
(2013) 04 DEL CK 0357

In the Delhi High Court

Case No : Writ Petition (C) 534 of 2011

RDS Project Ltd.

APPELLANT

Vs

Ratnagiri Gas and Power Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 18-04-2013

Acts Referred:

Citation : (2013) 201 DLT 503

Hon'ble Judges : Pratibha Rani, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Jagdeep Dhankar, instructed by Ms. Asha Jain Madan and Mr. Mukesh Jain, for the Appellant; A.S. Chandhiok, ASG instructed by Ms. Bindu Saxena, Shailendra Swarup, Ms. Aparajita Swarup, Ritesh Kumar, Ms. Shweta Gupta, Sidharth Tyagi and Mr. K.K. Patra, Advocates for R-1, Mr. Gaurab Banerji, ASG instructed by Mr. Sahil Tagotra, S.A. Haseeb and Mr. Ajit Pudusery, Advocates for GAIL, Mr. Neeraj Chaudhari, CGSC for UOI and Mr. Ashok Mathur and Ms. Kanika Singh, Advocates for R-3, for the Respondent

Judgement

Pratibha Rani, J

1. Dabhol Power Project at Ratnagiri (Maharashtra) is of great national importance. Revival and restructuring of the project being in the interest of nation and the task being highly technical, revival and restructuring of project at Dabhol was entrusted to two Navratna Companies, namely, GAIL and NTPC (now Maharashtra) with the hope that sailing will be smooth. GAIL and NTPC formed a Joint Venture Company, named, Ratnagiri Gas and Power Private Limited (RGPPL) to complete the balance of the works at the LNG Terminal and Power Plant, commission the same and thereafter, operate the facility. This also gave high rise to nation's expectations that construction/completion of the project would not only be entrusted to a highly skilled agency but completion would also take place, if not within stipulated time, within normally expected completion time for such projects. The turbulence through which the project is passing through even before the work could be awarded, was the least anticipated at that time. Global notice for invitation for bid (IFB) was issued to ensure that bidders are Techno-

commercially suitable to complete this highly technical project in a time bound framework. Notice for invitation for bids (IFB) for completion of Breakwater at LNG Terminal of M/s. Ratnagiri Gas and Power Private Limited, Dabhol (Maharashtra), India was given by Ratnagiri Gas and Power Pvt. Ltd. (hereinafter referred to as RGPPL) vide Bidding Document No. 6724/T-138/08-09/SPL/24. The balance of the works for the completion at the LNG Terminal is being managed after by GAIL. It was a turnkey project and the brief scope of work and time schedule for completion of the breakwater of the length 1800 mtrs to be completed in 33 months comprised the engineering and design; including model testing, mobilization, temporary works, surveys, acquisition and development of quarries, supply of all materials, fabrication of ACCROPODES, loading, transportation and placing of rock core, rock armour and ACCROPODES and removal of temporary works including mobilization and demobilization of all personnel, equipment and marine spread as per job specifications, codes and drawings.

2. GAIL was appointed as owner's engineer. While initiating the tender process, looking into the highly technical nature of the project, GAIL appointed EIL as Primary Project Management Consultant. Leaving nothing to chance, services of Scott Wilson of UK were also solicited as back up consultant. Tender documents, especially, Clause 8.1.1.1 was there to rule out any confusion in the mind of the bidders about the expectation from them and the eligibility criteria they were expected to meet. Above all, RGPPL also wanted to satisfy itself about the credential and capability of the recommended successful bidder for obvious reason. It was a case of international bid, not only the project was prestigious, even credibility of two main constituents of the joint venture i.e. GAIL and NTPC was at stake. Financial bids were to be opened only after the bidders' successfully qualify the conditions laid down in Clause 8.1.1.1 and their techno-commercial capability is ascertained.

3. The petitioner M/s. RDS was one of the bidders. While furnishing the details of the experience in the field, claim was made of having constructed Breakwater of the length 490-500 mtrs in Mus car Nicobar, specifying the date of award in the year 2000, completion of the Project was claimed in the year 2003 thereby, conveying the impression that the project at Mus Car Nicobar was completed in three years. The requirement for the project at Dabhol was to construct Breakwater of the length of 1800 Mtrs in 33 months. Out of 5 bidders, only 4 bidders, namely, (1) M/s. AFCONS Infrastructure Ltd., Mumbai (2) M/s. Essar Constructions (India) Ltd., Mumbai (3) M/s. Consortium of M/s. MT Hojgaard & Punj Lloyd and (4) M/s. RDS Projects, New Delhi techno-commercially qualified. Their price bids were opened. Against the estimated cost of Rs. 6,62,79,71,222/-, quoted price by RDS was Rs. 3,89,90,00,000.00. The recommendation was made to award the work to M/s. RDS being "L-1". The comparative statement showing the price quoted by four bidders is as under:-

4. RDS filed its tender, claiming experience in the field of construction of

Breakwater at Mus in Car Nicobar. The claim was construction of Breakwater up to the length of 500 mtrs contract awarded in the year 2000 and completion of the project in 2003. The manner in which the experience of construction of breakwater of the length of 500 mtrs at Mus in Car Nicobar, supported with requisite certificates from the project-in-charge as well EHL, a tribal society which was awarded the contract by Ministry of Surface and Transport, Government of India, at that stage the claims made by RDS were not doubted.

5. The experience claimed by the RDS to declare its Techno-commercial capability and certain doubts about the methodology to be used during the project was sought to be clarified on advice of Scott Wilson.

6. The necessary modification in the process was agreed to by RDS and approved by Scott Wilson. Thus RDS managed to clear the first stage i.e. Techno Commercially fit and next stage was financial bid. At this stage also, RDS had edge over the other competitors due to very low quoted price i.e. Rs. 3,89,90,00,000.00 against the estimated cost of Rs. 6,62,79,71,222/-.

7. RGPPL taking note that the estimated cost of the project and the tender amount by RDS being 47 per cent lower than the estimated cost, finding no supporting documents enclosed with the tender, on receiving recommendation to award the work to RDS, RGPPL undertook the exercise of ascertaining the facts by checking CAG Report on the internet about the details of the project at Mus in Car Nicobar for which RDS was claiming the credit of completing the job "single handedly". RGPPL obtained the certified copy in respect of that project from CAG and filed the application under RTI to have access to whatever documents that could be available to verify the claim made by RDS pertaining to construction of work at Mus in Car Nicobar for the reason the record was stated to have been washed away in Tsunami in December, 2004.

8. On realizing that 490 mtrs Breakwater was constructed at Mus in Car Nicobar during the period 1994-2003 in different phases under different contracts by various agencies, RGPPL was constrained to scrap the entire process and start afresh. Amendment in Clause 8.1.1.1 at the time of inviting tender, requiring that the past experience should be under a single contract, RDS considered it to be an attempt to eliminate the company from the tender process which gave rise to various rounds of litigation up to Supreme Court. To dispel the impression that RGPPL wanted to oust RDS by amending Clause 8.1.1.1, a concession was given by Mr. Nariman appearing for RGPPL in the Supreme Court at the hearing of appeals to the effect that eligibility of RDS would be considered as per Clause 8.1.1.1 existing at the stage of first Tender. It is in this backdrop, we have been entrusted with the task of ascertaining the eligibility of RDS under un-amended Clause 8.1.1.1 and treating the entire project as a single contract.

9. Writ Petition (C) No. 534/2011 filed by RDS Project Ltd. (RDS) was disposed of by this Court on 17.10.2011 moulding prayer (A) and declaring that the amended clause 8.1.1.1 (inserted in the 2nd tender) in the given facts and

circumstances of the case is bad in law. Further decision taken by the RGPPL in the meeting held on 04.10.2010 rejecting the bid of RDS and annulling the process of first tender was quashed. While observing that the Court cannot issue any direction to RGPPL to formalize award of contract in favour of RDS in respect of DPP, a hope was expressed that the State and its instrumentalities would have interest of the republic in mind and having erred once would correct its course, thus leaving the decision to the conscious of the superior officers and members of the Board of Directors of RGPPL, GAIL and EIL to take a decision in accordance with fairness, equity and justice.

10. Feeling aggrieved by the observations and decision of this Court in the above writ petition, Ratnagiri Gas Power Pvt. Ltd. (RGPPL) whereby RGPPL was advised as above, RGPPL sought redressal of its grievances before Supreme Court. Civil Appeal No. 7593/2012 arising out of SLP No. 3571/2012 was heard along with Civil Appeal No. 7594/2012 arising out of SLP No. 5554/2012 and Civil Appeal No. 7595/2012 arising out of SLP No. 6180/2012 and the Supreme Court framed four questions falling for determination in the above appeals:-

(1) Whether Writ Petition No. 534 of 2011 filed by RDS challenging the rejection of its tender and annulment of the entire tender process was maintainable in the light of the withdrawal of writ petition No. 8252 of 2010 previously filed by it?

(2) Whether the rejection of the tender submitted by RDS and the decision to annul the entire tender process was vitiated by mala fides?

(3) Whether the condition of eligibility stipulated in the second tender notice issued by the appellant-RGPPL unfairly excluded the appellant from bidding for the allotment of the work in question? and;

(4) Whether respondent-RDS was eligible in terms of the first tender notice to compete for the works in question having executed a minimum breakwater length of 400 meters in a single project required vide Clause 8.1.1.1.

11. While answering question No. 1, Supreme Court was of the opinion that scope of W.P.(C) No. 534/2011 had to be limited to the validity of the amendments in the conditions of the eligibility introduced by RGPPL in the second tender notice issued by it.

12. Question No. 2 was answered with observation that the final decision to reject the tender submitted by RDS was required to be taken by RGPPL in its capacity as owner of the project, GAIL and EIL being assigned only advisory role and give opinion which was recommendatory in nature to facilitate the owner to take final decision on the subject, held that there was no allegation of malice in fact and there was no material to establish malice in law while taking decision to scrap the entire process pertaining to tender No. 6724/T-138/08-09/SPL/24.

13. Supreme Court took note of the observations by this Court in respect of malice being attributed to RGPPL without there being any assertion of malice against the officers named in the judgment followed by a finding recorded

attributing mala fide behind the decision to scrap the tender process, though neither mala fide was pleaded nor the officers against whom mala fide could be inferred were parties to the writ petition in their individual capacities.

