
(2012) 02 SC CK 0032

In the Supreme Court Of India

Case No : Civil Appeal No. 2134 of 2012 (Arising out of SLP (C) No. 7807 of 2011)

NTPC Limited

APPELLANT

Vs

Ansaldo Caldaie Boilers India P. Ltd. and Another

RESPONDENT

Date of Decision : 16-02-2012

Acts Referred:

Citation : AIR 2012 SC 927 : (2012) AIRSCW 1542 : (2012) 3 AWC 2643 : (2012) 114 CLT 762 : (2012) 3 JCR 119 : (2012) 3 RCR(Civil) 20 : (2012) 2 SCALE 563 : (2012) 4 SCC 471 : (2012) 3 Supreme 126

Hon'ble Judges : J. Chelameswar, J;Altamas Kabir, J

Bench : Division Bench

Advocate : G.E. Vahanvati, A.G., Parag Tripathi, ASG, Mukul Rohtagi, Rajiv Dhawan, Debol Banerjee, Kunal Bahri, Swati Sharma, Bindu Saxena, Shailendra Swarup, Devadatt Kamat, K.K. Patra, Aparjita Swarup, Neha Kattar, Mohit Kumar, Anoopam Prasad, Prashant Kumar, Arnab Choudhary and Anurag Sharma, for M/s. AP and J Chambers, T.A. Khan and B.K. Prasad, for the Appellant;

Final Decision : Allowed

Judgement

Altamas Kabir, J.—Leave granted.

2. Following international competitive bidding procedures, the Appellant had invited bids for the supply and installation of Steam Generator package for captive coal- based Thermal Power Projects in different areas. The bid of the Respondent No. 1 was rejected by the Appellant by its letter dated 5th January, 2011, as the same did not meet the minimum qualifying requirements set out in the Bid documents. Furthermore, the Qualified Steam Generator Manufacturer, Ansaldo Caldaie, Italy, proposed by the said Respondent, did not have the necessary minimum qualification, as was required in terms of the Bid documents.

3. The main issue which arises for consideration in this Appeal is whether Ansaldo Caldaie, Italy, can be said to be a Qualified Steam Generator Manufacturer within the definition set out in the detailed Invitation for Bids. The

said invitation for bid contained the qualifying requirement for Bidders in Clause 7 of the Tender Document. Clause 7.1.0 provided that the Bidder should meet the qualifying requirements of any one of the qualifying routes stipulated under Clause 1.1.0 or 1.2.0 or 1.3.0 or 1.4.0 or 1.5.0. In addition, the Bidder was also required to meet the requirements stipulated under Clause 7.6.0 and 7.7.0, together with the requirements stipulated u/s ITB.

4. Route 1 permits a Qualified Steam Generator Manufacturer to join the bidding process provided that it should meet the qualifying requirements of any of the qualifying routes indicated in Clause 7 of the tender documents. In Clause 7 of the tender documents, five different routes have been enumerated which could be taken by the tenderers, namely:

- (i) as a Qualified Steam Generator Manufacturer; or
- (ii) as an Indian Steam Generator Manufacturer; or
- (iii) as an Indian subsidiary company of a Qualified Steam Generator Manufacturer; or
- (iv) as an Indian Joint Venture Company for manufacturing Super Critical Steam Generators in India between an Indian Company and a Qualified Steam Generator Manufacturer; or
- (v) as an Indian Joint Venture Promoter holding at least 51% stake in a Joint Venture Company for manufacturing Super Critical Steam Generators in India between an Indian Company and a Qualified Steam Generator Manufacturer.

5. Indisputably, none of the parties which responded to the invitation adopted Routes 1 or 3. Bharat Heavy Electricals Ltd. adopted Route 2, while Route 4 found favor with Larsen & Toubro, MHI and the Appellant, while BGR took recourse to Route 5. Route 4 contained in Clause 7.4.0 relates to Indian Joint Venture Companies for manufacturing of Super Critical Steam Generators in India between an Indian Company and a Qualified Steam Generator Manufacturer. For the sake of reference, Clauses 7.4.1 and 7.4.2 which formed part of Route 4 are extracted herein below:

