
(2009) 06 UK CK 0074

In the Uttarakhand High Court

Case No : Writ Petition No. 167 of 2009 (M/S)

Alstom Hydro France

APPELLANT

Vs

Tehri Hydro Development Corporation and Another

RESPONDENT

Date of Decision : 29-06-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Land Acquisition Act, 1894 — Section 17, 5A

Citation : (2009) 06 UK CK 0074

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : Abhishek Manu Singhvi, a/b., Prashant Mehta, Sanjay Kumar Mehta and Dharmendra Barthwal, for the Appellant; G.E. Vahnavati, L.P. Naithani, a/b., Shobhit Saharia, for Respondent No. 1, Amarendra Sharan a/b., Amit Anand Tiwari, Gurusharan Singh and Parikshit Saini, for the Respondent

Judgement

Sudhanshu Dhulia, J.—The arch competitors of Europe, France and Germany, have shifted their battle grounds from the Continent to Uttarakhand, a small hill state in India. The rich upper Gangetic basin, or more precisely the Bhagirathi river catchment area, with a huge potential for hydro projects, is their new Alsace and Lorraine.

2. The Petitioner, Alstom Hydro France is a French company and Voith Siemens Hydro Kraftwerkstechnik GmbH Company KG i.e. Respondent No. 2 is a German company, both are competing for a contract for turnkey execution of Tehri Pump Storage Plant (hereinafter referred to as Tehri PSP). Bids for this project have been invited by Respondent No. 1 which is Tehri Hydro Development Corporation Ltd. (i.e. THDC and hereinafter referred to as "employer").

3. This writ petition has been filed before this Court at a stage when the contract has yet not been awarded to any of the bidders. The Petitioner and Respondent No. 2 are the only two bidders who have qualified the pre technical bid and in the financial bid, apparently, the bid of Respondent No. 2 is lower than that of the

Petitioner. The Petitioner at this stage has filed this writ petition pointing out the "anomalies" of Respondent No. 1 in the process. The two main grounds, which the Learned Counsel for the Petitioner Dr. Abhishek Manu Singhvi calls "the highway points" are as follows:

4. The first ground taken by the Petitioner is regarding the qualifications of Respondent No. 2. According to Petitioner, Respondent No. 2 was not a qualified bidder as it was not having the required experience for the project and it failed to provide requisite certificates for compliance of mandatory conditions and hence its bid was liable to be rejected at the pre qualification stage itself.

5. The second ground is on the bid of Respondent, No. 2 being "non responsive". According to Petitioner, the bid given by Respondent No. 2 was a "non responsive bid" as it was in violation of the mandatory conditions, given in the bidding documents, more particularly in its instructions to the bidder (now referred to as "ITB") that "only one bid shall be submitted by each bidder". It is contended that since Respondent No. 2 has submitted two price bids he stands disqualified as his bid has become "non responsive".

6. Both the Respondents have denied these allegations of the Petitioner as incorrect, in fact misleading and have urged this Court to dismiss the petition at the very threshold, inter alia on the grounds that it is in public interest that the project be completed in the projected time framework and the pendency of the petition on wholly untenable grounds will only delay this project, resulting in further escalation of costs, etc.

7. A preliminary objection regarding the maintainability of the writ petition was also raised at the initial stage by both the Respondents. According to them, there is an "ouster clause" in the contract, or more precisely in the Bidding document where the jurisdiction of all courts except the court at Delhi has been ousted. Whatever be the merits of this argument, nothing is being stated on this aspect here as both the Learned Counsels for the Respondents Shri Vahnavati and Shri Sharan gave a statement at the bar that they do not wish to press with this objection. Consequently, an order was passed on 4.3.2009 by this Court, which is as under:

Mr. A.M. Singhvi, Senior Advocate assisted by Mr. Prashant Mehta, Mr. Sanjay Kumar Mehta and D. Barthwal, Advocates for the Petitioner.

Mr. G.E. Vahnavati, Senior Advocate, Mr. L.P. Naithani, Senior Advocate and Mr. U.K. Uniyal, Senior Advocate, assisted by Mr. Sobhit Saharia, Advocate for Respondent No. 1.

Mr. Amrendra Sharan, Senior Advocate, assisted by Mr. Amit Anand Tiwari, Mr. Gurusharan Singh and Mr. Parikshit Saini, Advocates for the Respondent No. 2.

A preliminary objection has been raised in the counter affidavit filed by the Respondent No. 1 and 2. in their preliminary objection, the Respondents have stated that this Court does not have jurisdiction in this matter inasmuch as there

is an ouster clause in the Particular Conditions of Contract (PCC), by which all the parties have agreed that the jurisdiction will lie in the Court at Delhi.

All the same, after the pleadings were exchanged, a statement has been made at the bar by Mr. GEE. Vahnavati & Mr. Amarendra Saran, Learned Senior Advocates that they do not want to press the preliminary objection raised by them, in this case. Statement is recorded.

A limited sur-rejoinder affidavit filed today by the Respondent No. 2 is taken on record.

Heard parties at length.

Put up this matter on 5th March, 2009 for admission / orders.

8. The case hence proceeded on merits and examined the two main grounds of the Petitioner. First point -The eligibility factor.

9. This point has been argued at great length by the senior advocata Dr. Abhishek Manu Singhvi, counsel for the Petitioner. According to the Petitioner, Respondent No. 2 does not have the essential qualifications as given in the Bidding document*, and since it was not technically qualified its bid was liable to be rejected at the pre qualification stage itself. The Petitioner has argued that as per the conditions of the Bidding document in order for a bidder to be technically qualified for submitting a bid, he "must have" completed, in the last 20 years, certain scope of works in design, manufacture, construction, installation/erection, testing and commissioning of electro-mechanical equipment for a hydro project of at least 150 MW capacity. For a ready reference, the extract of this technical qualifications, prescribed in Clause 4.2.1 of the conditions is as follows:

The term "bidding document" has been referred in this judgment in a broad sense and refers to the entire material supplied by Respondent No. 1 to the bidders which would, inter alia, include the bidding data sheet (BDS), Instructions to Bidder (ITB), etc.

Eligibility and Qualification Criteria

No. Subject Requirement Single Entity

4.2 Experience in related field

4.2.1 Electro-mechanical Equipments Specific Experience Participation as Contractor, Management contractor or Subcontractor, within the last 20 years that has been successfully completed scope of works covering:

- * Must have done design, Manufacture, Supply, Erection, Testing and Commissioning of Reversible Pump Turbines of minimum 150 MW Unit Capacity and should be in successful operation for at least 24 months after commissioning.

- * Must have done Design, Manufacture, Supply, Erection, Testing and Commissioning of Motor Generator with related equipments for Pumped Storage

Scheme of at least 150 MW Unit Capacity and should be in successful operation for at least 2 years after commissioning. Must meet requirement

10. In order to ascertain that a bidder has fulfilled such conditions, a certificate was required to be provided by that bidder.

11. In other words as per the above condition of the bidding document it was a mandatory technical qualification that a bidder must have completed in the last 20 years, the following works of reversible pump turbines of minimum 150 MW capacity. These works are (A) Design (B) Manufacture (C) Supply (D) Erection (E) Testing and (F) Commissioning, which should have been in successful operation for at least 24 months after commissioning. Similar qualifications as above were required for the work for motor generator and related equipment for pump storage scheme of at least 150 MW unit capacity which should also be in successful operation for at least 2 years after commissioning. In the present context, it is made clear that the word "erection" would also mean "installation", and these words are being used interchangeably, here in this judgment.