14. While answering the third question whether the amendment in Clause 8.1.1.1 at the time of issuance of second tender thereby inserting the word "single contract", which as per RDS was just for the sole purpose to eliminate RDS from the scene, concession was given by Mr. Nariman after taking instructions which has been incorporated in paragraph-39 of the judgment by the Apex Court. The concession given by Mr. Nariman to RDS was as under:-

Having said that we must say to the credit of Mr. Nariman that he made a statement on instructions that in order to show its bona fides and to prove that it had no intention to deliberately target or exclude RDS, RGPPL would not apply the modified Clause 8.1.1.1 of the second tender notice to fresh tenders while evaluating them for techno commercial purposes. RGPPL would, according to Mr. Nariman, treat Clause 8.1.1.1 in the first tender notice as the applicable clause and the second tender process shall be carried forward on the Clause 8.1.1.1 as it stood in the first tender document. The statement of Mr. Nariman makes it unnecessary for us to examine whether or not RGPPL was justified in amending the BQC and whether such amendment was meant to exclude RDS or any other similarly situated tenderers from competing for the works.

15. Now the fourth question requires determination by us for the reason that the appeal has been remanded by the Supreme Court for factual determination of BQC/eligibility criteria as per unamended Clause 8.1.1.1 to examine and decide afresh the limited issue whether RDS was eligible to compete for the works in question in terms of the first tender notice based on the works which RDS claims to have executed at Mus in Car Nicobar. If the conclusion arrived at is that RDS was not eligible in terms of Clause 8.1.1.1 of first tender as it had not executed a breakwater of the requisite length then to dismiss the writ petition in toto, otherwise to proceed in terms of direction given in paragraph 49(3) of the judgment of the Apex Court.

16. We highlight that during the course of hearing even on this aspect the stand of the parties is not uniform. While RDS claims that this Court is only required to look into the aspect whether RDS has constructed breakwater of length of 400 mtrs or beyond at Mus in Car Nicobar and if from the documents and material on record it is so established then the eligibility criteria required to be met by RDS to qualify for the bid for construction of the Dabhol project stands satisfied. Mr. A.S. Chandiok, learned ASG appearing for RGPPL finds himself in total disagreement with above contention. The stand taken by RGPPL is that completion of 400 mtrs. breakwater at Mus in Car Nicobar is one of the BQC required to be fulfilled as per Clause 8.1.1.1. Apart from that RDS is also required to satisfy eligibility criteria in terms of pre-amended Clause 8.1.1.1 to qualify for the bid. Since we are not required to examine decision making process pertaining to above tender which ultimately was scraped by RGPPL on

04.10.2010 but to give a finding of fact as directed by the Apex Court, let us note the circumstances leading to the direction by the Supreme Court in the above appeals.

17. In view of the unqualified concession given by Mr. Nariman the breakwater project at Mus in Car Nicobar has to be treated as "single project" for the purpose of determining the eligibility of the RDS, in Civil Appeals the Supreme Court observed in paragraphs 46 to 49 as under:-

46. We looked in vain for a finding on the above questions in the impugned judgment leave alone one that satisfactorily dealt with the material placed by the parties on record in support of their respective cases. What we found was concession attributed to which the High Court referred in para-30.2 of its order, and which by far is the only reason given by the High Court for holding that RDS had executed the Breakwater Project at Mus in Car Nicobar. The High Court observed:

30.02

We may note at this stage that we had had pointedly put to the ASG Ms. Indra Jai Singh during the course of hearing, as to whether there was any doubt or dispute that RDS had not executed the qualifying work at Mus Car Nicobar Island equivalent to the contracted length of 500 meters. Ms. Indra Jai Singh, on instructions, categorically informed us that this aspect of the matter was not in issue. She, however, submitted that what was in issue, was the fact, that since it had not emerged that RDS had completed the project in two (2) phases; according to EIL, it was not eligible. With EIL having taken this stand, which was not contradicted by GAIL at the hearing; it quite surprised us when Mr. Chandiook appearing on behalf of RGPPL took the stand that RDS had not even constructed the required minimum 400 meters length of qualifying work.

47. Ms. Indra Jai Singh appearing for the Central Government argued that the High Court had misconstrued her statement, in as much as no concession as attributed to her was made or could be made when the relevant record did not bear any evidence of RDS having been associated with the project in question. Mr. Nariman contended that the concession even if made did not bind the appellant RGPPL, who as a separate legal entity was entitled to argue, as it indeed argued, before the High Court that RDS had not been associated with or executed the entire project, at Mus Car Nicobar, hence was not eligible to complete.

48. There is considerable merit in the submission made by the learned counsel for the appellants and Ms. Jai Singh. A concession even if made by one of the parties could not prevent the other parties from arguing that it did not bind them or that the same was contrary to the facts. The High Court ought to have examined the issue on merits, rather than taking a short cut. The High Court has incidentally taken support from the certificate dated 5th April, 2008 and clarification issued on 5th June, 2010 to hold that the RDS had indeed executed

the qualifying project at Car Nicobar. We had in the course of the hearing asked Mr. Gulati, learned counsel for the Central Government, to disclose to us the basis on which the certificate and the clarification had been issued by the officers concerned. We got no satisfactory answer to the query. We even asked the parties to produce the relevant record including the government files, so that we could ourselves answer the question regarding eligibility of RDS in the absence of any conclusive evidence, and in the absence of a specific finding from the High Court, on the question, we remained handicapped. A remand to the High Court, therefore, became inevitable which part we must say in fairness to learned counsel for both sides, was conceded even by them.

49. In the result we allow these appeals, set aside the judgment and order passed by the High Court and remand the matter back to the High Court with the following directions:

(1) The High Court shall examine and decide afresh the limited issue whether RDS was eligible to compete for the works in question in terms of the first tender notice based on the works which it claims to have executed at Mus in Car Nicobar.

(2) If the High Court comes to the conclusion that RDS is not eligible in terms of Clause 8.1.1.1 of the first tender notice as it had not executed a breakwater of the requisite length, Writ Petition No. 534 of 2011 filed by the respondents-RDS shall stand dismissed in toto. Resultantly, the appellant-RGPPL shall be free to carry forward and finalize the process of allotment of works started by it in terms of the second tender notice.

(3) In case, however, the High Court comes to the conclusion that RDS was eligible to compete for the works in question on the basis of the first tender notice, subject to that finding attaining finality in any further appeal filed by the aggrieved party, the appellant-RGPPL shall be free to issue a fresh tender notice without altering the conditions of eligibility as stipulated in Clause 8.1.1.1 and finales the said process on such other terms and conditions as it may deem fit and proper to incorporate in the tender notice.

(4) Keeping in view that the tender process relates to a project of national importance, the High Court is requested to dispose of the matter at an early date and as far as possible within a period of four months from the date a copy of this order is received by it.

18. For deciding the limited issue referred to in paragraph No. 49.1 of the Supreme Court decision, we do not have any fresh material (other than the one which was before the Supreme Court) except the Affidavit dated 15.01.2013 of Mr. N. Karthikeyan, who was working as a Manager in EHL in 1995 and General Manager at the time of swearing this Affidavit. Counsel for the petitioner preferred to rely on the documents already available on record submitting that due to Tsunami in Andaman Nicobar on 26.12.2004, the entire record had been destroyed.

19. Noticing that registered office of petitioner RDS is at Delhi, major decisions regarding the project must have been taken at Delhi, accounts books must have been maintained at the registered office at Delhi, learned senior counsel was requested to find out if petitioner could place some material on record in the form of memorandum and Articles of Association for ascertaining the object for which RDS was formed, accounts books, Board Resolution, minutes, balance sheets, income tax records etc.

20. On 08.04.2013, while concluding the arguments, the petitioner placed on record copies of following documents in a separate index.

- (i) Copy of Memorandum & Articles of Association of petitioner.
- (ii) Copy of POA in favour of Sh. Amit Goyal, Director who signed MOU on behalf of petitioner.
- (iii) Copy of POA in favour of Sh. Madan Lal Goyal, MD of petitioner company.
- (iv) Copy of acknowledgement of ITR for AY 1996-97 with computation of Income.
- (v) Copy of Audited Financial Statement for the year ending 31st March 1997 as well.
- (vi) Copy of Income Tax Assessment Order for the AY 1998-99 and Intimation u/s. 143(1) for the AY 1997-98 with computation of Income.
- (vii) Copy of Audited Financial Statement for the year ending 31st March 2000 showing figures for the year ending 31st March 1999 as well.
- (viii) Copy of acknowledgement of ITR for AY 2000-01 and AY 1999-2000 with computation of Income of both years.
- (ix) Copy of Audited Financial Statement for the year ending 31st March 2002 showing figures for the year ending 31st March 2001 as well.
- (x) Copy of Income Tax Assessment Order for AY 2002-03 & 2001-02.
- (xi) Copy of Audited Financial Statement for the year ending 31st March 2003 as well.
- (xii) Copy of acknowledgement of ITR for AY 2004-05 and AY 2003-04 with computation of Income of both years.
- (xiii) Details of Rs. 540 Cr of credit facilities enjoyed by petitioner from consortium of 7 bankers
- (xiv) Copy of acknowledgement of ITR for AY 2012-13, 2011-12, 2010-11, 2009-10, 2008-09 with details of Taxable Income and Tax paid for each year.

Since copies of the documents from S. No. 1 to 14 do not contain any reference to the project at Mus in Car Nicobar, the desired purpose could not be achieved.

21. Sh. J. Dhankar, learned senior counsel for the petitioner has taken us through the relevant record to establish that the project for construction of Breakwater at Mus Car Nicobar had two sites, one at Hut Bay, Little Andaman, where quarrying, loading transportation of the boulders for dumping them at the site at Mus in Car Nicobar took place and another at the actual site i.e. Mus in Car Nicobar, where Breakwater was constructed by none else but RDS, the writ petitioner. He has taken us through the various documents to show that M/s. P. Suryarao, M/s. Reacon International or Aquamarine were engaged for the work at Hut Bay Little Andaman, but none of them had any role to play in respect of the actual construction of Breakwater at Mus in Car Nicobar. Thus the eligibility criteria that RDS has constructed Breakwater of the length of 490 mtrs at Mus in Car Nicobar stands established from these documents to support the claim of RDS having the experience of construction of Breakwater of minimum length of 400 mtrs., the requirement of Clause 8.1.1.1 as per invitation for bid (first tender) stands satisfied by RDS. Learned senior counsel further submitted that as in the case of RGPPL project at Dabhol, the project at Mus in Car Nicobar was also a turnkey project successfully completed by the petitioner. This fact stands proved not only from the completion certificate but also through the certificates dated 17th April, 2002, 5th April, 2008 and 5th June, 2010, issued by Dy. Chief Engineer Incharge of the project. Not only that, certificate issued by the EHL also leads to only one conclusion that RDS was the single agency to be given credit for construction of Breakwater at Mus in Car Nicobar. This fact was re-affirmed by Mr. Karthikeyan, who was Manager of EHL at the relevant time and General Manager of EHL, when he issued a letter dated 21st July, 2012 and thereafter sworn affidavit dated 15th January, 2013, which was in continuation of his letter dated 21st July, 2012, verifying the above facts.

