive decision of the Government be interfered with.

Though the aforesaid decisions have no direct application to the facts of the present case but, in a summation of the principles

therein, it is noticed that the method of open invitation to offer is generally accepted to be preferable method for award of the contract by the State and its agencies that ensures fairness and transperacy but, departure therefrom, by itself, is not of illegality, if the departure is based on some valid and rational principles and conforms to the requirements of fairness and reasonableness. However, a blithe deviation is considered intolerable by the Courts, the ultimate test being that of fairness of decision-making process and adequate compliance of Article 14 of the Constitution of India.

While keeping the principles aforesaid in view, it could now be examined if the impugned interrelated actions of the appellant-Board i.e, of cancelling the process under the NIT dated 01.03.2006; and of departure from the normal rule of inviting tenders while awarding the contract to the appellant-Company stand the relevant tests of reasonableness, rationality, fairness and transparency.

***No reason why the earlier tender process was abandoned and why tenders were not floated afresh; Unfairness self-evident***

In the present case, it is not in dispute that the appellant-Board indeed invited offers from reputed EHV Line Construction Contractors/Joint Venture Firms/Consortium of Firms by issuing NIT dated 01.03.2006 for 'Construction of 132KV Double Circuit Transmission Line on 220KV Towers from Myntdu-Leshka Stage-I HEP to the 132 KV substation at Khliehriat, Jaintia Hills, Meghalaya, India'. The appellant-Company and the respondent both submitted their respective bids in response to this NIT dated 01.03.2006. The process under this NIT was kept pending for an inexplicably long length of time, for the reasons best known to the appellant-Board

alone. In any case, on 13.11.2006, only the bid of the appellant-Company was sought to be considered to which, the respondent stated his protest by the letter dated 15.11.2006. Thereafter, the respondent was addressed the letter dated 01.12.2006 wherein, even while alleging that his techno-commercial bid was not fulfilling the requisite criteria, the respondent was requested to submit certain documents for placing the matter before the Tender Evaluation Committee. The respondent indeed furnished the documents with his letter dated 11.12.2006. However, thereafter, the tender process, as initiated in the month of March, 2006, was cancelled in the month of March, 2007, due to the alleged 'unavoidable circumstances'.

After examining the entire record, the learned Single Judge has categorically held such a cancellation of the tender process was without any convincing reason and, therefore, cannot be treated anything but arbitrary. We have no hesitation in endorsing the findings so reached by the learned Single Judge. It is very difficult to find from the record any justification whatsoever that the tender process that was taken up in the month of March, 2006 was abandoned in the month of March, 2007; and the only reason assigned for such cancellation of the tender process in the letter of the Superintending Engineer (Trans) dated 23.03.2007 had been that of the alleged 'unavoidable circumstances'. Obviously, no specific reason was stated therein. In fact, no such specific reason has been brought to the fore even before the Court.

In a desperate attempt to somehow justify this questionable abandonment, the appellants have attempted to suggest that there

had been a so called change of policy decision by the Board because of various technical and financial requirements that instead of going ahead with 220 KV towers, the construction shall be of 132 KV towers. Such a suggestion has its own shortcomings and pitfalls. In the first place, it is difficult to find from the material placed on record if such a policy decision was indeed taken before issuance of the aforesaid letter dated 23.03.2007 conveying abandonment of the tender process due to 'unavoidable circumstances'. Secondly, it is noticed that after such abandonment, it was proposed on 20.04.2007 that the appellant-Company be awarded the work of 'Construction of 132 KV double circuit line from Myntdu Leshka HEP to the 132 KV Khliehriat S/S'. The same particulars were stated in the work order dated 16.05.2007. The specifications of towers were nowhere stated in those propositions. It appears from the material placed on record that only after such placing of the work order that the Member Technical of the Board prepared the Agenda Note dated 14.06.2007 (Annexure-5) suggesting as if construction of 220 KV Towers was not considered technically and financially feasible. Only thereafter, the Board purportedly ratified the award of the work 'for construction/erection of 132 KV line on 132 KV double circuit towers from MLHEP-I to the 132 KV Khliehriat Sub-Station' in its meeting dated 15.06.2007.