12. It is Petitioner's contention that in order to comply with the above requirement Respondent No. 2 as a bidder relied on having carried out, inter alia, the work of "erection" in a project known as "Ghangzhou II Pumped Storage Project", in China. According to the Petitioner this was the only project Voith Siemens i.e. Respondent No. 2 claimed to have done and on which it based its compliance with the mandatory requirement, which is referred above. Since Respondent No. 1 has already qualified Respondent No. 2 technically it is apparent that Respondent No. 2 was satisfied with the aforesaid technical qualifications and the certificates submitted by Respondent No. 2 to Respondent No. 1.

13. Yet, the Petitioner states that such certificates could not have been submitted for the project Ghangzhou II by Respondent No. 2 because Respondent No. 2 has not done the "Erection"Yinstallation work at Ghangzhou II. According to the Petitioner, the "erection" work at Ghangzhou II was done by a Chinese Company by the name of M/s Synohydro Bureau. Consequently, the Petitioner also asserts that the certificates filed showing the work of erection by Respondent No. 2 for project at Ghangzhou II are false certificates and, therefore, he has indulged in a "fraudulent practice", as defined by the conditions given in the bidding document.

14. Petitioner has further elaborated that before the Ghangzhou II project in China, there was a Ghangzhou I project which was completed by none other than the Petitioner and, therefore, the Petitioner has first hand knowledge of the kind of work one can do and the kind one cannot do in China. While the Petitioner carried out phase I of Ghanghou Project No. I, Petitionerwas awarded the contract of design, manufacture, supply, testing and commissioning of the project but not for "installation" or "erection" work, because according to the Petitioner the laws in China do not permit erection/installation work by an outside company and such work (of erection/installation), as per the prevailing

Chinese law, has to be done by a domestic company. The Petitioner further asserts that for this reason the Petitioner has not submitted any certificate relating to the work done by it at Ghangzhou I project because submitting such certificates, according to the Petitioner, would amount to making a false claim. Respondent No. 2's claim for having done erection work/installation in China at Ghangzhou II is therefore incorrect and the certificates so submitted are false certificates, says the Petitioner.

15. In order to substantiate this point, Petitioner has relied upon the following documents:

(i) The report of the Asian Development Bank which is inter alia regarding the Hydro Project at Ghangzhou II.

(ii) The counter certificates issued by the authorities/companies in China showing that erection work has not been done by respondeat No. 2 but it has been done by a local company in China.

(iii) Magazine published by Voith Siemens, for advertisement of the work done by it.

16. Apart from this Petitioner has also submitted legal opinion from China showing that the work of erection/installation in such projects, as per the prevailing Chinese law, has to be given to domestic companies.

17. The report of the Asian Development Bank (from hereinafter referred to as the ADB report) dated November, 2001 titled "Asian Development Bank - PCR: PRC 26369; Project Completion Report on the Guangzhou Pumped Storage Stage II Project (Loan 1241-PRC) in the People's Republic of China - November 2001". The relevant portion of the report on which reliance has been placed by the Petitioner reads as follows:

5. Guangdong Pumped Storage Joint Venture Company (GPSJVC) was the Executing Agency Tor the Project. GPSJVC was established in 1988 by three shareholders: Guangdong Power Holding Company (GPHC; 54 percent), Guangdong Nuclear Investment Company (GNIC; 23 percent), and State Development and Investment Company (23 percent). Appendix 2 provides the organization chart of the executing agency. A domestic design institute was responsibse for the design, with two domestic hydropower firms as the supervising engineers. A domestic contractor carried out the civil and erection works. Electromechanical equipment-was provided by a foreign supplier but was installed by the domestic contractor under the supervision of the international consultants. These implementation arrangements worked out well, with proper coordination performed by GPSJVC. There was good cooperation and teamwork among all parties involved. The project facilities were well constructed, with actual performance meeting design standards.

(Emphasis added)

18. This report has been annexed in the writ petition and is a part of record. The Petitioner contends that since the ADB report clearly states that a domestic contractor carried out the "Civil and Erection Works", the claim of Respondent No. 2 that it was Voith Siemens which carried out the work of erection/ installation at Ghangzhou II is false and misleading.

19. The veracity of the certificates which have also been filed by Respondent No. 2 in its counter affidavit (which are from China, ostensibly from the authorities who were responsible for the project Ghangzhou II) have been challenged by the Petitioner, and it has been pointed out before this Court by the Learned Counsel for the Petitioner that these certificates on the face of it appear to be fake as the certificates are not signed! It is therefore contended by the Petitioner that since the certificates submitted by Voith Siemens were unsigned certificates, at least the employer i.e. Respondent No. 1 should have cross checked the claim of Respondent No. 2 instead of making him technically qualified on the basis of unsigned certificates!

20. On the other hand, the Petitioner has filed certificates in this Court and has made repeated averments in affidavits after affidavits before this Court, contending that the erection work for Ghangzhou II was actually done by a Chinese company and the claim of Respondent No. 2 that it had done the erection work for Ghangzhou II is false. The Petitioner and Respondent No. 2 were both trying to outwit each other by filing affidavit and presenting certificates showing the hollowness of other's claim, and this was leading nowhere when a suggestion was given at the bar by Shri Goolam E. Vahnavati, Learned Solicitor General of India (as he was then) representing Respondent No. 1 the employer, to which all parties agreed. As per this agreement Respondent No. 1 agreed to verify the allegations of Petitioner regarding the qualifications of Respondent No. 2, and to examine afresh the claim of Respondent No. 2 regarding work done at Ghangzhou II in China. By this time, the normal pleadings were already complete, inasmuch as the petition, the counter affidavits on behalf of all the Respondents and the rejoinder affidavit by the Petitioner was already on the record. All the same, the following interim orders were passed on 5.3.2009:

Mr. A.M. Singhvi Learned Senior Advocate assisted by Mr. Prashant Mehta, Mr. Sanjay Kumar Mehta and Mr. D. Barthwal, Advocates for the Petitioner.

Mr. G.E. Vahnavati, Learned Senior Advocate, Mr. L.P. Naithani, Learned Senior Advocate assisted by Mr. Shobhit Saharia, Advocate for the Respondent No. 1.

Mr. Amarendra Sharan, Learned Senior Advocate assisted by Mr. Amit Anand Tiwari, Mr. Gurusharan Singh and Mr. Parikshit Saini, Advocates for the Respondent No. 2.

During the course of arguments, a consensus has reached between the parties on some aspects. Consequently, Mr. G.E. Vahnavati, Learned Senior Advocate appearing for T.H.D.C./ Respondent No. 1 states that notwithstanding the stand

taken in the counter affidavit filed by Respondent No. 1 i.e. T.H.D.C. in these proceedings, Respondent No. 1 will verify whether Respondent No. 2 (Voith Siemens) is duly qualified in relation to the experience claimed by Respondent No. 2 and for this purpose, it will also take into account the submissions made by the Petitioner in the writ petition and the rejoinder affidavit and the submissions of the Respondent No. 2 in the counter affidavit and the sur-rejoinder filed by the Respondent No. 2.

Put up this matter on 26.3.2009 for admission in daily cause list.

Meanwhile, in view of the statement given by Mr. G.E. Vahnavati, which has been duly noted in order dated 19.2.2009, there is no need of passing any interim order.