7.4.0 Route 4 : Indian Joint Venture (JV) Company for manufacturing of Super Critical Steam Generator in India between an Indian Company and a Qualified Steam Generator Manufacturer

7.4.1 The Bidder shall be a Joint Venture (JV) Company incorporated in India under the Companies Act 1956 of India, as on the date of techno-commercial bid opening, promoted by (i) an Indian Company registered in India under the Companies Act 1956 of India and (ii) a Qualified Steam Generator Manufacturer meeting requirements of clause 7.1.1, created for the purpose of manufacturing in India supercritical steam generator sets covering the type, size and rating specified. If the JV Company is incorporated as a public limited Company then it should have obtained certificate for Commencement of Business in India as on

the date of techno-commercial bid opening.

The Qualified Steam Generator Manufacturer shall maintain a minimum equity participation of 26% in the JV Company for a lock-in period of 7 years from the date of incorporation of JV Company or up to the end of defect liability period of the contract whichever is later.

One of the promoters shall be a majority stakeholder who shall maintain a minimum equity participation of 51% in the JV Company for a lock in period of 7 years from the date of incorporation of JV Company or up to the end of defect liability period of the contract whichever is later.

In the event that the majority stake holder in the JV Company is an entity other than the Qualified Steam Generator Manufacturer, it should be an Indian Company and should have executed, in the last 10 years, large industrial projects on EPC basis (with or without civil works) in the area of power, steel, oil & gas, petrochemical, fertilizer and/or any other process industry with the total value of such projects being Rs. 10,000/- million or more. At least one of such projects should have a contract value of Rs. 4,000/- million or more. These projects shall be in successful operation for a period of not less than one year as on the date of techno-commercial bid opening.

7.4.2 The Bidder shall furnish a DJU executed by him, the Qualified Steam Generator Manufacturer and other JV promoter having 25% or higher equity participation in the JV Company, in which all the executants of DJU shall be jointly and severally liable to the Employer for successful performance of contract as per the format enclosed in the bidding documents. The joint deed of undertaking shall be submitted along with techno-commercial bid, failing which the Bidder shall be disqualified and his bid shall be rejected.

In case of award, each promoter having 25% or higher equity participation in the JV Company will be required to furnish an on demand bank guarantee for an amount of 0.5% of the total contract price of the Steam Generator Package in addition to the contract performance security to be furnished by the Bidder.

6. As mentioned hereinbefore, the bid filed by the Respondent No. 1 was rejected by the Appellant by its letter dated 5th January, 2011, as the same did not fulfill the qualifying requirements of Route 4, extracted hereinabove.

7. Appearing for the Appellant, the learned Attorney General, Mr. Goolam E. Vahanvati, submitted that Clause 7.1.1 prescribes the basic qualifying requirements for a Qualified Steam Generator Manufacturer and the same is applicable to all the routes permitted under the bidding documents, irrespective of the route which the Bidder would opt for, for seeking qualification. For the sake of convenience, Clause 7.1.1 is reproduced herein below:

7.1.1 The Bidder should have designed, Engineered manufactured/got manufactured, erected/supervised erection, commissioned/ supervised commissioning of at least one (1) number of coal fired supercritical Steam

Generator having rated capacity of 1500 tonnes of steam per hour or above. Further, such Steam generator should be of the type specified, i.e. single pass (tower type) or two pass type using either spiral wound (inclined) or vertical plain or vertical rifled type water wall tubing, and should be in successful operation for a period of not less than one (1) year as on the date of Techno-commercial bid opening. In addition, the above Steam Generator should have been provided with evaporator suitable for variable pressure operation (sub-critical and supercritical pressure ranges). The Bidder shall offer only the type of Steam Generator and type of water wall tubing for which he is qualified.

8. The learned Attorney General submitted that Clause 7.1.1 is identical to Clause 1.1.2 of Item No. 4 of Section III of the Tender Documents and under Clause 1.4.1 it has been clearly mentioned that the requirements of Clause 1.1.1 had to be met. The learned Attorney General urged that in view of Clause 7.1.1, the Bidder must have "designed" and "engineered" the entire Steam Generator himself and the same could not be outsourced. Accordingly, once it is submitted that a Steam Generator is to be designed by the Qualified Steam Generator Manufacturer itself, all the integral parts of the Steam Generator like the furnace (evaporator), Superheaters 1, 2 and 3, Reheaters 1 and 2, connecting piping etc., have to be designed and engineered by the said manufacturer himself. The learned Attorney General also urged that Clause 7.1.1, however, permitted the manufacture, erection or commissioning to be outsourced by the Qualified Steam Generator Manufacturer, in view of the expressions used, such as, "got manufactured", "supervised erection" and "supervised commissioning".