22. Learned senior counsel for the petitioner has taken us through the tender file in respect of Agreement No. DCE/LA/DB/A-1A/98-99 Dated 9.9.1998, whereby part work of "construction of Breakwater from Chainage 22 mtrs. to 200 mtrs. at Mus in Car Nicobar" was awarded to M/s. Reacon International. Learned senior counsel for the petitioner has referred to letter dated 4th June, 1998 as well as Clauses 26 and 27 of the Notice Inviting Tender to emphasise that the work awarded to M/s. Reacon International was only for quarrying at Hut Bay and transportation of the boulders to the site at Mus in Car Nicobar, which is clear from paras 3 and 4 of the letter dated 4th June, 1998, wherein M/s. Reacon International claimed that they shall have no responsibility in case after discharge of stone products in the alignment as per the direction of Engineer-in-charge, the same are dislocated due to under water current or wave action.

23. Clarifying why that RDS could not bid, he submitted that RDS did not own ships at that time and as per Clause 26 of Tender No. DCE/LA/DB/A-1A/98-99 the bidder must have vessels/ships for transporting of stones from Hut Bay to Car Nicobar. Highlighting that even in the notice inviting tender in Clause 7, reason to invite fresh tenders was specified mentioning M/s. EHL is executing the project and the work is completed upto 102 mtrs, to augment execution of work,

engagement of additional agency was proposed.

24. It was clarified that M/s. EHL will be doing the same job, meaning thereby that M/s. EHL was not out of site and the work assigned to M/s. Reacon International was only in respect of work at Hut Bay but the construction at site remained with M/s. EHL and the construction work being carried out by RDS, no other agency can claim the credit of completing the Breakwater. He emphasized on the subject of Tender, submitting that the subject was "Part work on Construction of Breakwater" and not "Part work of Construction", which clarifies the entire situation. Clauses 26 and 27 of the tender work awarded to Reacon International and relied upon by the petitioner are extracted as under:-

26. The tender shall have vessels/ships for transporting of stones from Hut Bay to Car Nicobar. He shall indicate in the tender for the type of vessels with capacities. He has and the details of other his proposing to engage from out side. so as to asses through capability/capacity of the tender.

27. M/s. EHL Co-operative Society Ltd., Car Nicobar is executing the project. The work is completed upto 102 MTRs. Due to inadequate capacity, it is proposed to augment execution of work by engaging additional agency. M/S. EHL will be doing the same job. There shall be harmony in executing the work. The Engineer in Charge will coordinate and the machinery available will be distributed between the two agencies on the basis of the requirements.

25. Learned senior counsel for the petitioner submitted that the MOU between EHL and RDS is dated 24.07.1996 and it is not that this MOU was withheld by the petitioner at any stage. Rather the writ petitioner at the time of bidding for the RGPPL project at Dabhol filed a certificate issued by M/s. EHL along with the tender, which referred to the MOU between M/s. EHL and RDS. Learned senior counsel Shri Jagdeep Dhankar referred to the Chart indicating the status of agencies involved in the construction of Breakwater, (Extracted from RGPPL affidavit dated 09.01.2013 page 181 of convenience file Volumes No. 1), filed by the petitioner, wherein status of the agencies involved was reflected. Learned senior counsel for the petitioner submitted that once petitioner is able to show the documents that M/s. P. Suryarao and M/s. Reacon International were engaged in the work at Hut Bay, Little Andaman, M/s. EHL had entered into MOU with RDS and the work at site at Mus in Car Nicobar being done by RDS, which stood certified not only by M/s. EHL but also by the Project-in-Charge, hardly anything is left to disprove the claim of the petitioner that Breakwater was constructed by RDS. He also referred to the affidavit of RGPPL after the case was remanded by the Supreme Court, wherein the work done by RDS has been reflected. Shri Jagdeep Dhankar, learned senior counsel also referred to the Report of the Attorney General, wherein the opinion in respect of this contract was given in favour of RDS.

26. Learned senior counsel for the petitioner submits that the role of M/s. Reacon International is akin to a material supplier and a material supplier cannot claim

that just by supplying the boulders he has to be given the credit for construction of the Breakwater, which is highly technical and skilled job.

27. Mr. A.S. Chandhiok, learned Additional Solicitor General, appearing on behalf of RGPPL submitted that as per the directions of the Supreme Court after the concession was given to RDS that the entire project shall be treated as single contract, which was completed in the year 2003, BQC as per Clause 8.1.1.1 has to be satisfied in any circumstance so as to qualify for the project. Learned ASG further submitted that initial contract with M/s. EHL was for construction of Breakwater from 22 mtrs. to 200 mtrs. It was a turn key project. M/s. EHL was not in a position to construct the same at the required pace, resulting into taking steps to award the contract to some other agency after inviting tenders. At that stage, the construction of Breakwater was upto 102 mtrs. When the remaining work has been awarded to M/s. Reacon International and it has completed the job, RDS being not associated with M/s. Reacon cannot claim the credit for construction of Breakwater from the length 102 mtrs. to 200 mtrs i.e. 98 mtrs. Learned ASG has taken us through the documents obtained by RGPPL under RTI Act as well as the CAG Report to indicate the extent of work attributed to RDS as well as to emphasize that construction of breakwater at Mus in Car Nicobar, RDS cannot claim to have completed the contract "single handedly".

28. Since we have to perform the task of determining the eligibility of RDS to compete for the bid for construction of project at Dabhol only on the basis of existing material, let us first deal with the claim and contentions of the petitioner. It is only if RDS is able to clear this hurdle so as to lead to the conclusion that RDS has satisfied the eligibility conditions of constructing 400 mtrs. breakwater project at Mus in Car Nicobar that we need to deal with various contentions raised on behalf of RGPPL claiming that RDS has to fulfill all the conditions incorporated in clause 8.1.1.1 of the first tender. As the BQC has to be ascertained in terms of clause 8.1.1.1 (first tender), this clause is extracted hereunder:-

8.0 BIDDER'S QUALIFICATION CRITERIA (BQC)

....

8.1 EXPERIENCE CRITERIA

8.1.1 IN CASE OF SINGLE BIDDER

8.1.1.1 The bidder shall have experience of having successfully completed, as a single bidder, or as a leader of a Consortium/Joint Venture, at least one project of a breakwater in an offshore location (as defined at Clause No. 8.1.2.5 below) of minimum length of 400m during the last 20 (twenty) years to be reckoned from the last date of submission of bids. The scope of work of the proposed qualifying project work should comprise of the design, engineering, project management and construction of the breakwater.

29. Before commencing this exercise we note that in view of the scope of the

work (referred to by us in para 2 above), RGPPL was looking for an agency, who had the requisite experience, capability, credibility to deserve this turn key project. It is in this background that we proceed to examine the correctness of the claim by RDS at the time of bidding in the light of contemporaneous record available before us.

30. Apart from referring to the documents obtained by RGPPL, the writ petitioner-RDS is substantiating its claim i.e. construction of 490/500 mtrs. breakwater project at Mus in Car Nicobar relying on the documents furnished along with Tender No. DCE/LA/DB/T-55/94-95 and the certificates/affidavits issued by the Engineer/EHL during this litigation.

I. MOU between M/s. E.H.L. and M/s. RDS Projects Ltd. dated 14.7.96.

II. Certificate dated 17.04.2002 of Dy. Chief Engineer-IV

III. M/s. EHL completion certificate dated 30.06.2003 furnished with tender.

IV. Certificate dated 05.04.2008 of Dy. Chief Engineer-IV

V. Certificate/letter dated 05.06.2010 of Dy. Chief Engineer.

VI. Letter from Mr. Karthikeyan, GM of EHL dated 21.7.2012

VII. Affidavit of Mr. Karthikeyan dated 15.1.2013.

31. The correspondence entered into in respect of Tender by various stakeholders in the Ratnagiri Project need not be dealt with by this Court for the obvious reason that we have been assigned task of giving a finding of fact whether 400 mtrs. or above breakwater project at Mus in Car Nicobar has been completed by RDS. This claim is tried to be substantiated on the basis of above documents. Let us examine these documents one by one.

32. The records stated to be destroyed in Tsunami, we are constrained to extract the contents of the certificate to do complete justice to the petitioner that all the contentions are being noted for consideration by us to deal with his claim that entire project at Mus in Car Nicobar was dealt with and completed by RDS single handedly.

33. The first document is MOU dated 14.07.1996 entered into between ELLON Hinengo Ltd. (EHL) and RDS which is to the following effect:-

MEMORANDUM OF UNDERSTANDING

This MOU is entered into on 14th day of July 1996 between the following parties, namely:-

M/s. Ellon Hinengo Limited a Central Tribal Co-operative Society having its registered office at Tower House, 1st Floor, Aberdeen Bazar, Port Blair - 744 101.

AND

M/s. RDS Project Limited, a company incorporated under the Indian Companies Act, 1956 (1 of 1956) and having its registered office at 427, Somdutt Chambers-II, 9, Bhikaji Cama Place, New Delhi-110 066, India and branch office at 1, Gandhi Bhawan, Moulana Azad Road, Port Blair.

M/s. Ellon Hinengo Ltd., have been awarded a contract No. EEM/LA/DB/A-10/95-96 dt. 05.06.1996 for Rs. 14.10 crores for construction of "MUS" Breakwater at Car Nicobar by deputy Chief Engineer-IV Andaman Harbour Works Little Andaman-744207.

NOW:

M/s. Ellon Hinengo Ltd., is desirous for executing the same project with RDS Project Ltd.

M/s. Ellon Hinengo have knowledge that the said contract is for a part of the job of construction of "MUS" Breakwater at Carnicobar. There will be another big work for the remaining length of Break-water, for which tender will be issued in the near future and M/s. Ellen Hinengo Limited will complete to get the same if M/s. RDS Project Ltd. executes this work.

M/s. Ellon Hinengo have expressed the desire that the said project be executed by M/s. RDS Project Ltd., provided their ships are chartered by M/s. RD Project Ltd.

SCOPE OF WORK

M/s. RDS Project Limited will execute entire scope of work as per Contract provision to the entire satisfaction of the "Employer".