21. Consequently when the matter was listed, an affidavit was filed by the employer stating that consequent to the order dated 5.3.2009, the employer deputed a team of its officials who visited Guangdong Pumped Storage Company Ltd. (GPSC) and the Guangzhou Pumped Storage Project in China. This team comprised of senior officers who remained in China between 16.3.2009 to 20.3.2009. The names of the persons in China whom this team met have also been given in the affidavit. The certificates which were submitted by the Voith Siemens Hydro Company pertaining to their experience in Ghangzhou II project have also been examined and the documents which have been submitted by the Petitioner have also been taken into consideration. After having said this in some detail, the affidavit states that the committee has given the following findings after its visit to China and its appraisal of the documents. These findings are as follows:

(i) The certificate dated 23.08.04, 07.02.05 & 21.02.05 (for work done at Ghangzhou ii) were issued by Guangdong Pumped Storage Company Ltd. (GPSC). These certificates are normally sealed as per Chinese practice but on the request they are now signed by the project authorities.

(ii) The ADB report is not contract specific and it is true that no separate contract was signed for erection of electro-mechanical equipments other than those specified in the annexure of the ADB report under reference.

(iii) The erection contract signed with M/s SINOHYDRO BUREAU 14 was for supply of skilled & unskilled labour and general purpose tools and tackles etc. which is mandatory as per Chinese practice/rules.

(iv) Voith Siemens Hydro Power Generation company (Then joint Venture of JM Voith GmbH and Siemens AG) under the contract No. 94-ML-460080 DE signed on 15th September 1994 was awarded the work of design, manufacture, supply, erection and commissioning of equipments of Guangzhou II pumped storage project (4x 300 MW) and they have successfully designed, manufactured, supplied, erected and commissioned these equipments and the project was put into operation in March 2000 and the units are operating smoothly since then.

GPSC is satisfied with the performance and quality of the equipments supplied by M/s Voith Siemens and with their services rendered for Guangzhou II project.

22. In short, finding of the team suggested that there is no strength in the claim of the Petitioner that Respondent No. 2 had not done the erection work at Ghangzhou II or the certificates submitted by Respondent No. 2 are false.

23. In addition to the above development, what has actually weakened the claim of the Petitioner on this aspect is the copy of the "contract" which has now been filed by means of an affidavit dated 24.3.2009 by Respondent No. 2. This is the contract which was signed between Respondent No. 2 and the Chinese authority pertaining to Ghangzhou II project, about which the whole issue has been made by the Petitioner as to the erection work done by Respondent No. 2 at Ghangzhou II. Both Shri Goolam E. Vahnavati, the Learned Solicitor General of India, Learned Counsel for Respondent No. 1 and Shri Amrendra Sharan, Senior Advocate for Respondent No. 2 have meticulously read before this Court provision after provision of the contract to show that Voith Siemens had done the work relating to erection at Ghangzhou I project.

24. It is not necessary to quote the detail provisions of this contract as emphasised before this Court by the Learned Counsels for the Respondents. However, some of provisions as read before this Court by the Respondents may just be referred. According to the Respondents, a conjoint reading of the definition of works, for example, in Clause 1.8 and Clause 2.1 of this contract make it clear that it was the responsibility and liability of Voith Siemens to ensure "functional integration" of the "works" and Voith Siemens was made expressly responsible for the "Technical Performance and Time Schedule of Installation, Tests and Trial Operation". Again as per Clause 16.1.2 of Ghangzhou Contract, the entire responsibility for "the technical excellence of the installation, adjustment, commissioning and trial operation of the Works was with Voith Siemens". Further Clause 16.2.4 of the Ghangzhou Contract which provided for the selection of the installation team it was laid that selection of the installation team was subject to Voith Siemens' "final decision" and vide Clause 16.2.6 it required that the installation team was to work under "the direction and supervision" of Voith Siemens and the Ghangzhou Contract also gave Voith Siemens the right to request the Chinese Project Authorities "to replace, without delay, the workers or even the senior management staff of the installation team". It has also been pointed out to this Court that Clause 1,8 of Ghangzhou Contract read with Clause 5.2.1 (B) of the contract makes it clear that the contract price of Voith Siemens included Voith Siemens' costs for installation. Other provisions have also been brought to the notice of this Court which provided that the Voith Siemens was to train the personnel of the Chinese Project Authorities as well as the installation team at the work site for installation, commissioning, operation and maintenance of the equipments.

25. What has emerged from a reading of these provisions is that though Respondent No. 2 may not have done the actual installation work at Ghangzhou

II project, as it was indeed done by a local Chinese company called M/s Synohydro Bureau but the installation work was under the supervision and control of Respondent No. 2 and not only this, the final responsibility regarding installation also rested with Respondent No. 2. In other words, though Respondent No. 2 or its team may not have done the actual "nut and bolt" job, but where the nuts and bolts have to be placed and "how" the machinery has to be installed was under the supervision and control of Respondent No. 2. As Shri Vahnavati, asserted "the buck stopped with Respondent No. 2", as the ultimate responsibility for installation in the project was with Respondent No. 2.

26. In its rebuttal to the aforesaid recital of the provisions of Ghangzhou contract, Dr. Abhishek Manu Singhvi, Learned Counsel for the Petitioner stated that the extracts of the contract only show that Respondent No. 2 was "supervising" the erection work and it did not undertake the actual erection or installation work for Ghangzhou II PSP. The terms of the said contract, he states, make it clear that erection work for Ghangzhou II PSP was awarded to a local Chinese installation team, namely, Synohydro Bureau 14 for which there was a separate tender and a separate contract between Guangdong Pumped Storage Company Ltd and Synohydro Bureau 14. It is argued by the Petitioner's counsel that merely the fact that Respondent No. 2 may have been responsible for supervising erection work, which was actually carried out by a third party, does not and cannot meet the qualification criteria and in any event it was not the basis on which Respondent No. 2 was pre qualified. It is also argued that there is a clear difference between having carried out erection, and being responsible for erection. It is also contended that when Respondent No. 1 was appreciating the documents and the certificates filed by Respondent No. 2, it had held Respondent No. 2 as technically qualified on the basis of his claim of doing the erection work for Ghangzhou II PSP and not as a management contractor or as a person supervising erection or responsible for erection. There is a clear change of stand now both by Respondent No. 1 and Respondent No. 2. They had taken one stand while appreciating the documents and the qualifications of Respondent No. 2 at the pre qualified stage which is quite different from this present stand which is after the filing of the Ghangzhou contract by Respondent No. 1 before this Court in which it is now clearly revealed that Respondent No. 2 had not done the actual erection work but it was only doing the supervision of erection and was responsible for erection.

27. Reliance was also placed by the Petitioner on the magazine taken out by Voith Siemens. It has been contended by the Petitioner that Voith Siemens while advertising the projects undertaken by it in this magazine has not stated that it had also done erection work at Ghangzhou II and since that magazine was taken out much before the present controversy actually arose, the Petitioner asserts that a lot of creditability has to be given to this document. Indeed, on a perusal of this document, the word "erection" is missing from the page where the Ghangzhou II project has been highlighted by Respondent No. 2. However, this has been explained by Respondent No. 2 by saying that the magazine is merely

for sales promotion of Voith Siemens, prepared by concerned marketing managers. The intention of these articles and photographs in the magazine is to give a potential customer a general overview of the technological capabilities of the recent orders bagged by Voith Siemens and in these articles general summary is given. It is further asserted that even if Voith Siemens has supplied, erected and commissioned certain equipments for a particular project, the magazine may understate the facts by simply stating that Voith Siemens has supplied equipment for such project. The magazine does not necessarily set out the entire contractual scope of each project mentioned therein. Respondent No. 2 has also pointed out that such an understatement of the work done is not merely in the case of Ghangzhou II by Voith Siemens but also in case of other projects as well. It has also been argued that such an understatement of the fact does not and cannot amount to a misrepresentation and question of misrepresentation would arise only in the event of Voith Siemens contending that it had executed some work, which in fact it had not. This explanation of Respondent No. 2 though not fully convincing, yet it matters little at this stage. The reason why it is so will be explained shortly, in this judgment.