9. The learned Attorney General also contended that Clause 7.1.1 also categorically states that the Steam Generator would have to be provided with an evaporator suitable for variable pressure operation (emphasis added). It was submitted that an evaporator is an integral and one of the most critical parts of any Supercritical Steam Generator. It was further urged that if the evaporator was not designed for variable pressure operation, conditions in Note 5 of the Notes in Clause 1.0.0 of the Bid documents would have to be complied with. For the sake of reference, Note 5 is reproduced herein below:

Steam Generator Manufacturer with Technology Tie-up for Variable Pressure Design

In case a supercritical Steam Generator manufacturer meets all the requirements as specified in clause No. 1.1.1 above except that the evaporator in the reference steam generator is not designed for variable pressure operation and is designed for constant pressure (Universal Pressure) operation only, in such case, the Supercritical Steam Generator Manufacturer has an ongoing license agreement (which covers technology transfer), as on the date of Techno-commercial bid opening, with the original Technology Owner (Licensor) for design, manufacture, sell, use, service of once through variable pressure supercritical steam generator technology (with evaporator suitable for variable pressure operation in sub-critical pressure ranges).

i. The licensor should have experience of providing such variable pressure design steam generator technology for at least one (1) No. of coal fired supercritical steam generator for a 1500 T/hr or higher capacity using either spiral wound (inclined) or vertical plain or vertical rifled type water wall tubing with the evaporator suitable for variable pressure operation in sub-critical and super-critical pressure ranges and which should be in successful operation for a period of not less than one (1) year as on the date of bid opening.

ii. The Bidder shall offer only the type of steam generator i.e. single pass (tower type) or two pass type for which the Bidder is qualified and shall offer only the type of water wall tubing (either spiral wound (inclined) or vertical plain or vertical rifled type) for which his licensor is qualified.

iii. In such an event, the Bidder shall furnish a Deed of Joint Undertaking executed between the Bidder and the supercritical steam generator manufacturer (as the case may be) and its Technology Owner (Licensor), as per the format enclosed in the Bidding Documents towards the Bidder and the licensor being jointly and severally liable to the Employer for successful performance of the Steam Generator along with an extended warranty of at least one (1) year over and above what is required as per tender documents.

iv. In case of award, Technology Owner (Licensor) will be required to furnish an on demand bank guarantee for an amount of 0.1% of the total contract price of the Steam Generator Package in addition to the contract performance security to be furnished by the Bidder.

10. In addition to the above, the learned Attorney General submitted that in the event the provisions of Note 5 were to be followed, it would be necessary for the Bidder to provide a Deed of Joint Undertaking to be executed between the Bidder, the proposed Qualified Steam Generator Manufacturer, who possessed the experience of designing and engineering a Steam Generator with evaporator suitable for constant pressure operation. The very reason for the furnishing of a Deed of Joint Undertaking was to make the technology owner responsible for the successful operation of the plant along with the Bidder. It was submitted that only when such an undertaking was given by the licensor and the Qualified Steam Generator Manufacturer that the Bidder would be eligible for being considered as being qualified to participate in the bidding process. The learned Attorney General submitted that despite the fact that the Respondent No. 1 had taken recourse to Note No. 5 and the bid of the Respondent was non-responsive, no Deed of Joint Undertaking had been furnished by the Respondent. On the other hand, in the bid submitted by the Respondent No. 1, it had been mentioned in Clause 1.2.0 that the evaporator in the reference Steam Generator, which was supplied to Enel, was for variable pressure operation. The Respondent claimed to have designed and engineered the reference Steam Generator, but when it came to the actual confirmation in reference to the experience, it was indicated as follows:

1.5.0 We, confirm that M/s ANSALDO CALDAIE S.p.A. (Qualified Steam Generator Manufacturer) meets all the requirement as per 1.1.1 of BDS except that the evaporator indicated in the reference steam generator is not designed for variable pressure operation and is designed for constant pressure (Universal Pressure) operation only and seeking qualification along with the original technology owner (Licensor) from which he has an ongoing license agreement (which covers technology transfer), as on the date of Techno-commercial bid opening, for design, manufacture, sell, use, service of once through variable pressure supercritical steam generator technology (with evaporator suitable for variable pressure operation in sub-critical and supercritical pressure ranges).