PAYMENTS

....

INDEMNITY

....

SEVERABILITY

....

DISPUTE RESOLUTION

....

JURISDICTION

....

ASSIGNMENT

No party shall assign its rights or obligations arising out of or in connection with this Agreement to any company, partnership or person without prior written

consent of the other party.

34. The completion certificate dated 30.06.2003 issued by EHL to M/s. RDS Project is also relevant for our purpose, hence needs to be extracted as under:-

30th June 2003

To

M/s. RDS Project Ltd.

1. Gandhi Bhawan

Maulana Azad Road

Port Blair

Completion Certificate of Construction of Breakwater at Mus in Car Nicobar AGT No. 33/2000-01 dt. 03.11.2000.

I hereby certify that the above mentioned work has been satisfactorily completed by M/s. RDS Project Ltd., on 27th June 2003 and taken over by us subject to the defects listed in the statement attached.

Please ensure the defects listed are rectified by not later than 30 days from the day of this letter.

Thanking you,

For ELLON HINENGO LIMITED

Sd/-

(N. Karthikeyan)

Senior Executive Manager

35. We note that the above certificate does not contain the extent of the work completed except reference to AGT No. 33/2000-01 dt. 03.11.2000, though pertains to the pre Tsunami period but available with the petitioner.

36. A copy of undated certificate issued by EHL was furnished by RDS while submitting tender for RGPPL project at Dabhol. The certificate was considered by GAIL and EIL while examining techno commercial capability of the tender submitted by the RDS and is extracted as under:

Ellon Hinengo Limited

CENTRAL TRIBAL CO-OPERATIVE SOCIETY

Tower House 1st Floor

Aberdeen Bazar, Port Blair-744101

Phone: 32419 & 34083

Fax: 03192-34083/30896

e-mail:ehlkarthik@vsnl.com

TO WHOM SOEVER IT MAY CONCERN

This is to certify that M/s. RDS Project Ltd., had entered into a Memorandum of understanding for completion of break water structure at Mus Car Nicobar and after the award of the contract it was solely executed by M/s. RDS Project Ltd., and successfully completed within the stipulated time and handed over.

The scope of work consisted of making a rubble mound type structure with 8 to 12 Tonnes Tetrapod armour on the lee side. The length of Breakwater is 500 Mtrs beyond the low water line.

Work consisted of Quarrying stones from nearby Island (Hut Bay, Little Andamans) transporting the stones on ship approx. 100 Miles on sea to the Car Nicobar Island and placing the stones in the Sea by bottom opening barges, other barges and cranes casting Tetrapods at Car Nicobar, place the tetrapods in position on the breakwater alignment, lay rail tracks for hammer head cranes on the crest of the breakwater.

For ELLON HINENGO LIMITED

sd/-

(N. KARTHIKEYAN)

SENIOR EXECUTIVE MANAGER

Date:

Place: Port Blair

37. Pursuant to the letter dated 11.07.2012 by RDS, another certificate forming foundation of the claim of the petitioner that RDS constructed more than 400 mtrs. breakwater project at Mus in Car Nicobar is also issued by EHL on 21.07.2012 which is after more than 71/2 years.

38. Letter dated 21.07.2012 by Mr. N. Karthikeyan to EHL addressed to RDS Project Ltd. contains an averment that:-

M/s. Reacon International has in no way participated in the said formation/ construction of breakwater for the first phase of the project, which was solely executed and completed by M/s. RDS Project Limited on our behalf in terms of above mentioned Memorandum of Understanding and to our utmost satisfaction. We may mention that as per the understanding of the MOU if you i.e. RDS would have completed the 1st phase to our satisfaction and to the satisfaction of the Ministry, then the 2nd phase was also likely to be awarded to us.

39. In this affidavit which was furnished in continuation of letter dated 21.07.2012, Mr. Karthikeyan sworn as under:-

AFFIDAVIT

I.N. Karthikeyan, s/o. Late K.P. Nagasamy, aged 53 years, r/o. Machi Line, Port Blair do hereby solemnly affirm and declare as under:

That I am presently working as a General Manager of Ellon Hinengo Ltd. (EHL). In the year 1995 I was working as the Manager in the said company.

In continuation to my earlier letter dated 21.7.2012 I have to depose that after entering into the MOU with M/s. RDS Projects Ltd. On 14.7.96 it was M/s. RDS Projects Ltd. who had done the construction of the breakwater including project management. No other agency had done the said work on our behalf. Initially M/s. EHL had executed a Power of Attorney in my favour, being the Manager of EHL at the relevant time and also M/s. Surya Rao for representing EHL before the government in connection with the execution of the said contract but the Power of Attorney executed in favour of M/s. Surya Rao was not entertained by the Government and thus the same was never acted upon. Also there was some defect in the Power of Attorney and the Government had asked M/s. E.H.L. to cure the defects. The said defects in the Power of Attorney in favour of M/s. Surya Rao, were never cured by the EHL. However in the meanwhile M/s. E.H.L. had entered into a MOU with M/s. RDS Projects Ltd. and therefore there was no question of M/s. E.H.L. executing any Power of Attorney in favour of M/s. Surya Rao.

I say that before entering into the MOU with M/s. RDS Projects Ltd., the requisite prior consent as per clause 48 of the General Conditions of work was taken from the government and RDS was allowed to execute work on our behalf to the knowledge of the Government. It is stated that if EHL Ltd. had not taken the requisite consent then the contract could have been rescinded which was not done.

As regards the contention that all the progress review meetings from start of the work in 1995 till 1997-98 were attended by EHL and P. Surya Rao only, it is reiterated that M/s. Surya Rao had nothing to do with EHL. They were however attending the meetings as the vendor of RDS for quarrying at Hut Bay only which is at the distance of about 80 Nautical Miles from Car Nicobar, where the work in question was executed. It may be noted that except its name being figured in the attendance, no role is assigned to it in the body of the minutes.

I further reiterate that in order to augment the transportation of stones, a contract for some portion of the remaining quantity upto 200 mtr. was simultaneously given to additional agency M/s. Reacon International. It is stated that M/s. Reacon had not done any work towards construction of the breakwater. It was exclusively done by EHL through RDS.

I further say that EHL had taken support of RDS for all the items under the contract. However the referred Power of Attorney dated 10.11.2000 at page 130 was pertaining to two items i.e. quarrying and transportation, which related to

the work done at Little Andaman (Hut Bay). The remaining items pertained to the work done at Car Nicobar for which a separate Power of Attorney was executed. Since RDS had engaged Surya Rao as its vendor for quarrying, we had vide letter dated 4.12.2000 referred its name also to the government. I say that EHL had nothing to do with Aquamarine who was also a vendor of RDS Projects Limited which is evident from the fact that a POA in favour of Krishnendu Kundu (K. Kundu) of Aquamarine was executed by RDS Projects Limited.

I have to further say that the delay in execution of the 1st phase was not attributable to the M/s. E.H.L. The delay was due to hindrances and problems faced by the contractor during the execution of work.

I have seen the certificate dated 05.04.2008 and communication dated 05.06.2010 issued by Mr. T.N. Krishnamoorthi, Deputy Chief Engineer-IV, Andaman Harbour Works, Little Andaman. I say that the said certificate as well as communication are true and correct. The said Mr. T.N. Krishnamoorthi was associated with the work in question throughout.

DEPONENT

VERIFICATION:

I, the above named deponent do hereby verify this the 15th day of January, 2013 at Port Blair that the contents of the above affidavit are true and correct to my personal knowledge.

DEPONENT

40. We are confronted with a situation where on the plea that entire record had been washed away in Tsunami, the documents in the form of certificates by the Dy. Chief Engineer-IV, Project In-charge of EHL and affidavits have been placed on record by the RDS to claim that breakwater at Mus in Car Nicobar was constructed by RDS only thereby RDS is eligible to bid for the tender for Ratnagiri Project. We have some contemporaneous record to examine the claim of writ petitioner of completing the project single handedly. Since RDS was not the bidder and the contract of Mus in Car Nicobar was awarded to EHL, we have to track this path carefully noting that EHL and RDS have to sink and swim together. Whatever work was assigned, it was to EHL and RDS claims to have performed the work on behalf of EHL on the terms and conditions as incorporated in the award of work to EHL. For this purpose, fortunately sufficient documentary evidence of that period is available with us to examine the claim of the writ petitioner RDS that the only company entitled to be given credit for completion of breakwater project of 490/500 mtrs. at Mus in Car Nicobar is RDS and none else except RDS. It is in these circumstances, we are examining the record of the work awarded to EHL by Ministry of Surface Transport, Govt. of India. We straight away proceed with the letter dated 27.04.1995 by Ministry of Surface Transport, Govt. of India informing EHL about acceptance of its tender. EHL was further informed that it was required to complete the project within 34

months from the date of issue of this letter, calling upon EHL to attend the office within seven days of receipt of this letter to complete the formalities and thereafter start the work at once.

41. This contract also contained Clause 48 which provided that the contractor (EHL) shall not sublet the whole or part of the work, except where otherwise provided by the contract. The contractor shall not sublet any part of the work without prior written consent of the Executive Engineer (Marine) or his representative (which shall not be unreasonably withheld) and such consent if given shall not relieve the contractor from any liability or obligation under the contract and he shall be responsible for the acts, defaults and neglects of any sub-contractor, his agents, servants or workmen as fully as if they were the acts, defaults or neglects of the contractor, his agents, servants, or workmen.

42. At this stage, we simply note that the MOU dated 24.07.1996 does not talk of any permission obtained by EHL from Ministry of Shipping and Transport as required under Clause 48 (Part-C general conditions for work) but for the time being we are not attaching any significance to this aspect for the reason that we are just concentrating on whether RDS has single handedly constructed 490/500 mtrs. breakwater project at Mus in Car Nicobar.

43. We notice the letter dated 04.03.1996 addressed by Ministry of Shipping and Transport, Officer of Deputy Engineer-IV (AHW), Little Andaman to the Chief Engineer and Administrator, Andaman and Lakshadweep Harbour Works. While referring to the work awarded to M/s. EHL which included quarrying at Little Andaman, transportation from Little Andaman to Mus Break water site by ship and dumping, casting and placing of tetrapods etc. in the Breakwater alignment etc. On behalf of EHL, meeting was attended by (i) Mr. Ebrahim Hussain, Chairman EHL; (ii) Mr. Yusuf Jadwet, Managing Director; (iii) Mr. P. Surya Rao, Contractor; (iv) Mr. N. Karthikeyan, Manager. We have minutes of review meeting held on 18.06.1997 in the Chamber of Chief Engineer and Administrator (ALHW). Minutes of the review meeting running into three pages records the problem being faced by M/s. EHL and the corrective measures assured to be taken by EHL to complete the project and agreeing to prepare a detailed proposal of executing the work in the coming season round the clock. Here we note that the this review meeting was post MOU between EHL and RDS but RDS had not attended the meeting. At appropriate stage, we will deal with the question whether M/s. P. Surya Rao, Contractor had an independent existence or acting on behalf of EHL or an employee of RDS. The subsequent review meetings held on 06.09.1997, 17.10.1997 and 16.12.1997 also did not indicate the presence of RDS.