28. It is further argued by Dr. Singhvi that the documents/certificates submitted by Respondent No. 2 in support of its claim of having done erection at Ghangzhou II being unsigned cannot be relied upon as they are unsigned. To strengthen his argument, reliance has been placed on two Supreme Court judgments which are Collector of Customs, Bombay Vs. East Punjab Traders and Others, and Shree Balaji Steels v. Gontermann-Peipers India Ltd. (2003) 114 Gomp Cas 193 (Cal).

29. Indeed in both the said cases, the Supreme Court had declined to rely upon the documents which were unsigned and not authenticated. In Collector of Customs case (supra) which was a case where majority of the members of CEGAT refused to rely upon the documents submitted by the Appellant which were photocopies and did not bear any signature either of the exporter or the forwarding agent and, therefore, the majority of the members of CEGAT had expressed a serious doubt whether the copies relate to any of the consignment in question and under these circumstances the majority member of CEGAT did not place reliance on these documents and consequently the Apex court had also held that if the majority of members failed to place any reliance upon such documents, it was a correct approach.

30. In Shree Balaji Steels case, it was a company matter relating to winding up of a company in which certain claims were being made regarding interest to be paid and the entire reliance was being placed upon statement which was annexed with the winding up petition which was unsigned and was also not authenticated. Therefore, the Apex Court had said:

Such being the state of affairs before the Learned company judge we do not find any reason to hold otherwise as we find that the document annexed to the winding up petition was not at all a signed and authenticated document and,

therefore, the Learned company judge was fully justified in not relying on the said document and thereby refused to grant interest.

31. The facts of the present case are entirely different. Firstly, although the documents submitted by Respondent No. 2 for having done erection work at Ghangzhou II are admittedly unsigned documents, yet a team of the employer has gone to China and has personally checked and verified these documents with the authority who has given these documents/ certificates to Respondent No. 2 and the authority has stated that in China it is a general practice not to sign such certificates but to only seal them. Moreover, the veracity of these documents is not in doubt after the China visit and also after appreciating the contents of the contract in issue. Moreover, what actually matters is whether Respondent No. 2 has done the erection work at Ghangzhou II and not whether the certificates it had submitted are only sealed though not signed. Therefore, on the facts of the present case, the judgment referred to by the Petitioner will not be applicable.

32. Much emphasis has been given by the Learned Counsel for the Petitioner on the words "must have done the work of erection", which is given in the Bidding document. Now the Learned Counsel for the Petitioner contends that the condition stipulates that a bidder must have done the actual work of "erection". It is submitted by the Learned Counsel that it was not the intention, at the relevant time, of the employer to invite bids even from such companies who though may not have done the actual erection work but may have supervised the erection work and the reliance upon the Ghangzhou II contract and the change in stands of both Respondent No. 1 and Respondent No. 2 at this stage, before this High Court, that though it may not have done the erection work but since it has supervised the erection work, compliance with the mandatory condition is met, will not be correct. The Petitioner has relied upon the seminal judgment of the Apex Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, (hereinafter referred to as "Airport Authority case") wherein, inter alia, the Apex Court had held that the persons who do not complete the qualifications, are not liable to be entertained by the State and the Public Sector corporations and State cannot act arbitrarily while inviting tenders and granting contracts and distributing state largesse.

33. In *Airport Authority case*, the Apex Court, inter alia, was dealing with the issue as to what are the constitutional obligations on the State when it takes action in exercise of its statutory or executive power? Is the State entitled to deal with its property in any manner it likes or award a contract to any person it chooses without any constitutional limitations upon it? What are the parameters of its statutory or executive power in the matter of awarding a contract or dealing with its property? The Apex Court, inter alia, decided that the conditions in the tender document must be strictly adhered to as "It is well-settled rule of interpretations applicable alike to documents as to statutes that, save for compelling necessity, the court should not be prompt to ascribe superfluity to the language of a document, and should be rather at the outset inclined to suppose

every word intended to have some effect or be of some use. To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable." It has, therefore, been argued by Dr. Abhishek Manu Singhvi, that since the Bidding document only speaks of the word "erection", it has to be read as erection and not as "supervising of erection."

34. Now, what happened in the Airport Authority case was that although the tender document clearly stipulated that the Applicant must be registered as a second class hotelier having at least five years' experience yet the tender which was accepted was of a person who did not have five years' experience. This was held to be wrong. According to the Apex Court, since the condition stipulated five years of experience, it should have been strictly adhered to. In the present case, indeed the employer had made it a mandatory condition that a person, inter alia, should have done the work of "erection". However, any meaning other than what has just been given to the word "erection" would in fact render the entire exercises undertaken by the employer futile. Also, one of the tender condition i.e. 4.2.1 also states that Participation as Contractor, Management contractor or Subcontractor, within the last 20 years that has been successfully completed scope of work, inter alia, erection. The case of Respondent No. 2 can fall under the category of "management contractor" for having supervised the work of erection. Moreover, leaving aside erection, all other works the actual work done is important, in other words one cannot supervise "designing", "manufacturing" or "testing" - one must have actually done it. One cannot supervise a design or supervise a manufacture or supervise a testing. This has to be actually done by a person, who is making a claim on this field, in order to make him qualified under the said category. But as far as erection is concerned, the term "erection" does involve installation of machinery, which most of it is labour intensive work and "expertise" is involved not in doing the work of installation but getting the installation done, which would mean supervising installation, which is where the expertise comes in. Therefore, under the facts of the case, there is an absolute justification for the employer to keep "supervision of erection" on the same footings as actual erection.

35. Reliance has been placed upon W.B. State Electricity Board v. Patel Engineering Company Ltd. and Ors. (2001) 2 SCC 451 (hereinafter referred to as the Patel Engineering case). According to Petitioner, the certificates submitted by Respondent No. 2 do not say that he was the contract manager or had supervised erection work. It says that Respondent No. 2 has done the erection. Therefore, now Respondent No. 2 cannot change his stand and say that he will qualify even as a "contract manager" or "supervisor of erection". According to Petitioner, such alteration in stand by the Respondents would be in contravention

of the principles enunciated by the Supreme Court in Patel Engineering case. All the same, a reading of the said judgment shows that the ratio laid down by the Apex Court in that case is not applicable to the facts in the present case. In Patel Engineering case, the issue was whether a mistake, arithmetical or clerical, made by a bidder in its contract document can be corrected, and also whether it can be done even after the deadline for such correction is over. On this, the Apex Court had held that in contracts of such nature (as is the present case as well) no latitude should be given to the bidder and such mistakes cannot be corrected after the deadline. As per the Supreme Court "in the present case (i.e. Patel Engineering case) the errors pointed out above are not simply arithmetical and clerical mistake but a deliberate mode of splitting the bid which would amount to rewriting the entries in the bid document and cannot be treated as non-material."

36. Therefore, there was a particular kind of mistakes or errors in the bid document, the rectification or correction of which was disallowed by the employer which was held to be correct under the facts of Patel Engineering case by the Apex Court.