Further we confirm that original technology owner (Licensor) had experience of providing variable pressure design steam generator technology for at least one (1) No. of coal fired supercritical steam generator technology for at least one (1) No. of coal fired supercritical steam generator for a 1500 T/hr or higher capacity using either spiral wound (inclined) or vertical plain or vertical rifled typed water wall tubing with the evaporator suitable for variable pressure operation in sub-critical and super-critical pressure ranges and which should be in successful operation for a period of not less than one (1) year as on the date of techno commercial bid opening. The detail of Licensor and his experience detail are as follows:

11. The learned Attorney General submitted that it was, therefore, clear that the evaporator for the Steam Generator, which the Respondent No. 1 had agreed to provide, had not been designed for variable pressure operation and, accordingly, the experience of the licensor was relied upon. Furthermore, the Deed of Joint Undertaking referred to in Clause 1.01.00 was left blank, and Clause 1.6.0 which included the reference to the Deed of Joint Undertaking was expressly and consciously scored off. It was submitted that the failure to furnish the said undertaking made the bid of the Respondent No. 1 completely non-responsive.

12. In support of his aforesaid submissions, the learned Attorney General submitted that the crucial aspects of the case are:

- (i) Did the tender contemplate that the Evaporator is something separate from the Steam Generator?
- (ii) Is the Evaporator not an integral part of the Steam Generator?
- (iii) Could the Evaporator, if the tender contemplated that the Evaporator could be manufactured by a third party, be manufactured by a third party?
- (iv) Did Ansaldo Caldaie indicate that the Evaporator would be supplied by it after having it manufactured by a third party?

13. The learned Attorney General submitted that as far as the first two questions are concerned, the Evaporator was very much an integral part of the Steam Generator and as far as the third and fourth questions are concerned, the Attorney General submitted that the answer was in the negative.

14. Learned Attorney General contended that the Respondent No. 1 was ineligible to compete in the bid, since it did not satisfy one of the critical conditions of the tender document. It was submitted that in order to be eligible, a Bidder had to satisfy the conditions contained in Clause 7.1.1 of the Memorandum of Understanding, hereinafter referred to as 'MOU'. Although, manufacturing, erection or commissioning of the Steam Generator could be outsourced, the "designing" and "engineering" of the Steam Generator had to be done by the Bidder himself. The learned Attorney General submitted that if the party proposed as Qualified Steam Generator Manufacturer by the Bidder had not designed or engineered the Steam Generator himself, he could not be said to have met the qualifying requirements stipulated for a Qualified Steam Generator Manufacturer and consequently, the Bidder could not also be said to have fulfilled the requirements relating to meeting the minimum qualification requirements for his bid to be accepted. The learned Attorney General submitted that the evidence on record clearly indicated that the Respondent No. 1 had not designed or engineered the entire Steam Generator and that it transpired that in response to queries raised by the Appellant to Enel, the reference station owner had indicated that the work had been split up between the Respondent No. 1 and BHK, but executed the contract for the reference station as part of a consortium. The detailed break-up which was provided, indicated that the Respondent No. 1 had not done the designing and engineering of the boiler walls furnace. It was submitted that the failure to design and/or engineer the critical parts of the Steam Generator was fatal for qualification as a Qualified Steam Generator Manufacturer and hence the bid submitted by the Respondent No. 1 had to be rejected.

15. The learned Attorney General submitted that there were various contradictions and inconsistencies in the bid submitted by the Respondent No. 1 and while, on the one hand, it was mentioned that the reference Steam Generator was provided with evaporator suitable for variable pressure operation within sub-critical and super critical pressure ranges, it was also indicated in another part of the Tender Documents that the evaporator indicated in the reference Steam Generator was not designed for variable pressure operation, but for constant pressure operation. It was submitted that the said condition being one of the fundamental conditions of the bid, it could not be held to be substantially responsive.