44. It appears that the review meetings could not achieve the desired result thereby requiring intervention by Ministry of Shipping and Transport as in reflected from the communication dated 09.07.1998.

To,

The Chief Engineer and Administrator,

Andaman Lakshadweep Harbour Works,
Post Box No. 161,
Port Blair - 744101

Sub: Construction of Breakwater and Wharf from Chainage 22 mtrs. To 200 mtrs.
At Mus in Car Nicobar-contract awarded to M/s. Ellon Hinengo Ltd., Car Nicobar-
extension of time for this contract.

Sir,

I am directed to refer to your letter No. ALHW/Tech/6(16)/97 dated 28th Nov 1997 and ALHW/Tech/6(7)/94 dated 6th June, 1998 on the subject cited above and to convey the approval of the Central Government to the following:-

(i) Extension of time upto May, 2000 for Construction of Breakwater and wharf from 22 mtrs. Chainage to 200 mtrs. Chainage (first phase of work) at Andaman Nicobar Island.

(ii) For engaging additional agency for executing part of the work subject to the "Risk and Cost" of original contractor i.e. M/s. Ellon Hinengo Ltd. As per the terms and conditions of the contract agreement.

2. As soon as indications are available that the sanctioned cost of the project will be exceeded the ALHW have to come up with a Revised Cost Estimate to this Ministry immediately for Govt's Sanction.

3. This issue with the concurrence of Finance Wing of this Ministry vide No. 258RF-D98 dated 29th June, 1998.

Yours faithfully

(R.K. Srivastava)

Director

45. Here it is necessary to refer to the tender notice No. DCE/LA/DB/T-19/97-98 pursuant to above approval wherein tenders were invited on behalf of President of India. The tender notice it is to the following effect:-

GOVERNMENT OF INDIA

MINISTRY OF SURFACE TRANSPORT

OFFICE OF THE DEPUTY CHIEF ENGINEER-IV

ANDAMAN HARBOUR WORKS

LITTLE ANDAMAN-744207

TENDER NOTICE NO: DEC/LA/DBBT-19/97-98 26-03-1998

1. Tender in sealed cover superscribing the name of work are hereby invited on

behalf of the President of India and will be received upto 1500 Hrs. IST on 15.03.1998 by the Executive Engineer (Marine), Andaman Harbour Works, Little Andaman for the under mentioned work.

a) Name of work Part work on Construction of Breakwater from Challenge 22M to 200M at Mus Car Nicobar.

b) Estimated cost put to tender: Rs. 4,92,71360/-

c) Earnest money deposit: Rs. 1,00,000/-

d) Price of Tender document: Rs. 1,500/-

e) Period of completion: 22 (Twenty two) Months.

2. Tender will be opened at 1530 Hrs. I.S.T. on 15.05.98 by the Executive Engineer (Marine) A.H. W. Little Andaman or his authorised nominee in the presence of the attending Tenders or their authorised representatives.

3. Tender documents containing conditions of contract, specification of work and schedule of quantities and drawing can be had from office of the Executive Engineer (M) A.H. W. Little Andaman on any working days during the office working hours from 02-05-98 to 08-5-98 (Both days inclusive) on non-refundable cash payment of Rs. 1,500/- (Rupees One thousand and five hundred only). The tender documents will be available in the Office of the Officer-In-Charge, (ALHW), Calcutta, Chennai, Senior Hydrographic Surveyor, Mumbai and Officer-In-Charge (Little Andaman cell) at Port Blair.

4. Tenderers shall remit E.M.D. amount specified above either by depositing call deposit receipt or demand draft issued by any schedule Bank guaranteed by Reserve Bank of India. The cell deposit receipt/demand draft should be drawn in favour of the Executive Engineer, (Marine), Andaman Harbour Works, Little Andaman.

5. Tenders received without E.M.D. will not be considered.

6. Tenderers must produce latest Income Tax Clearance Certificate before the Tender document could sold to them. Also the tenderers should quote his permanent Income Tax Account number given to him by the Income Tax authority while applying for tender from.

7. The last date of receipt of application for tender document will be 30.04.1998.

8. The contractor who are already enlisted in the department Classes "A" only eligible to obtain Tender document for this work.

9. The competent authority reserves the right to vivo any formalities thereof or reject any or call the Tenders received without assigning any reason, whatsoever and does not bund himself to accept the lowest tender.

sd/-

EXECUTIVE ENGINEER (MARINE)

46. Part-D contains the details of work and special conditions of this work awarded to Reacon International which are as under:

DETAILS OF WORKS AND SPECIAL CONDITIONS

General

1. The work covered is the part work on construction of Breakwater from chainage 22M to 200M at Mus in Car Nicobar.

2. M/S. EHL Co-Operative Society Ltd., Car Nicobar is executing the project. The work is completed upto 102M. Due to inadequate capacity, it is proposed to augment execution of work by engaging additional agency. M/S. EHL will be doing the same job.

3. The total length of Breakwater is 490M including the round head. The structure is rubble mound breakwater.

4.

5.

6.

7.

8. The brief details of works covered by this contract are (a) Quarrying operation at Hut Bay and sorting of stones at Hut Bay, (b) Transportation of Quarry products from Hut Bay quarry to Hut Bay Wharf/Jetty, (c) Loading into Ship at Hut Bay Wharf/Jetty, (d) Transportation by Ship upto Mus in Car Nicobar anchorage from Hut Bay (e) Unloading from ship in anchorage into barges and placing as directed in the Breakwater alignment/stacking at site as per the direction and finally placing by end on method.

47. We record that EHL did not bid for above work which was awarded to Reacon International thus could not have been completed by RDS. A bare reading of above documents will lead any prudent person to the conclusion that when EHL was not able to deliver the result, for execution of the part of the work subject to risk and cost of original contractor EHL, decision was taken to invite tenders for part work of construction of breakwater from chainage 22M to 200M at Mus in Car Nicobar.

48. Even CAG Report highlighted this aspect in para 19.4. Now, we have to examine who were the bidders for this part work. If this is EHL and the work is awarded to EHL and completed by RDS on its behalf, RDS may have some basis to stake its claim that RDS is the only agency that completed the construction of breakwater project at Mus in Car Nicobar. But if record is contrary to that, then RDS who was to execute the work on behalf of EHL has to be shown the exit door. The relevant part of CAG Report is extracted hereunder:-

19.4 Loss due to non-compliance with agreement

The Executive Engineer (Marine) neither proposed levy of compensation for delayed execution nor recovered risk and cost amount from the defaulting contractor leading to loss of Rs. 2.61 crore.

Ministry of Surface Transport accorded administrative approval and expenditure sanction in January 1994 of Rs. 47.63 crore for the construction of a break water and wharf at Mus, Car Nicobar in Andaman and Nicobar Islands, to be completed by July 2001.

The Chief Engineer, Andaman Lakshadweep Harbour Works accorded technical sanction in October 1994 to a portion of the total work, namely, construction of break water at chainage 22 M to chainage 200 M for Rs. 15.43 crore. Executive Engineer (Marine) awarded the work in April 1995 to Ellon Hinengo Limited at a cost of Rs. 14.10 crore, to be completed by February 1998. Till January 1998 the contractor had completed only 15 to 47 percent of various components of the work. In April 1998, the Executive Engineer took out only a part of the unexecuted work from Ellon Hinengo Limited for awarding it to other contractor.

Test check conducted by Audit revealed that:

(i) In April 1998, the Chief Engineer permitted the contractor to continue with part of the balance work to be completed by May 2000. However, as per CPWD manual, in case of breach of contract the department cannot cancel only a part of the unexecuted work and permit the original contractor to execute the other part under the same contract.

In July 1998, the Executive Engineer awarded the remaining part of the work taken out from Ellon Hinengo Limited to Reacon International at Rs. 6.28 crore with scheduled completion in May 2000. Reacon International completed the work in February 2000, while Ellon Hinengo Limited completed the remaining part of the work only in May 2000. The Executive Engineer had not settled the final bill till September 2001. Moreover, as per terms of contract, the Executive Engineer did not take any action to recover the amount of Rs. 2.61 crore from Ellon Hinengo Limited as detailed below

In October 2001, the Chief Engineer stated that there was no extra expenditure as the rates quoted by Reacon International were less than the rates quoted by the original contractor after allowing escalation. Hence by awarding the balance work to Reacon International there was a saving of Rs. 35 lakh. This is factually not correct since while computing the cost of the balance work at accepted rates of Ellon Hinengo Limited, the escalation to be paid beyond the initial stipulated date of completion i.e., February 1998 was taken into account. The Chief Engineer's contention that compensation was not levied as the work was delayed mainly because of involvement of multi modal transportation and Ellon Hinengo Limited completed the work within extended time was also not correct, as the contractor could not complete two main items of the work within the extended

period and the department at the time of award of the work to Ellon Hinengo Limited was aware of the adoption of various modes of transport.

Thus, due to delay in construction of a portion of the breakwater coupled with non-compliance with agreement terms, the department had sustained a loss of Rs. 2.61 crores, apart from increase in cost of the work by Rs. 3.55 crore.

The matter was referred to the Ministry in July 2001; their reply was awaited as of November 2001.

49. The communication dated 31.07.1998 addressed to Secretary to Govt. of India, Ministry of Shipping and Transport, by Chief Engineer & Administrator (ALHW) contains the details of the process and reason for award of work to Reacon International, as under:-

To,

The Secretary to Govt. of India,

Ministry of Surface Transport (Ports Wing),

1, Sansad Marg

New Delhi - 110 011.

Sub: Construction of Breakwater from Chainage 22 Mtr. Chainage 200 Mtr. at Mus in Car Nicobar - Contract awarded to additional agency - reg.

Ref: 1. This Office letter No. ALHVV/TECH/6(17)/94, dated 06.06.98.