37. In the present case, however, there is no rectification of an error or mistake on the part of Respondent no 2 which has been corrected beyond the deadline by Respondent No. 1. What has happened in the present case is that the work done by Respondent No. 2 regarding supervision of erection at Ghangzhou II in China has been held to be in accordance with the conditions of bidding document and "supervision of erection" has been held to be "erection" or "installation" itself by Respondent No. 1. In other words, it is the meaning given to the word "erection" by Respondent No. 1 which is being challenged. This Court, as it has already been stated above, finds no fault on this account on the part of Respondent No. 1. Therefore, with due respect Patel Engineering case will not be applicable in the present case. Moreover, the veracity of the certificates/documents submitted by Respondent No. 2 is also not in doubt any more.

38. Therefore, having heard the arguments of both the side on this aspect, this Court is satisfied that though Respondent No. 2 may not have done the actual "erection" work at Ghangzhou II but since it had supervised the erection work and since the final responsibility for such erection/installation lay with Respondent No. 2, so much so that the contractor who had done the installation work was to be chosen by Respondent No. 2 and this contractor was responsible and answerable to none other than Respondent No. 2 and also keeping in mind that the essence of erection work lies in one having the expertise for erection hence "erection" work here would include "supervision of erection". In other words sufficient compliance is made of the mandatory conditions of Bidding document by Respondent No. 2.

39. It is for this reason why this Court is not inclined to take notice of the apparent contradictory versions given in the Voith Siemens' magazine and the statement made in the counter affidavit before this Court because, there is now an overwhelming evidence in support of Respondent No. 2 that it had actually

"supervised the work of erection" at Ghangzhou II, which this Court views as the same thing as having done the work of "erection".

40. There is another aspect to this issue which must be stated and which is in fact the settled position of law on the subject. This Court does not have the expertise to see the relative merit of the parties or to appreciate their qualifications for a given job. This is the work for the experts - experts who have been appointed by the employer, and if these experts in their wisdom and knowledge believe, after appreciating the documents and examining the qualifications of Respondent No. 2, that it is indeed qualified, then so be it. This Court will not indulge in a roving enquiry or appoint independent commissioners to examine the veracity of the claim of Respondent No. 2.

41. The seminal decision on this would be Tata Cellular Vs. Union of India, . In the said case, the Apex Court while elaborating law on the subject and while discussing various case laws on the subject laid down the following principles which must be followed by Courts on the matter such as the present. These principles are laid down in para 94 of the judgment and are as follows:

94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

42. At another place in the above judgment the Hon"ble Apex Court has observed, "It is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator".

43. The importance of the committee of experts was reiterated in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, , in the following words:

Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work - which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee.

44. Again, in *Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another*, , the Apex Court observed as under:

12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

45. In *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, , the Apex Court has stated as follows:

7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others*, , *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, , *Tata Cellular Vs. Union of India*, , *Ramniklal N. Bhutta and another Vs. State of Maharashtra and others*, and *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, . The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons,

if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

46. In *Delhi Science Forum and others Vs. Union of India and another*,¹ the Apex Court had held that while granting contracts, the experts who have been given authority to apprise such matters have to take into account several factors and, therefore, a greater latitude is to be given to these authorities to select the best terms considering the economic and social interest of the nation. The Apex Court has held as follows:

it is well-settled that the onus to demonstrate that such decision has been vitiated because of adopting a procedure not sanctioned by law, or because of bad faith or taking into consideration factors which are irrelevant, is on the person who questions the validity thereof. This onus is not discharged only by raising a doubt in the mind of the court, but by satisfying the court that the authority or the body which had been vested with the power to take decision has adopted a procedure which does not satisfy the test of Article 14 of the Constitution or which is against the provisions of the statute in question or has acted with oblique motive or has failed in its function to examine each claim on its merit on relevant considerations. Under the changed scenarios and circumstances prevailing in the society, courts are not following the rule of judicial self restraint. But at the same time all decisions which are to be taken by an authority vested with such power cannot be tested and examined by the court. The situation is all the more difficult so far as the commercial contracts are concerned. Parliament has adopted and resolved a national policy towards liberalization and opening of the national gates for foreign investors. The question of awarding licences and contracts does not depend merely on the competitive rates offered; several factors have to be taken into consideration by an expert body which is more familiar with the intricacies of that particular trade. While granting licences a statutory authority or the body so constituted should have latitude to select the best offers on terms and conditions to be prescribed taking into account the economic and social interest of the nation. Unless any party aggrieved satisfies the court that the ultimate decision in respect of the

selection has been vitiated, normally courts should be reluctant to interfere with the same.

47. Other decisions of Supreme Court such as in *M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others*, and *Association of Registration Plates Vs. Union of India (UOI) and Others*, have also been relied upon by Respondent No. 1 on this issue.

48. In short, therefore, the scope of interference of this Court is very limited and more precisely interference can only be made if there is a fault in the decision-making process of granting a contract. There is definitely no fault of Respondent No. 1 in making assessment of the qualifications of Respondent No. 2 and, therefore, the first argument of the Petitioner can only be rejected, as under the facts of the case, supervision of erection will be treated to be erection and since admittedly there is no dispute any more about Respondent No. 2 having met the standards of "supervision of erection" and Respondent No. 1 having accepted this qualification of Respondent No. 2 as valid qualification, there will be no justifiable reason to interfere on this aspect.

49. Dr. Singhvi, the Learned Counsel for the Petitioner had, however, urged for an interference by this Court and had submitted that right since *Airport Authority* case, it has been a settled view that in case of arbitrariness in contractual matters, courts will interfere. Reliance has also been placed upon other decisions such as *Harmander Singh Arora Vs. Union of India (UOI) and Others*, and *Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others*, , where the Apex Court had interfered in a contractual matter. However, the facts of these cases referred above are entirely different where there has been a gross arbitrariness, which in the present case, in the present aspect, is absent.

50. Dr. Singhvi has also relied upon *Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others*, and has urged before this Court that the Supreme Court had laid down that the High Courts can interfere in a writ petition even on disputed questions of fact, if it is so required. However, the facts of the case in *Gunwant Kaur (supra)* were that even though no urgency clause have been invoked u/s 17 of the Land Acquisition Act, the owners of the land were not heard u/s 5A of the Act and when they filed the writ petition, the writ petition was summarily rejected by the High Court on grounds that no interference will be made on disputed question of fact. It was on these facts that the Supreme Court has interfered and stated as follows:

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit in reply from the Respondents, and should have proceeded to try the petition instead of relegating the Appellants to a separate suit.

The facts of the above case, therefore, are totally different to the present case, hence no interference is required on this issue.

Second Point - The non responsive bid.

51. It is the second argument of the Petitioner which had drawn considerable interest of this Court. This argument is undoubtedly very attractive! One bidder one bid rule has been violated! It has been argued that since Respondent No. 2 has made a non-responsive bid by making two price bids, his bid is liable to be rejected. Now, there is no doubt that Respondent No. 2 has made two price bids - In one he has quoted a price "x" with A as an assignee and then he has quoted a price "y" with A not as an assignee but as a partner.

52. It must be explained here that in accordance with Clause 12 of the ITB, the bidding process was divided into three stages which are as follows:

(a) pre selection of bids in light of pre-selection criteria as described in the Bidding document.

(b) Evaluations of technical bids of the bidder meeting the pre-selection criteria

(c) Evaluation of Responsive Bidders meeting the pre-selection and technical requirements.