In an overall comprehension of the record, it is but clear that the suggestion as made before the Court that the work was abandoned because of the change of specifications of towers is not

supported by the material available on record; and is rather contradicted by the surrounding factors.

We would hasten to observe at this stage itself that if it were a simple case of abandonment of a particular tender process only, may be the decision as such could not have been questioned by the respondent/writ petitioner nor the Court would have taken an exception against the same. However, what had transpired before and after such abandonment leaves nothing to doubt that the cancellation of earlier tender process was lacking in bona fides and was only a maneuver to somehow avoid the respondent and to award the contract to the appellant-Company.

As noticed, both the appellant-Company and the respondent were the bidders in response to the NIT dated 01.03.2006 but then, there had been the attempts in the very first place that the consideration of the bid of the respondent be avoided. However, the respondent stated his protest and submitted the documents as called for. Then, the tender process was abandoned on 23.03.2007. However, thereafter, the same work was immediately offered to the appellant-Company by way of the letter dated 20.04.2007 and then, this very work of erection of towers and laying of transmission lines from Myntdu-Leshka Stage-I HEP to the 132 KV substation at Khliehriat, Jaintia Hills, Meghalaya was awarded to the appellant-Company by the work order dated 16.05.2007. Thereafter, the decision was ratified by the Board only on 15.06.2007 with insertion of the expression suggestive that the towers would be '132 KV double circuit towers'. While awarding the work to the appellant-

Company in this manner, the appellant-Board chose not to issue the NIT nor adopted any other method of competitive bidding by the interest and eligible persons.

It is noticed that the appellants suggested the justifications for departure from the ordinary rule of tender process in the manner that (i) there had been change in the specifications; (ii) it was a matter of urgency inasmuch as the project in question was a time bound project of public utility; (iii) the appellant-Company was the only EHV contractor in Meghalaya, registered with the Board having a long working experience with the Board; and (iv) the work in question was allotted to the appellant-Company at the approved rates of the Board.

Though learned counsel for the appellants have not suggested the bogus ground of change of specifications as any justification for not inviting offers in these appeals before us but, the fact that such a ground was suggested in the first place before the Court when the respondent took up the litigation clearly shows that the appellants was seeking to put forward nothing but pretentions to justify the apparently questionable method adopted by them. As noticed, even such change of specification of towers does not appear to be a reason for scrapping the earlier tender process. In any case, even if it be assumed that the specifications of the towers had been changed, the work essentially remained that of laying of transmission lines from Myntdu-Leshka Stage-I HEP to the 132 KV substation at Khliehriat. It beats imagination as to how such alleged

change of specifications of towers could have been any justification for not inviting competitive offers.

In an attempt to justify the award of work to the appellant-Company without invitation to offers, it has been strenuously argued that the project in question was that of public utility and was time bound; and that the same would have been jeopardized by invitation of such offers. This justification is also nothing but a hollow pretext. As noticed, for this work, an NIT was issued earlier in the month of March, 2006 but the process itself dragged on for an inordinate length of time and in fact, the respondent, who was one of the bidders and was sought to be disqualified, made his protest in the month of November, 2006 whereupon, he was requested to submit certain documents; and the respondent indeed submitted the documents in the month of December, 2006. Thereafter, the appellant-Board chose to sit over the matter for another three months and then, cancelled the tender process only in the month of March, 2007. As noticed, no plausible reason for scrapping of the said process has been brought on record. If at all it were a matter of urgency, it is left to everyone's guess as to why the earlier tender process was kept pending for more than one year and then, why the same was scrapped at all? In this regard, again, even if we assume that scrapping of earlier tender process was not an oblique decision, it is difficult to find any rationale or any justification that after scrapping, the appellant-Board suddenly found it to be a matter of urgency and then, chose to offer the work to the appellant-Company

without adopting any such method which would have ensured competitive biddings.

We are at one with learned Single Judge that no compelling circumstances or reasons had been assigned for not inviting offers, even if it was suddenly found to be a matter of urgency. Although, the urgency suggestion itself is clearly pretentious for, as observed above, the earlier tender process was kept pending for more than a year without any reason.