2. DD-11013/1/98 - ALHW, dated 09.07.98.

Please refer to the letter under reference No. 2 where in approval of the Ministry of &Transport has been accorded for the following:

Extension of time upto May, 2000 for Construction of Breakwater and Wharf from 22 M. Chainage to 200 Mtr. Chainage (First phase of work) at Mus in Car Nicobar Island.

For engaging additional agency for executing part of the work subject to Risk and Cost". of original Contractor i.e. M/S. Elton Hinengo Ltd. as the terms & Conditions of the contract agreement.

For engaging additional agency for executing part of the work tenders were called by wide publicity from the eligible Contractor vide tender No. DCEJLA/D Bit-19/97-98, dated 09.98, The following agencies have applied for tender documents.

MIS ECI Engineering Construction Company

Limited, Chennai. MIS Shri. P. Surya Rao,

Contractor, Port Blair,

M/S. Reacon International, Port Blair.

M/S. R.B. Rajesh, Campbell Bay.

M/s. EHL, Car Nicobar.

M/S. A. Manickam & Son's, Port Blair.

M/S. M/s. Maruthy

Construction Co. Chennai. M/S.

M/s. Hauers Lines Pvt. Limited, Port Blair.

50. Vide communication dated 26.07.2000 by Executive Engineer, Marine on behalf of President of India to M/s. Reacon International on the subject work, it was informed that the tender of subject work mentioned has been accepted. M/s. Reacon International was also directed to complete the formal agreement within seven days of receipt of letter and commence the work at once.

51. Letter dated 04.02.2000/11.02.2000 is a communication by Chief Engineer & Administrator (ALHW) to Chief Port Manager, Port Management Board, Port Blair which also record that the department had engaged two agencies i.e. EHL and M/s. Reacon International for construction of breakwater at Mus in Car Nicobar. Thereafter, the general practice and at the same time the necessity that ships engaged for the project were to be treated with priority, certain suggestions were made to allow birth and cast off any time whether day or night. This letter further establishes that after completion of 102M of breakwater at Mus in Car Nicobar by EHL, two agencies apart from EHL, Reacon International was also put on the job.

52. Tender No. DCE/LA/DBT-02/99-2000 dated 26.05.99 pertains to the work to be executed for construction of breakwater from chainage 200-330 mtrs.

53. We notice that for construction of breakwater from 220 mtrs breakwater at Mus in Car Nicobar, tender for the said work by EHL was accepted on behalf of President of India. In this very communication it was mentioned that project was required to be completed within 18 months from the issue of order.

54. There is certificate dated 17.04.2002 issued by Deputy Chief Engineer-IV which also formed basis of claim of the petitioner RDS to meet the criteria of construction of 400 mtrs. breakwater project at Mus in Car Nicobar. This certificate reads as under:

TO WHOM IT MAY CONCERN

This is to certify that the construction of MUS Breakwater at Car Nicobar in A & N Islands has been awarded to M/s. Ellen Hinengo Ltd., a tribal society at Car Nicobar vide Tender No. DCE/LA/DBT-02/99-2000 dated 26.05.99 (Agt. No. 33/200-01)/dated 03.11.2000. The completion cost of the project is 40 Crores. The Breakwater is rubble mound type of 8 to 12 T tetrapod armour on the lee

side. M/s. RDS Project limited is executing a portion of this work, on behalf of M/s. Ellen Hinengo Ltd. The work is virtually complete at progress as 92% approx. M/s. RDS Projects have completed nearly 17 Crores worth of work on this project from Dec. 2000 to Mar 2002.

This firm is well equipped with requisite T & P and quite resourceful. They have team of dedicated Engineers having sufficient exposure to marine works The performance of M/s. RDS Project Ltd. in this work is quite good.

sd/-

Deputy Chief Engineer IV

DEC/la/gl-20/DATED 17.4.2002

55. If out of the cost of project of Rs. 40 crores, the work performed by RDS for construction of chainage 200-330 mtrs. is worth Rs. 17 crores, even then the minimum requirement for construction of 400 mtrs. of breakwater remains unsatisfied. What is the extent of construction by RDS can be ascertained from the CAG report which indicated that the extent of construction by RDS was 47%. It is obvious that in construction of chainage from 22-200 mtrs., 200-330 mtrs. and even beyond i.e. upto 490 mtrs., if 47% is calculated, RDS cannot claim the credit of having constructed 400 metres or more breakwater at Mus in Car Nicobar.

56. Now, it is time to see the details of specific work experience submitted by RDS in Form-B along with its tender for RGPPL project at Dabhol:-

DETAILS OF SPECIFIC WORK EXPERIENCE MEETING THE BQC

57. The above details revealed that this work awarded in November, 2000 (Tender No. DCE/LA/DB/T-2/99-2000) was with reference to construction of breakwater from chainage 200-330 mtrs at Mus in Car Nicobar. The scheduled completion date was June 2003 as per Cl. No. 6 of Form-B which was also claimed to be actual completion date. There is no MOU or contract between EHL and RDS with reference to this award of work However, for purpose of determination of issue involved, this aspect is not being considered.

58. The letter dated 06.11.2000 on the subject captioned addressed by Managing Director, EHL to Deputy Chief Engineer-IV (AHW) with reference to letter written by EHL to the Deputy Chief Engineer-IV, Andaman Harbour Works, Little Andaman and the detailed discussions pursuant thereto he was communicated that EHL had appointed RDS its sub agent for quarrying work at Hut bay. The letter dated 06.11.2000 is reproduced as under:-

EHL/PB/2000-2001/638

DATE: 06.11.2000

The Deputy Chief Engineer (IV)

Andaman Harbour Works

LITTLE ANDAMAN

SUB: CONSTRUCTION OF BREAK WATER FROM CHAINAGE 200M TO 330M AND BEYOND AT MUS IN CARNICOBAR - REG-

REF: LETTER NO. DCE/LA/DB/T-2/99-2000/Vol. IV/3318 DT. 03.11.2000.

LETTER NO. DCE/LA/DB/T-2/99-2000/694 DT. 04.11.2000

Dear Sir,

With reference to the above cited letters for the above said work and on your detailed discussions had with you, we have appointed M/s. R.D.S. Project, Gandhi Bhavan, Port Blair as our Sub Agent for Quarrying work, transportation of quarry products from quarry to side.

We request you to kindly handover the machineries and tools to our Authorised Representatives of R.D.S. Project as mentioned in the contract for start the Quarry works immediately.

Thanking you,

Yours faithfully,

For ELLON HINENGO Ltd.

Sd/-

(Y.E. JADWET)

Managing Director,

Copy to:-

1. M/s. R.D.S. Project, Gandhi Bhavan
2. EHL, Carnicobar

59. Since in this case, there is an issue whether quarrying at Hut bay was an integral part of this contract or ancillary to the project carried out at Mus in Car Nicobar, we prefer to extract only description of items No. 1 and 2 of Schedule of quantity of work in respect of Tender No. DLE/LA/DB/A-14/98-99 awarded to Reacon International to answer the contention of the petitioner that the work awarded to Reacon International was only like that of a "building material supplier", as under:

1) Quarrying at Hut Bay in Little Andaman, Collection and stacking of Quarry products as directed including removal of overburden, drilling holes on the rock with the jack hammers, loading of explosive into the drilled holes, blasting and sorting out the quarried stones separately according to category, breaking stone to 40 mm graded metal including charges of blasters, cost of all labour charges,

minor tools, POL and operators for all the machineries issued to the departmental Magazine at Little Andaman hire charges of drilling rods, hose pipes, compressor, crusher, bull dozer and other accessories for the same etc. which will be supplied by the department at quarry on free of cost without POL and operator complete.

2) Loading and Transportation of Quarry products from Quarry at Hut bay in Little Andaman to Breakwater Site at Mus in Car Nicobar including conveying the Quarry products such as Stone Metal, Boulder of various sizes upto 3 Tonnes by truck from Quarry at Hut Bay to jetty/Wharf, loading into ship, transporting to Car Nicobar, etc., unloading into barges, dumping along the alignment of Breakwater upto suitable level taking to shore for dumping by end-on-method and loading back the empty steel trays and loading the empty trays to the ship and transport the same to Hut Bay and unload at Jetty and convey to Hut Bay Quarry as directed by the Engineer-in-charge, cost of hire charges & POL and Operator of all the operations of all above machineries, all labour charges, minor tools, etc. but excluding hire charges of shovel, crane at quarry and products cranes at Mus etc. without POL and operator, complete.

60. In the light of above, it is difficult to arrive at a conclusion that even for the purpose of construction of chainage 200-330 mtrs., the job was handled by RDS single handedly. Here we simply want to highlight that the contention of the learned counsel for the petitioner that Reacon International was engaged only for the purpose of quarrying and bringing boulders to the site at Mus in Car Nicobar whereas highly technical job in respect of construction of breakwater at Mus in Car Nicobar done by RDS needs to be rejected. At the same time, we observe that quarrying at Hut bay was integral part of contract at every stage. Items 1 & 2 of Schedule of Work of Reacon shows that job of Reacon was also technical not only at Hut Bay but also at the site at Mus in Car Nicobar who performed on the direction of Engineer.

61. While recording above, we are conscious of the fact that concession had already been given in favour of the petitioner RDS that entire construction of breakwater right from the first stage i.e. 22-200 mtrs. till end has to be treated by this Court as single contract for the purpose of determining the issue regarding the eligibility of the petitioner as required under the clause 8.1.1.1 of the contract that he has the experience of construction of breakwater of the length of 400 mtrs.

62. We have scrutinized even the file produced by the concerned Ministry, GOI but to our dismay we could not find any mention of RDS at the site prior to the year 2000.

63. Submission made on behalf of the petitioner that M/s. P. Surya Rao was only an attorney of M/s. RDS needs to be rejected in view of the various documents like letters from EHL to GOI and participation by P. Surya Rao in various meetings. Not only that, he also participated in the tender process at various stages whereas though claiming to be already on the job after MoU dated

24.07.1996, RDS preferred not to file the tender at the stage and contract was awarded to Reacon International or thereafter. The submission that RDS did not own ships which was precondition as per tender document is factually incorrect as ships could be hired/chartered. This is strengthened from letter dated 04.06.1998 of Reacon International, paras 2 & 7.