16. The learned Attorney General submitted that the High Court had not applied itself to these aspects of the matter, which were essential in nature and had proceeded on the assumption that the bid of the Respondent No. 1 was in order and that the rejection of the bid of the Respondent No. 1 was liable to be quashed.

17. On behalf of the Respondent No. 1 it was submitted by Mr. Mukul Rohatgi, learned Senior Advocate, that the Respondent No. 1 Company is an Indian Company jointly promoted by Gammon India Limited and Ansaldo Caldaie S.p.A.,

Italy, who has been in the business of manufacturing, designing, erecting and commissioning of boilers since 1853 and is a world leader in the manufacture of Supercritical Steam Generators and had engineered, designed and manufactured 24 Supercritical boilers with capacity of 1500 Tonnes of Steam per hour and above. Mr. Rohatgi submitted that the Respondent No. 1 Company had installed boilers of various types all over the world and it also has a significant presence in India since 1960. Included amongst its major projects within India, are:

(i) 3 x 200 MW for NTPC at Ramagundam, Andhra Pradesh, which was installed in 1980 and has been operating successfully since its installation;

(ii) 2 x 500 MW for NTPC, Farakkha in West Bengal, which has been in operation since 1992;

(iii) 230 MW at Smalkot for BSES, which was commissioned in 1999; and

(iv) 2 x 210 MW at Neyveli Lignite Corporation at Tamil Nadu, which was the first of its kind in the State.

It was submitted that the consortium, of which the Respondent No. 1 was a part, has the distinction of being the second largest company involved in the installation of boilers in India after Bharat Heavy Electricals Ltd. (BHEL).

18. Mr. Rohatgi submitted that the Respondent No. 1 has vast experience in working with Steam Generators and was fully eligible to compete in the bids relating to Clause 7.4 of the detailed information for bids, which stipulated that the qualification of the Qualified Steam Generator Manufacturer would be considered if it owned at least 26% of the equity of the Bidder as per Clause 7.1.1. Accordingly, Respondent No. 1 submitted its performance certificate. Mr. Rohatgi submitted that the Respondent No. 1 submitted the Performance Certificate issued to Ansaldo Caldaie by Anel Tower for Torranvaldaliga Nord Power Plant, to the Appellant to support its eligibility for participating in the Bid.

19. Mr. Rohatgi submitted that there were four Bidders, including the Respondent No. 1, but ultimately on 5th January, 2011, the Respondent No. 1 was informed that his technical bid had been rejected on the ground that it did not meet the qualification criteria. The Bank Guarantee furnished by the Respondent No. 1 was returned to him. In the meantime, the Writ Petition filed by the Respondent, (WP (C) No. 296 of 2011), came up for hearing on 17th January, 2011, when it was withdrawn with liberty to file a fresh petition based on the fact that the Respondent No. 1 had in the interregnum period received the rejection letter dated 5th January, 2011, issued by the Appellant.

20. Mr. Rohatgi submitted that Clause 7.1.1 and Clause 7.4 clearly reflected the mind of the Bidder. Learned Counsel urged that the use of the expression "provided" in dealing with the capability of the Bidder to deal with variable pressures merely indicated that the Steam Generator Manufacturer would have to provide technical tie-up for variable pressure design and in the absence of the same, the bid submitted would still qualify for being considered. It was urged

that the use of the expression "provided" would have to be read along with the phrase "designed, engineered, manufactured/got manufactured" etc. The further usage of the words "in addition" indicated that the stipulation regarding the provision of an evaporator suitable for variable pressure operation was an additional, ancillary and peripheral requirement and not integral to the type of Steam Generator contemplated. Mr. Rohatgi urged that the submission made on behalf of the Appellant to the contrary was incorrect since it had been in no uncertain terms submitted that in the bid document and in the pleadings before the High Court and this Court noted that the evaporator provided with the Steam Generator at the reference plant at TNP was suitable for variable pressure operation.

21. It was submitted that the entire basis of the case made out by the Appellant was, therefore, non-est and the High Court did not commit any error in allowing the Writ Petition filed by the Respondents.