The other specious justification as put forward by the appellants for awarding of the contract without open invitation in the manner that the appellant-Company was the only EHV contractor in the State of Meghalaya, having a long working experience with the Board, in fact, clinches the issue that the entire exercise had been wanting in bona fides and was intended only to award the contract to the appellant-Company alone. Even if the appellant-Company was having a so called 'long working experience with the Board', it had not acquired the status of an exclusive contractor with the Board who could have a monopoly over the contracts. It is not the case, and we are unable to find any logic in any such proposition, that only the EHV contractor in the State of Meghalaya could have been considered qualified for the work in question. Unless an open invitation was made and offers were received, there was no occasion for the Board to assume that the appellant-Company alone was to be awarded the contract in question. Noticeable in this regard is the fact that the respondent had indeed made the offer pursuant to the earlier NIT issued and even submitted the documents later on

required. There had not been any final decision on the offer made by him that he was disqualified. The learned Single Judge has found, and rightly so, that the appellant-Board had not been able to assign any reason as to why the respondent was sought to be considered as disqualified. We have no hesitation in finding the action of the Board wanting in bonafide because without inviting any offer after scrapping of the earlier tender process, the Board could not have assumed that the appellant-Company alone was to be awarded the contract in question.

The other justification stated on behalf of the appellants sounds rather preposterous. It is suggested that work in question was allotted to the appellant-Company at the approved rates of the Board. The very fundamental of inviting competitive bids is that such a process best serves the interest of revenue. Without inviting other bidders, the Board could not have assumed that awarding of the contract on its suggested rates was best serving the interest of revenue and there could not have been any better proposal serving the finances.

When we find that there had been no justification in abandonment of the earlier tender process and no justification in awarding the contract thereafter to one of the bidders in the earlier tender process but without inviting offers, we have no hesitation in affirming the findings of the learned Single Judge in this regard and in holding that the impugned action of the appellant-Board was lacking in fairness and reasonableness; and was intended only to

provide a backdoor entry to the appellant-Company. The action of the appellant-Board could only be deprecated and disapproved.

***The writ petitioner's right to relief***

In the ordinary course, the consequence of the findings against the validity of the process in question would have been of setting it aside but then, it cannot be said that as a further consequence thereof, the work would have been awarded to the respondent alone. Then, the fact of the matter had been that even when the writ petition was filed, a substantial part of the work in question had already been executed and by the time the writ petition was decided, the execution was complete. In the given set of facts and circumstances, though the respondent could be considered as one of the potential bidders who had indeed offered the bid earlier and who might have been interested in offering the bid if tenders were floated afresh but then, it is difficult to say that the respondent alone would have the only person entitled to be awarded the contract in question. Taking an overall view of the matter, we are of the view that only a reasonable amount of compensation could have been considered available for the respondent (writ petitioner) and not beyond.

***Quantification of compensation and offers for settlement***

After it is found that the respondent (writ petitioner) could have been awarded a reasonable amount of compensation, the question arises as regards quantification of such compensation. It is noticed that the respondent has not given out all the factors requisite for

making a fair assessment of compensation in this matter. The learned Single Judge had rightly observed in the first place that the writ petition was not the appropriate proceedings for awarding of damages to the petitioner for the loss which he had suffered. However, thereafter, the learned Single Judge observed that the writ petitioner was required to be compensated for having been denied the right to equal treatment under Article 14 of the Constitution. Thereafter, the learned Single Judge referred to the decision in the case of *Subhash Projects* (supra) and then, straightway awarded an amount of Rs.10 lakhs to the writ petitioner. With respect, we are unable to endorse such awarding of a lump sum to the respondent (writ petitioner) and that too to the tune of Rs.10 lakhs. No basis for arriving at this figure of Rs.10 lakhs had been indicated in the order impugned except a reference to the decision in the case of *Subhash Projects.* However, in the case of *Subhash Projects* (supra), the reasons for awarding compensation to the tune of Rs.1 crore to the writ petitioner therein have been indicated at the outset by the Hon'ble Supreme Court in the introduction of the case in paragraph 1 of the judgment as follows:-

> "….. This was on the finding that the contract based on the tender floated by Respondent No.1, the West Bengal Power Development Corporation Limited (hereinafter referred to as "the Power Corporation") ought to have been awarded to the writ petitioner L & T and the award of the same to Respondent 11 Subhash Projects was illegal, but it was inexpedient at that stage to set aside the award of the contract and the least that should be done was to direct Subhash Projects to disgorge at least some portion of the profit it would have earned out of the illegally awarded contract and make over the same as compensation to the writ petitioner L & T, who ought to have been awarded the contract……"
>
> (underlining supplied for emphasis)