64. Petitioner has placed reliance on the certificate issued by Deputy Chief Engineer-IV who was the Project In-charge as well as by the Managing Director EHL certifying the petitioner to be the company who handled the job single handedly and constructed the breakwater at Mus in Car Nicobar from chainage 22-200 mtrs extending 330 mtrs. and thereafter upto 490 mtrs. The contention of the petitioner is that these certificates were found genuine issued by competent authority who were directly associated with the project at Mus in Car Nicobar cannot be taken lightly by this Court especially when these officers are still working and till date no action has been taken against them for issuing these certificates. We need not enter into this controversy for the obvious reason that these certificates appear to have been issued on the request of the petitioner who intended to compete in the bidding process for the Ratnagiri project, on the basis of recollection of same facts and not certified/verified on the basis of record. At the time of determining the techno-commercial capability of the bidders in respect of Ratnagiri Project at Dabhol the owner's Engineers have accepted the certificate on their face value. No doubt, the certificates are genuine, but only to the extent that they are issued by the concerned authorities. Rather the documents obtained by RGPPL under RTI and the CAG report project different picture. The genuineness itself cannot be a proof of correctness of the contents of those certificate. The CAG report and the contemporaneous record referred to above persuade us not to give any weightage to such certificates which are more in the nature of certificates appreciating the work of petitioner associated in construction of breakwater. It is for the concerned authority to look into the matter as to how and on what basis such certificates were issued by issuing authority Dy. Chief Engineer-IV when the record was claimed to have been washed away in Tsunami. Definitely RGPPL was justified in seeking more and more details from the recommended bidder i.e. RDS in support of tall claims made in the bid in form-B.

65. Supreme Court had already examined this aspect affirming the authority of RGPPL to examine the eligibility of the bidder and observed as under:

...Suffice it to say for the present that RGPPL as the owner acting as a prudent and responsible public authority discharging public trust obligations was well within its rights to raise questions and seek answers on an important matter like the eligibility of RDS to participate, no matter EIL and GAIL had on the basis of the certificates produced before them recommended RDS as an eligible bidder....

66. We find that despite all the concessions being given to RDS at every stage, still it could not bring on record that it had to its credit construction of breakwater of length of 400 mtrs. at Mus in Car Nicobar single handedly.

CONCLUSION:

67. On examination of the available record pertaining to construction of breakwater at Mus in Car Nicobar vis-?-vis claim of RDS having constructed the breakwater of the length 490/500 mtrs single handedly. We summarize the position as under:-

a) Tender No. DCE/LA/DB/T-55/94-95 for the work at Mus in Car Nicobar was awarded to EHL for construction of breakwater from chainage 22-200 mtrs. The tender covers all the works starting from removal of overburden in quarry till the completing of Breakwater with cap slab. Thus it is a turnkey project. The items of work are inter related and sequential. Full consideration is required for execution of this project.

b) Schedule of work had two major components, (i) at Hut bay in Little Andaman and (ii) at Mus in Car Nicobar where breakwater was to be constructed. Items No. 1 & 2 of Schedule of work of EHL and Reacon are identical. It was also so claimed by EHL during discussion in the meeting held in the office of Dy. Chief Engineer-IV.

c) The work at Hut bay, Little Andaman, as referred to in Schedule of Work, was also very technical in nature and not akin to that of the job of a "building material supplier".

d) Prior to execution of MoU between EHL and RDS on 24.07.1996, the project had already commenced in the year 1995 as is clear from various meetings held to review the progress. However, the work was going at slow pace.

e) MoU dated 24.07.1996 between EHL and RDS does not refer to the details of the agencies already engaged by EHL and on the job, the extent of the work already completed, schedule of rate to be charged by RDS for the work at Mus in Car Nicobar or whether EHL or RDS would coordinate with the agency working at Hut bay, Little Andaman.

f) Role of M/s. P. Surya Rao was not that of a "building material supplier" or an employee/attorney of RDS. Rather, he was acting as an agent for EHL right from the beginning and had the capability to even bid for the project.

g) The contention of the petitioner is that the power of attorney executed in favour of P. Surya Rao was never acted upon as testified by Mr. N. Karthikeyan, General Manager of EHL in his affidavit dated 15.01.2013 for the reason that the defects in Power of Attorney in favour of M/s. Surya Rao were never cured by EHL and that on entering into MoU with RDS there was no question of EHL executing any Power of Attorney in favour of Surya Rao, Mr. P. Surya Rao had nothing to do with EHL as only from 1995 till 1997-98, review meetings were attended by EHL and P. Surya Rao. The relevant portion is reproduced as under:-

... As regards the contention that all the progress review meetings from start of the work in 1995 till 1997-98 were attended by EHL and P. Surya Rao only, it is

reiterated that M/s. Surya Rao had nothing to do with EHL. They were however attending the meetings as the vendor of RDS for quarrying at Hut Bay only which is at the distance of about 80 Nautical Miles from Car Nicobar, where the work in question was executed. It may be noted that except its name being figured in the attendance, no role is assigned to it in the body of the minutes....

We find contents of above affidavit are contrary to the record as in the meeting dated 11.08.1999 between the Office of Dy. Chief Engineer-IV and EHL which was attended by Shri Yusuf Jadwet, MD, EHL and Shri N. Karthikeyan, Manager, EHL, at Item No. 6 of the Minutes, it is recorded as under:-

The DCE-IV enquired about the set up of M/s. EHL at Little Andaman for operating the quarry. In reply, they informed that as done in the previous years, M/s. Surya Rao will be their main agency for operating the quarry and loading the stones in the ships.

Status of Mr. P. Surya Rao qua this project was even extended to his authorized representative Mr. A.C. Ravi as can be noted from the office communication No. DLE/LA/DB/T-2/99-2000/3432 dated 18.11.2000 which is extracted as under:-

As per instruction of Deputy Chief Engineer-IV, explosive can be issued to Shri A.C. Ravi an authorised representative of M/s. P. Surya Rao departmentally after obtaining signatures from the above individual. This system will continue till legal authority for issuing explosive comes.

To,

The Assistant Engineer (Quarry)

Andaman Harbour Works, I/A

Executive Engineer (M)

h) The objections in respect of Special Power of Attorney in favour of P. Surya Rao were only to ascertain the jurisdiction and scope of the power of P. Surya Rao and whether P. Surya Rao was an individual or a company M/s. P. Surya Rao.

i) EHL was represented by Surya Rao even post MoU with RDS as is clear from the meetings attended to by P. Surya Rao on behalf of EHL on 18.06.1997, 06.09.1997, 17.10.1997 and 16.12.1997.

j) Even prior to MoU with RDS and even at the stage of construction of breakwater from chainage 200-330, P. Surya Rao continued representing EHL and work for it.

k) Work of RDS was not limited to Mus in Car Nicobar to construct the breakwater which is undoubtedly a highly technical job. Even RDS was asked by EHL to carry on the work of quarrying, transportation etc. at Little Andaman.

l) At the stage of award of part work of construction of breakwater to Reacon International, Clause-27 of the tender document reads as under:-

27. M/s. EHL Co-operative Society Ltd., Car Nicobar is executing the project. The work is completed upto 102 MTRs. Due to inadequate capacity, it is proposed to augment execution of work by engaging additional agency. M/S. EHL will be doing the same job. There shall be harmony in executing the work. The Engineer in Charge will coordinate and the machinery available will be distributed between the two agencies on the basis of the requirements.

m) The contention of the petitioner that RDS did not own any ship hence could not bid for the work at Mus in Car Nicobar at any stage when work was awarded to Reacon International or the scope of the work was increased from chainage 200-330 mtrs. is not stipulated as mandatory requirement in the tender documents. There was no requirement that bidder must own the ships. Even the letter dated 04.06.1998 by Reacon International to Executive Engineer (Marine), Little Andaman referred to by learned counsel for the petitioner (paras 2 & 7) contain an assertion that offer should be accepted three months prior to the working season i.e. middle of October to enable Reacon International to negotiate, buy, hire vessels and vessels could be chartered as per requirement.

n) Completion certificate in Form-44 has been issued by Assistant Engineer (D/B) and Executive Engineer (Marine) reveal that the work was started on 18.02.1994 (page 85 of Additional Compilation of petitioner, File 2) and completed in March, 2003. Though, this completion certificate was available in the records, RDS filed a completion certificate issued by Mr. N. Kartikeyan, Senior Manager of EHL. This certificate (page-64) dated 30.06.2003 without giving the date of commencement of the project just contain an assertion that the construction work of breakwater at Mus in Car Nicobar has been satisfactorily completed by M/s. RDS Project Ltd. on 27th June 2003 and taken over by EHL subject to the defects listed in the statement attached therewith., this certificate issued by EHL misled the owner's engineer in understanding the time taken in completion of the project of construction of breakwater of length 490/500 mtrs.

o) The certificates issued by EHL and Dy. Chief Engineer-IV to the effect that RDS completed the construction work of breakwater at Mus in Car Nicobar successfully and single handedly, are not in consonance with the available record of the corresponding period obtained by RGPPL under RTI and CAG report accessed through net of which later on some certified copy was obtained. Further, the certificates referred to above filed along with by RDS while bidding for the Ratnagiri project, were not certified /verified on the basis of available record. As per certificate dated 17.04.2002 issued by EHL, out of total cost of the project to the tune of Rs. 40 crores, the extent of work done by RDS was worth Rs. 17 crores.

p) While furnishing information in Form-B and bidding for the Ratnagiri project at Dabhol, much more was concealed than what was revealed. Had RDS filed the completion certificate in Form-44, the owner's engineer would have been clear in understanding the time consumed in completion of breakwater of length 490/500 mtrs. at Mus in Car Nicobar. The requirement of RGPPL was to find out a bidder

who could construct 1800 mtrs. in 33 months.

q) The requirement of RGPPL was to get the breakwater constructed of 1800 mtrs in 33 months which was almost more than 3 1/2 times of the length of the project at Mus in Car Nicobar required to be constructed in about 1/3rd of the time consumed in construction of breakwater at Mus in Car Nicobar. In that circumstance, RGPPL would not have undertaken exercise for gathering information in respect of project at Mus in Car Nicobar or obtained record under RTI to verify the claim made by RDS.

r) The fact that RGPPL could get around 750 pages under RTI in respect of the project at Mus in Car Nicobar, indicate that not everything was washed away in Tsunami on 26.12.2004.

s) Had the documents and correct/complete information been furnished by RDS at the time of submitting bid for the project at Dabhol, the owner's engineer would have looked into this aspect very carefully while ascertaining the techno-commercial capacity of the bidders including the RDS.

t) Various power of attorneys available on record executed by RDS in favour of Mr. P. Surya Rao, Mr. V. Sampath, Mr. Madhusudan and Mr. K. Kundu as per assignment clause of MOU without any averment that it had the written consent of EHL. We ignore but noting even this MoU was contrary to requirement of Clause-48 of the tender document. We have observed so as the perusal of various files maintained by GOI do not contain any reference of RDS till the year 2000 and MoU was executed in 1996 thereby ruling out the compliance of Clause 48 of the contract.