53. On 29-12-2007, four pre-qualification bids were submitted by the following bidders through their respective consortium leaders:

(a) Aistorrt Hydro France as the lead bidder with a consortium comprising of Alstom Hydro France and Hindustan Construction Company ("Alstom Consortium")

(b) Patel Engineering as the lead bidder with a consortium comprising of Patel Engineering, India Ltd and Maytas Infra Ltd. India ("Patel Consortium")

(c) Sumitomo Japan Ltd., as the lead bidder with a consortium comprising of Sumitomo, Japan Ltd. KCT, India and Samsung, South Korea. Subsequently Samsung was substituted by SKE&C, South Korea ("Sumitomo Consortium") and

(d) Voith Siemens as the lead bidder with a consortium comprising of Voith Siemens Hydro Kraftwerkstechnik GmbH Company KG, Andritz v. Atech, Austria and L&T, India. Subsequently Andritz v. A Tech withdrew from the consortium leaving Voith Siemens and L&T India, as the consortium members ("Voith Consortium").

54. On 1 -4-2008 Respondent Nos. 1 issued a pre-qualification approval in respect of the Petitioner, Respondent No. 2 as well as the Sumitomo Consortium. The Patel Consortium did not pre-qualify.

55. Later, the bid of Sumitomo Consortium was declared as non-responsive bid and only the bid of the Petitioner and Respondent No. 2 went forward, meaning that they were the only two who passed the stage of "pre technical qualification".

56. In short, there were now only two consortiums in the race- one was the Petitioner which is referred to as the Alstom Consortium and the other was Respondent No. 2 being referred to as Voith Siemens Consortium.

57. To appreciate this point we will have to refer to the terms and conditions of the tender document and more particularly Clause 9.4.4 and the amendments made in this clause.

58. It is an admitted fact that under the conditions of the Bidding document the employer i.e. Respondent No. 1 has the power to amend the bidding documents prior to the deadline for submission of these bids. The relevant clause empowering the employer to amend the bidding document is given in Clause 8.1 which reads as under:

(i) Clause 8.1 "At any time prior to the deadline for submission of bids, the employer may amend the Bidding Documents by issuing addendum that shall be displayed on Employer's web site and shall also be communicated in writing to all who have obtained the Bidding Documents directly from the Employer.

59. It is also an accepted position that once an amendment is carried out in the tender conditions by the employer, a bidder becomes bound to follow the same and amend its bid to bring it in conformity to the amendment which is clear from Clause 6.1 and 6.2 of the conditions of bidding document. Clause 6.1 and 6.2 are quoted below:

(ii) Clause 6.1 "The Bidding Documents consist of volume I, II, III and volume IV, which includes all the Sections, indicated below, and should be read in conjunction with any Addendum issued in accordance with ITB Clause 8."

(iii) Clause 6.2 "The Bidder is expected to examine all instructions, forms, terms and specifications in the Bidding Documents, Failure to furnish all information or documentation required by the Bidding Documents may result in the rejection of the bid.

60. Initially there was no provision in the tender for the consortium to include any other company either as an assignee or as a partner. A limited role of an assignee was carved out later by means of an amendment. This was precisely done by way of amendment No. 6, which was introduced on 10-6-2008 by which it was made clear by Respondent No. 1 that an assignee can be included only if the employer is satisfied with the experience / qualification of the proposed assignee, with a limited role to it of "onshore supplies" and "onshore services". However, subsequent to it, the Petitioner vide his letter dated 7-7-2008 made a request to Respondent No. 1 to widen the scope of an assignee to include offshore supplies as well. The request in the letter dated 7-7-2009 made by the Petitioner is quoted below:

We therefore request you to kindly modify the tender conditions suitably and approve Alstom Projects India Limited's role as Assignee in the tender for part Offshore and Onshore supplies (which will also include manufacture and supply

of components of Turbine, Generator and Main Inlet Valves) and Onshore Services (which will include installation of the electro-mechanical and hydro-mechanical equipment) prior to submission of the tender which will enable us to deliver a highly competitive bid for the project.

Therefore, what was being asked for was an enlargement of the role of assignee for both onshore as well as offshore supplies.

61. Subsequently thereafter, vide letter dated 14-8-2008, the Petitioner sought permission to include Alstom Projects India Limited as a partner in the consortium and allow the change in the consortium structure from consortium of Alstom Hydro France and Hindustan Construction Company Limited to consortium of Alstom Hydro France, Alstom Projects India Limited and Hindustan Construction Company Limited. It is a fact admitted by all the parties that such a request was being made so that there could be a substantial cost saving and a competitive bidding may be done. According to the Petitioner as well as Respondents, it is an admitted fact that if one is allowed an Indian company as an assignee in the project, it would substantially reduce the cost of project and if the same Indian company is allowed as a partner in the project, then the cost will go down even further. Therefore, admittedly a bidder would first want its Indian company as a partner and if this cannot be granted then at least as an assignee, in order that it may give a competitive bid for the project. On this point, there is no doubt.

62. Amendment No. 9 was introduced on 30-8-2008. The relevant portions of Clause 9.4.4 (as amended by Amendment No. 9) are reproduced below:

Clause No. 9.4.4 (e) of Section 1.1. (Amendment No. 9)

Notwithstanding anything contained herein above, the Employer on merits of the Financial strength, competence and experience of the Assignee proposed in the Bid (if Assignee is from the Group Holding Company of the EM/HM Works partner) may ask the Bidder / Consortium prior to award of the contract to include such Assignee in the Consortium as partner. The Bidder shall to do so by submitting a fresh consortium agreement and the new Consortium in case of award of the contract shall enter into several Contracts (Form-Arev-2 and Form-B rev-2) as per the bid conditions and the Consortium so formed shall be jointly and severally responsible and liable to the Employer for execution of the Project on turnkey basis. The Assignee if made partner in the Consortium shall be permitted to manufacture component of plant and equipment described at para (si) herein above subject to following the outsourcing conditions mentioned therein.

In such case (Assignee becoming Consortium partner), signing of Fortn-K or K1 shall not be required and the Joint Deed Undertaking (Form-III.11) submitted with the bid shall be discharged by the Employer and accordingly no additional Performance Bank Guarantee shall be required from the Assignee accepted as Consortium partner.

63. Immediately after making amendment No. 9, Respondent No. 1 had issued a clarification dated 2-9-2008 to all the bidders in which, inter alia, the clarification was given by the employer particularly on the request of the Petitioner dated 14-8-2008 (supra) was also explained. It was as follows:

The request is advanced from that in SI. No. 38 and such frequent change in the stand is not appreciated when the bidders had the opportunity to propose maximum four partners in the Consortium in pre selection bid stage.

However, as per the ITB Clause 9.4.4 (Amendment 9), the bidders to elaborate their proposal in their bids on Assignment/subcontracting and for acceptance of proposed Assignee as Consortium partner.

In view of the above, the bidders are advised to submit the proposal instead of expecting the change of the consortium at this stage.

It may also be necessary to state that though this clarification was sent on 2-9-2008, it is actually dated 30-8-2008.

64. According to the Petitioner Clause 9.4.4., as it stood after amendment No. 9 and the clarification dated 2.9.2008, he had to give only one bid including Alstom Projects India Limited as an assignee and it was left open to the employer, who may or may not promote the status of that assignee to that of a partner. However, according to Respondent No. 1 a bare perusal of Clause 9.4.4, as it stood after amendment No. 9 read with clarification dated 2.9.2008 shows that the bidders had to "elaborate" their bid in financial terms as well, which would mean that they had to give two price options, one as an assignee and other as a partner, though the final choice would be of the employer whether to accept their bids as an assignee or as a partner. In fact, the very fact that Respondent No. 2 has given two price bids, says Respondent No. 1, - one as assignee and other as partner shows that as far as Respondent No. 2 is concerned, he had no doubt in its mind that two price options have to be given. Moreover Respondent No. 1 has argued that the concept of a bid and bid price are completely different. There may be a bar of submitting only one bid but there is no bar of submitting more than one price bids as the term "bid" necessarily refers to the comprehensive bid running into several volumes submitted by each of the bidders. However, the concept of the bid price is entirely different and in a particular contingency two price bids may be given.