In the present case, as noticed, all the relevant factors for quantification of compensation are not available on record and in any case, it cannot be said that the contract in question ought to have been awarded to the writ petitioner alone, as was the finding in the case of *Subash Projects.* Of course, the process as adopted by the appellant-Board is thoroughly disapproved and it is also found that the unfair and unquestionable process was adopted essentially in order to provide backdoor entry to the appellant-Company but then, these findings by themselves do not lead to the result that the writ petitioner alone was to get the contract in question. In any case, the learned Single Judge has not indicated any basis for awarding the lump sum of Rs.10 lakhs. The decision in *Om Metals* (supra) is also of no help to the respondent because therein, compensation was awarded per the terms of contract for excess period of work.

The respondent is of course entitled to be awarded a reasonable amount of compensation particularly when the first tender process was cancelled in an unfair manner and thereafter, no tenders were invited and the contract was awarded to the appellant-Company. Having said thus, we would have considered taking up the process for arriving at a reasonable amount of compensation while compelling the appellant-Company to disgorge some portion of profit earned out of illegally awarded contract and the appellant-Board also to share such burden for having conducted the proceeding in an unfair manner. However, such a process does not appear necessary in this matter for the reasons that during the course of hearing, the appellants have placed before us by way of

alternative submissions, their offers, as were earlier made to the respondent but were not accepted by him. Now and at this juncture, we may take note of such offers. On behalf of the appellant-Company, the offer for settlement has been stated as under:-

> "1. The instant appeal has been filed by the Appellant challenging the Judgment and Final Order dated 11.10.2010 passed by the learned Single Bench in WP(C) No.295 of 2007.
>
> 2. That the Appellant is willing to part with an amount of Rs.2.17 lacs (Rupees two lakhs and seventeen thousand) only, towards compensation/damages to be paid to the private respondent.
>
> 3. That it is prayed that this Hon'ble Court may kindly consider the proposed amount of Rs.2.17 lacs (Rupees two lakhs and seventeen thousand) only towards compensation/damages to be paid to the private respondent."

On behalf of the Board, its efforts for settlement and matching offer made for the purpose have been indicated as follows:-

> "1. That the Appellant/MeECL have preferred an appeal and the same was registered as W.A. No.6 of 2011.
> 2. That the Appellant/MeECL begs to state that on the 30.03.2016 the Appellant/MeECL with the permission of this Hon'ble Court had again made an effort for settlement and the Appellant/MeECL was ready to part with Rs.2,17000/- (Rupees two lakhs seventeen thousand) only towards compensation/quantum for the loss/injury suffered by the Respondent.
>
> 3. That the Appellant begs to state that the amount of Rs.2,17000/- (Rupees two lakhs seventeen thousand) only proposed by the Appellant/MeECL was not accepted and denied by the Respondent.
>
> 4. That this Application is filed bonafidely for the ends of justice to bring on record the outcome of the settlement effort made by the MeECL/Appellant."

In an overall comprehension of the matter, we find the offers aforesaid just and proper and the resultant amount payable to the respondent i.e., a sum of Rs.4,34,000/- (Rupees four lakhs thirty four thousand) to be that of fair amount of compensation in this case. Having regard to the circumstances of the case, we find no reason to interfere with the award of costs in this matter but shall not make any further order towards costs of these appeals.

***Conclusion***

Accordingly, and in view of the above, these appeals are partly allowed to the extent and in the manner indicated. The findings as regards the process adopted by the appellant-Board in awarding the contract in question to the appellant-Company are affirmed; however, the amount of compensation as awarded in the order impugned is modified and the respondent (writ petitioner) is held entitled to an amount of Rs.4,34,000/- (Rupees four lakhs thirty four thousand) towards compensation. The respondent (writ petitioner) shall be further entitled to the amount of Rs.50,000/- (Rupees fifty thousand) towards costs of proceedings as awarded by the learned Single Judge. The amount so payable shall be borne in equal proportion by the appellant-Company and the appellant-Board.

**JUDGE** **CHIEF JUSTICE**

*lam*