22. There is no dispute that the Respondent No. 1 chose Route 4 while submitting its Tender Bid, in its capacity as an Indian Joint Venture Company for manufacturing Super- Critical Steam Generator in India between an Indian Company and a Qualified Steam Generator Manufacturer. The crucial condition for a Bidder of the said category to be considered is contained in Clause 7.1.1 of the Tender Documents, which has been extracted hereinbefore and provides that the Bidder should have designed, engineered, manufactured/got manufactured, erected/ supervised direction, commissioned/supervised commissioning of at least one Steam Generator having rated capacity of 1500 Tonnes of Steam per hour or above and that it should be provided with an Evaporator suitable for variable pressure operations for special category and supercritical pressure ranges.

23. The controversy which led to the rejection of the Technical Bid of the Respondent No. 1 was with regard to the question as to whether in the case of a Joint Venture Undertaking it was essential that the Qualified Steam Generator Manufacturer also had to be the manufacturer of the evaporator or whether it could function as a facilitator. Furthermore, what appears to have weighed with the Appellant in rejecting the Technical Bid of the Respondent No. 1 was that the Steam Generator had been designed for constant pressure and not variable pressure, as required by the Appellant.

24. Admittedly, the evaporator is an integral part of the Steam Generator. The question is whether the same could not be manufactured by a third party and supplied to the Qualified Steam Generator Manufacturer for use in the boiler. Although, the said proposition has been hotly contested on behalf of the Respondent, an attempt was also made to show that the evaporator was in fact designed for variable pressure, but such a submission was contrary to the confirmation given by the Respondent No. 1 which indicated that the evaporator had been designed for Constant Pressure (Universal Pressure) operation only. The MOU, while permitting manufacturing, erection or commissioning of the

Steam Generator, provided that the same could be outsourced, but the "designing" and "engineering" of the Steam Generator had to be done by the Bidder himself and if the party proposed as Qualified Steam Generator Manufacturer and the Bidder had not designed and engineered the Steam Generator itself, it could not be said that the qualifying requirements for such manufacturer had been satisfied.

25. From the terms and conditions contained in the MOU, it appears to us that it was the intention of the Appellant that the Qualified Steam Generator Manufacturer would have to be the manufacturer of the evaporator itself and could not have outsourced the manufacture thereof to a third party, since the evaporator controlling the pressure of the Steam generated is a vital and crucial component of the Steam Generator itself. The Appellant, which will be the ultimate user of the Generator, must be presumed to be conscious of the competence of the tenderer to "provide" the evaporator in keeping with the required specifications.

26. In the aforesaid context, we are unable to uphold the decision of the Division Bench of the Delhi High Court quashing the letter dated 5th January, 2011, issued by the Appellant herein, informing the Respondent No. 1 that its Techno-commercial Bid had been rejected on the ground that it did not meet the minimum requirement set forth in item No. 4 of Section III of the Tender Documents. The High Court while interpreting the provisions of Clause 7.1.1 of the Tender Documents was influenced by the use of the phrase "manufactured/ got manufactured" while considering the fact that although, Ansaldo Caldaie, Italy, was being projected as the Qualified Steam Generator Manufacturer, Siemens A.G. was shown as the technology owner/licensor of the evaporator which was offered by the Respondent No. 1. In other words, the evaporator being offered by the Respondent No. 1 was one which had been manufactured not by the Qualified Steam Generator Manufacturer, but by a third party, which was not contemplated in the aforesaid condition of the Tender Documents.

27. The importance of the above condition is manifested in the functioning of the Steam Generator which handles High Pressure Steam for the purpose of turning the turbines for generating electricity. The design and engineering of the evaporator and the boiler itself has to be such as to withstand the very high temperatures and pressures generated. The importance of the variable pressure operations is of great importance as far as generation and wastage of energy is concerned. The importance of the evaporator in controlling pressure during operations is to automatically regulate the flow of water, generation of pressure and temperature of the steam to the desired level.

28. In that view of the matter, we allow the Appeal and set aside the impugned judgment of the Division Bench of the High Court allowing the Writ Petition filed by the Respondent No. 1. The Writ Petition filed by the Respondent No. 1, therefore, stands dismissed.

29. There shall, however, be no order as to costs.