65. Respondent No. 1, therefore, argues that there is a difference between giving two bids and giving two price options. There is admittedly a bar on giving two bids but as per the conditions of bidding document, there is no bar on giving two price options more particularly in a given situation where assessment had to be made of the bidder both as an assignee as well as a partner. Moreover, it has been argued that giving two price bids would become non-responsive only in a case where a consortium partner in agreement with partner "X" submits a bid "A" and at the same time enters into another consortium agreement with "Y" and submits bid "B". It is this which would be non-responsive and in violation of the

conditions of bidding documents. Merely giving two price options as in the present case in the same bidding document is not in violation of any of the conditions of bidding documents, in fact, tenders were required to give two price options.

66. The case of the Petitioner, on the other hand, is that the amendment as well as the clarification makes it clear that bidders were required to elaborate on their proposal in their bids on assignment/sub-contracting as also their proposal as to why particularly a proposed assignee could be treated as a "Consortium partner". No bidder could have, therefore, submitted bids assuming that its proposal would be accepted. The terms of the tender and in particular Clause 9.4 (as amended by Amendment No. 9), according to the Petitioner, only "proposals were to be elaborated in the bid". It has not been stated that in spite of the mandatory condition of one tender one bid, two price bids, one as an assignee and other as a partner could be given.

67. There are two aspects to this issue. The first is whether asking a bidder to give two price options or to give two price bids, is violative of the mandatory conditions of one tender one bid and the second is, whether such an option was at all called for by the employer.

68. It is true that in the bidding process, the very concept of assignee and partner, as we understand it now, was introduced in the first place by the Petitioner itself. Both the Petitioner as well as Respondent No. 2 were aware that if they are allowed to bring in someone as an assignee then in monetary terms it would mean that the cost will go down and they would be able to make a competitive bidding. Again if they were allowed to bring in someone as a partner then the costs would go down further and this kind of an arrangement would suit both the Petitioner as well as Respondent No. 2. Whether it would also suit Respondent No. 1 is a different question altogether as Respondent No. 1 would have to look into not only the cost factor but various other factors and the final decision of acceptance of bids as an assignee or partner was with the employer i.e. Respondent No. 1.

69. In the opinion of this Court though normally one tender one bid is a rule but here in case Respondent No. 1 was allowing the tenders to make their options both as an assignee as well as a partner then submission of two price bids seems to be in order and not in violation of any condition of the Bidding document.

70. One tender one price bid is not a universal law applicable in all contingencies and looking at the facts of the case and the conditions given in the tender document, it sounds logical if the participants who have finally crossed all hurdles and have now only to compete for the final bid are giving option to make the bid as an assignee as well as a partner. This Court sees no anomaly if such an option is either invited or given. Therefore, the second ground of the Petitioner also must be rejected to this extent. This Court finds no anomaly in Respondent No. 2 giving two price bids or price options - one as an assignee and other as a partner

and merely because two price options have been given by Respondent No. 2, it will not be held to be non responsive or violative of the tender documents as alleged by the Petitioner. Moreover, an interference on this aspect would also amount to interfering with the terms of invitation to tender, where the courts are definitely slow to interfere.

71. In *Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others*, , The Apex Court observed that:

10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.

72. In *Puravankara Projects Ltd. Vs. Hotel Venus International and Others*, , the Apex Court has held that it was not for the Court to judge how the tender conditions would have to be framed. The Apex Court has stated thus:

In essence, it was held that tender terms and contractual and it is the privilege of the Government which invites its tenders and courts did not have jurisdiction to judge as to how the tender terms would have to be framed.

73. This position was again reiterated by the Apex Court in *Nagar Nigam, Meerut Vs. Al Faheem Meat Exports Pvt. Ltd and Others*, .

74. Therefore, the legality or the propriety or even the intention of the employer to invite two price options cannot be questioned. Invitation of two price bids will not be violated of the tender condition as is being made out by the Petitioner.

75. However, looking at the second aspect as to whether such an option was at all invited, this Court definitely finds an ambiguity. This Court has noticed a lack of clarity in the tender document! There is an ambiguity and confusion as to what is being asked in the tender document, to be precise in amended Clause 9.4.4 as well as in the clarification letter of Respondent No. 1 dated 2-9-2008. Nowhere has Respondent No. 1 said, in simple plain language, that the tenderers can make two price bids, one as an assignee and the other as a partner.

76. Sri Vahanavati, the Learned Sr. Counsel for Respondent no 1 has painstakingly taken this Court to various provisions of the tender document and has argued that the invitation of two price options was implicit in the document vide the amendment No. 9 and the clarification dated 2-9-2008 and the fact that two price options were invited can be seen from the documents itself. However, to this Court, such a provision, like the "emperor's new clothes" is not visible ! It has nowhere been stated, in plain English, that bidders have to give two price options, or two price bids.

77. The fact that there is no clarity in Clause 9.4.4 of bidding document, as it stood after amendment No. 9 as well as in the clarification given by the employer dated 2-9-2008 is obvious. Respondent No. 1 has also argued that even if there

is some ambiguity then commercial contracts or even tender documents have to be interpreted in a manner so as to make commercial sense ! They have not to be construed like a statute and have to be interpreted keeping in mind the intention of the parties at the relevant time. It is further argued that commercial contracts are often recorded in a crude and summary fashion and even while it is so, the Courts will always consider such documents broadly without being too astute and subtle in finding defects in such documents. Reference has been made here of decision of the House of Lords in *Hillas & Company v. Arcos Ltd.* (1932) All E.R. 494 which says as follows:

Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise, it is accordingly, the duty of the court to construe such documents *fasriy* and broadly, without being too astute or subtle in finding defects;

78. This decision of the House of Lords in *Hillas & Company* (*supra*) has been relied upon by the Supreme Court in *Dhanrajamal Gobindram Vs. Shamji Kalidas and Co.,* . While referring to the said judgment, the Apex Court has stated as follows:

Commercial documents are sometimes expressed in language which does not on its face bear a clear meaning. The effort of the Courts is to give a meaning if possible. This was laid down by the House of Lords in *Hillas & Company v. Arcos Ltd.* (1932) All E.R. 494, and the observations of Lord Wright have become classic and have been quoted with approval both by the judicial Committee and the House of Lords ever since....

Lord Viscount summarises at page 158 all the rules applicable to construction of commercial documents and laid down that Efforts should always be made to construe commercial agreements broadly, and one must not be astute to find defects in them as being meaningless.

79. A decision given by the Division Bench of Madras High Court in *Kamala Sugar Mills Ltd., Delhi Vs. Ganga Bishen Bhajan Singh and Another*, has also been relied upon by Respondent No. 1. The relevant paragraphs of the said judgment as relied upon by Respondent No. 1 state as follows:

21. Commercial transactions" couched in easy and understandable language and contained in a contract have to be respected according to its tenor. This is so because, the parties with open eyes and being conscious of the merit of the letter and spirit of the Clauses in such a contract do enter into them.

22. The courts, therefore, ought not to be astute to "defeat the efficacy of such document or destroy such bargains. While interpreting a commercial contract, a broader outlook has to be ad opted and care should be taken to avoid an artificial arid unrealistic approach in the matter oTthTurioVirstaTidTnglhTrneaning.and.pu

such documents, in such cases", the courts should occupy the chair of the contracting parties and reasonably understand their minds and intents. Tfalter^u^rTirTapproach the instrument still presents circumstances which the conscience of a reasonable and prudent person cannot accept and if ex facie the terms are so unconscionable, illegal and designed to avoid or evade law, then only the doctrine of public policy will intervene, and will not implement such bargains.

80. In short, what Respondent No. 1 has tried to submit on this issue is that commercial documents like invitation offender have to be construed and given a businesslike interpretation and the understanding of the parties has to be considered and more particularly the author of the documents have to be given paramount importance.

81. While explaining the obvious vagueness of the bidding documents and the explanation given to it thereafter, Respondent No. 1 has argued that in any case the Petitioner had participated in the tender proceedings and, therefore, it cannot raise an issue of "vagueness" at this stage. The judgment relied upon by Respondent No. 1 is that of *Tafcon Projects v. Union of India* (2004) 13 SCC 788. The relevant paragraph which is relied upon by Respondent No. 1 is as follows:

Respondent No. 3 had bid pursuant to the tender notice and participated in the proceedings before the Selection Committee. It cannot now take advantage of any alleged vagueness in the tender notice.

82. However, in the case of *Tafcon Projects* (supra) a party to the litigation alleged vagueness in the tender notices but accepted that it had actually misunderstood the clause of the tender. Therefore, the facts of that case appear to be somewhat different where a particular tender price was quoted on an admitted misunderstanding of the clause.

83. Another case cited by Respondent No. 1 is that of *Gauhati High Court in Larsing M. Vs. Meghalaya Tourism Development Corpn. Ltd. and Another*, , where the plea of vagueness in bidding conditions was rejected and the Court stated as follows:"....the submission is to be noted only to be summarily rejected. The reason is that the Petitioner never challenged or raised objections against such omission, if there be any. Whenever the Petitioner entertained and doubt on the bidding criteria, it was not slow in raising such issues as can be seen from his letter dated 23-5-2007 wherein it had sought clarification as to the meaning of the word "Company" before submission of RFP bids. If the pre-qualification criteria were really vague and was, therefore, likely to cause prejudice to it, it ought to have challenged the same in an appropriate manner. Having proceeded to participate in the bidding process knowing fully well such alleged defective criteria, it cannot at the belated stage turn around and say that the bidding process is unfair or arbitrary or vague."

84. Respondent No. 1 has drawn a parallel with the case of *Larsing M.* (supra) and has argued that in the present case as well the Petitioner was constantly

seeking several clarifications and modifications of the tender conditions. Therefore, if it had any doubt regarding the tender, it was open to the Petitioner at that stage to seek clarifications from Respondent No. 1. Since the Petitioner chose not to do so, it cannot now raise any alleged grounds of uncertainty or vagueness in the tender conditions.

85. There may be a logic in this defence of the Respondents that even if there was a confusion in the bidding document, looking at the history of negotiations in this bidding process where letters have been exchanged and clarifications have been sought, could not the Petitioner seek such a clarification and, therefore, can any interference be made merely on the ground of vagueness in the bidding document. This Court has considered this aspect as well and has found that on this aspect of vagueness, looking at the entire facts of the case, there are definitely two views possible - one, to reject the claim of the Petitioner on the ground of vagueness due to the past history of negotiations and the second, to accept this ground and interfere. This Court will lean on the second option as, Goodness lies in clarity. Fairness and equity also demand that for lack of clarity benefit must go to the Petitioner. As clarity has been a causality in the process, Petitioner must be given a second chance to give its price bid.

86. The principle of *Contra Proferentem* may also be of use here. If the Petitioner has read amendment No. 9 as well as clarification to mean that bids had to be given with a proposal as an assignee only and it was upon Respondent No. 1 whether to accept the assignee or reject it, or to promote the status of an assignee to that of a partner, then he is justified in reading it that way. Since there is an ambiguity in the tender document, the benefit of this ambiguity must go to the Petitioner. In case of ambiguity in the tender document, the document has to be interpreted "*contra proferentem*" i.e. against the party which drafted the said document which in this case is Respondent No. 1, and consequently in favour of the Petitioner. A reference to the concept of "*contra proferentem*" is given in two cases cited by the Petitioner (a) *General Assurance Society Ltd. Vs. Chandumull Jain and Another*, and (b) *State of Maharashtra Vs. Dr. M.N. Kaul (Deceased by his Legal Representatives) and Another*, .

87. It may be stated here that the principle of *contra proferentem* is derived from a Latin maxim which reads as follows. "*Verba fortius accipiuntur contra proferentem*", which means that words are interpreted more strongly against the party who puts them forward. The principle of *contra proferentem* would therefore mean that where the words of a document are ambiguous, they shall be construed against the party who prepared the documents. This principle has been applied recently in the judgment of the Apex Court in *United India Insurance Co. Ltd. Vs. Pushpalaya Printers*, .

88. Although in the present case there is a history of past negotiations and amendments, and the exchange of letters and clarifications, between the Petitioner and Respondent No. 1, however, in face of a clear ambiguity in the document, it must be read against its author i.e. Respondent No. 1, and in favour

of the Petitioner.

89. Therefore although there is no illegality in Respondent No. 2 giving two price bids - one as an assignee and other as a partner, yet, the manner in which it has been sought and more particularly, in the ambiguous manner in which it has been asked, the document will have to be read as understood by the Petitioner.

90. It may not be out of place to mention here that the price bids which were opened on 15-1 -2009, the Petitioner had given his bid of 2520.6 crores which after a discount offer was Rs. 2483.8 crores whereas Respondent No. 2 gave two price options - one as an assignee which was of Rs. 2327.5 crores and the other as a partner which was of Rs. 2261.6 crores. Undoubtedly there is a substantial difference between the bids given by the Petitioner and Respondent No. 2. The price offered by Respondent No. 2 is substantially lower than that of the Petitioner even as an assignee. The case of Respondent No. 2 is that he had to give two price options because only by giving two price options can he demonstrate the cost affect of inclusion of assignee as a partner and then it is left for the employer to choose between two options offered by Respondent No. 2. However, the Petitioner may very well argue that he could not have given price option as a partner because its request for including the assignee as a partner was effectively turned down by Respondent No. 1 vide its clarification dated 02-09-2008 and the Petitioner bonafidely understood the implications of letter dated 02-09-2008 to mean that only one price option has to be given that too as an assignee and it is left with the employer who may promote the status of assignee to that of a partner and only on that event would the question of giving a price option of a partner arise.

91. This submission of the Petitioner does make sense as a bare reading of the amendment and the clarification shows that any of the two meanings, one understood by the Petitioner and other as is being explained by Respondent No. 1 can be ascribed to these documents.

92. Consequently this Court holds as follows:

The qualifications of Respondent No. 2 for having done the work of "erection" at Ghangzhou II seems to be in order as this Court holds "supervision of erection" as equivalent to that of "erection" and rejects the arguments of Petitioner on the eligibility of Respondent No. 2. Further, under the facts of this case, if two price bids had been invited by the employer - one as an assignee and the other as a partner, then again there is nothing wrong in such an approach and if consequent to it two price bids have been given by Respondent No. 2 - one as an assignee and the other as a partner, it is in order and will not be called a non-responsive bid, However, since the process of calling two bids is flawed for lack of clarity, the benefit has to be given to the Petitioner, for the reasons already stated above. Hence, it is directed that Respondent No. 1 must ask for fresh bids from the Petitioner as well as Respondent No. 2.

93. With the above directions, the writ petition is disposed of.