68. This leads us to inescapable conclusion that RDS did not meet the BQC even as per un-amended Clause 8.1.1.1.

69. It is unfortunate that a project of national importance remains non-starter even after 4 years, which has not only resulted in escalation of the cost by manifold but incalculable loss to the nation as the project is yet at the stage of determining the eligibility of the RDS to qualify for this project. Right from the stage of bidding for RGGPL Project at Dabhol, RDS was in the knowledge of the extent of work done for the project of construction of breakwater at Mus in Car Nicobar and the years spent to complete the project from 1994-2003. The claim of the writ petitioner that the project at Mus Car Nicobar was completed single handedly within three years is sought to be projected in Cl. No. 6 in Form-B submitted along with the tender. This is also not substantiated in the completion certificates in Form-44 obtained by RGPPL under RTI. The owner's Engineers during their correspondence with RGPPL, while answering the queries put by RGPPL requiring documents in support of the claim made by recommended successful bidder had to accept that the certificates being issued by the Government agencies like Dy. Chief Engineer-IV were accepted as correct. However, the contents of these certificates have not been found to be correct by us when examined along with contemporaneous record.

70. Even if RDS could manage to throw dust in the eyes of GAIL/EIL on the basis of certificates obtained and filed along with the bid, merely because there was no action against the EHL or the authorities issuing such certificates, giving credit solely to RDS for the completion of the project at Mus Car Nicobar, RGPPL was not under any obligation to swallow whatever was plattered. When the claim of RDS came under the scanner of RGPPL, noticing that RDS did not even satisfy the BQC, decision was taken to scrap the process and invite fresh bids. RDS knew from day one that it did not satisfy any of the criteria laid down in Clause 8.1.1.1, even at the time of first tender, dragged RGPPL into litigation and till date this project could not be revived. This project of national importance is yet to undergo another tender process and delay has already resulted into incalculable loss to the nation.

71. However, we appreciate the efforts made by RGPPL to ensure that this project of national importance is entrusted only to a bidder who can meet all the eligibility conditions to ensure that the project does not meet the same fate again.

72. The petition is dismissed with costs.

Pradeep Nandrajog, J.

73. Agreeing with the view expressed by my learned sister, Pratibha Rani, J., my apology for a short concurring opinion is that a point needs to be separately highlighted because it has got obscured in the plethora of facts and documents which were brought to our notice when arguments were heard; finding a reflection in the opinion penned by my learned sister.

74. As has been brought out by the opinion, the core issue which required to be adjudicated in terms of the decision dated October 18, 2012, by the Supreme Court, disposing of Civil Appeals No. 7593-95/2012, was whether RDS Projects Ltd. i.e. the petitioner had executed the work of constructing a breakwater having length 500 mtrs. at Mus Car Nicobar.

75. The earlier round of litigation in the instant writ petition resulted in a verdict favourable to RDS Projects Ltd. when aforesaid writ petition was allowed vide judgment dated October 17, 2011, holding that the scattered material produced required it to be inferred that the breakwater at Mus Car Nicobar was constructed by the petitioner and that though the work was awarded under two separate tenders, the work was factually one.

76. Succinctly stated, the decision held in favour of the petitioner in view of two certificates dated April 05, 2008 and June 05, 2010 issued by the Deputy Chief Engineer, Andaman Harbour Works.

77. On account of the fact that parties stated that due to Tsunami which had struck Car Nicobar Island in the year 2004, the primary record was not available, the Division Bench heavily relied upon the two certificates which were issued by a fairly senior Government functionary and the Court had no material way from

the contents of the two certificates could be refuted.

78. From the facts culled out by my learned sister, it is apparent that the single breakwater at Mus Car Nicobar was constructed in two phases, with separate Notice Inviting Tender issued for Phase-I and Phase-II resulting in the contract being awarded separately for the two phases. Undisputedly, both contracts were successfully bagged by M/s. Ellon Hinengo Ltd., a tribal society. Petitioner claims that both works were successfully completed by it.

79. Undisputedly Phase-I pertained to the length segment 22 mtrs. to 200 mtrs. of the breakwater and Phase-II pertained to the remainder length of the breakwater from 200 mtrs. onwards till 500 mtrs.; initially Phase-II was awarded to a length segment upto 330 mtrs. and this was later on extended.

80. The relevance of the said claim of the petitioner is the requirement of Clause 8.1.1.1 of the Global notice for invitation of the bid issued on behalf of the first respondent on June 26, 2009, with which we are concerned, mandating as a term of technical qualification, that the bidder should have experience of having successfully completed, as a single bidder or as a leader of a consortium/joint venture, at least one project of a breakwater in an offshore location of minimum length 400 mtrs. during the last 20 years and that the scope of work of the proposed qualifying project work should comprise of the design, engineering, project management and construction of the breakwater.

81. The opinion dated October 17, 2011 of the Division Bench when the writ petition was allowed would reveal that the Division Bench took into account that the Phase-I work was completed with the involvement of another agency "Ms Reacon International" but limited to supply of boulders only. This is evident from the fact that in para 12.3 of the opinion dated October 17, 2011, the certificate/letter dated June 05, 2010 written by the Deputy Chief Engineer, Andaman Harbour Works has been noted with the following sentence in the letter emphasized by being put in bold letters and under lined for emphasis:-

Subsequently to augment further progress, another agency M/s. Reacon International was introduced against work order valuing 6.28 crores against supply of boulders only.

82. The opinion does not refer to the primary documents concerning the subsequent augmentation of the work pertaining to Phase-I and from which it could be gathered that the same were not placed before the Division Bench. Since said documents were produced for our perusal, I feel it my duty to elaborate upon the said documents, which have found a mention in the opinion penned by my learned sister.

83. It is not in dispute that on June 05, 1995, M/s. Ellon Hinengo Ltd. was awarded, at a value of Rs. 4.10 crores, the work of constructing a breakwater at Mus Car Nicobar from Chainage 22 mtrs. to 200 mtrs. It is also not in dispute that within the given stipulated time the work could not be completed, resulting

in a Notice Inviting Tender being issued by the Deputy Chief Engineer, Andaman Harbour Works, on behalf of Government of India, on March 26, 1998; contents whereof have been noted in para 46 of the opinion authored by my learned sister. Clause (a) at Serial No. 1 of the Notice Inviting Tender clearly brings out that offers were invited to complete part work of construction of breakwater from Chainage 22 mtrs. to 200 mtrs. at Mus in Car Nicobar. A letter dated July 09, 1998, contents whereof have been noted in para 45 of the opinion of my learned sister, would bring out that the said work was awarded at the "risk and cost" of the original contractor i.e. M/s. Ellon Hinengo Ltd.

84. The detailed scope of work pertaining to the Notice Inviting Tender dated March 26, 1998, as noted in para 47 of the opinion of my learned sister enlists the work to be executed, as under:-

8. The brief details of works covered by this contract are (a) Quarrying operation at Hut Bay and sorting of stones at Hut Bay, (b) Transportation of Quarry products from Hut Bay quarry to Hut Bay Wharf/Jetty, (c) Loading into Ship at Hut Bay Wharf/Jetty, (d) Transportation by Ship upto Mus in Car Nicobar anchorage from Hut Bay (e) Unloading from ship in anchorage into barges and placing as directed in the Breakwater alignment/stacking at site as per the direction and finally placing by end on method.

85. It is not in dispute that the work pertaining to the Notice Inviting Tender dated March 26, 1998, was awarded to M/s. Reacon International Ltd. at a cost of Rs. 6,27,52,288/- (for short Rs. 6.275 crores).

86. Petitioner conceded as aforesaid.

87. The arguments advanced by Mr. Jagdeep Dhankar, learned senior counsel for the petitioner was that, evidenced by the scope of work pertaining to the tender in question, M/s. Reacon International Ltd. was only to supply stones after performing Quarrying Operation at Hut Bay and thereafter transporting the Quarry stones to Mus Car Nicobar anchorage. Learned senior counsel urged that the work, including the balance work, of constructing the breakwater from chainage 22 mtrs. to 200 mtrs. was carried out by the petitioner.

88. That there is no credible evidence to so establish, except the certificates issued by the Deputy Chief Engineer, Andaman Harbour Works and affidavits deposed to by individuals to said effect, that works awarded to M/s. Ellon Hinengo Ltd. were officially completed by the petitioner, the legal effect of the tender successfully bagged by M/s. Reacon International Ltd. in the year 1998 needs to be highlighted separately.

89. Assuming that the claim of the petitioner is correct that whatever works were awarded to M/s. Ellon Hinengo Ltd. were actually executed by it, the impact of the work awarded to and performed by M/s. Reacon International Ltd. pursuant to the Notice Inviting Bids dated March 26, 1998, needs to be considered and its impact evaluated.

90. With reference to Clause 8.1.1.1 of the instant tender, it becomes apparent that the object thereof was to test the technical capacity of bidders and past performance was the criteria adopted. The bidder had to be one, who during the last 20 years had designed, engineered and constructed a breakwater having minimum length of 400 mtrs. in an off shore location.

91. As discussed in para 4.077 in HUDSON'S BUILDING AND ENGINEERING CONTRACTS, 11TH EDITION, that when a design and build contract, popularly called Turnkey contract, has a clause of the kind, the apparent intention is that the owner of the work intends to tell the contractor that the owner would be relying on the actual knowledge of the contractor; upon his skill and judgment. In other words, the clause in question requires the bidder to evidence his skill and judgment in constructing breakwaters with reference to a previously executed work; and which has to be in full.

92. The construction of a breakwater requires, if not more, the following:-

(i) Preparation of a design.

(ii) Preparation of drawings and in particular structural reinforcement drawings.

(iii) Fabricating Tetrapods, which we are given to understand involves RCC fabrication using steel, cement and chips of stones.

(iv) Chiseling stones of various weights from 5 kg. upwards to upto 300 kg.

(v) Dropping stones in the sea by slipping them through ships in a manner that stones of different shapes and sizes drop to the bottom, and on top of each other, in a manner that each reinforces the other-to complete the structure constituting the breakwater with pre-cast tetrapods, placed on the sea bed, at such points where the sea currents would probably weaken the stone component of the structure of the breakwater.

93. The scope of work as per Notice Inviting Tender dated March 26, 1998, which has been reproduced by me in para 12 above would bring out that M/s. Reacon International Ltd. was awarded the work of Quarrying stones at Hut Bay; transporting the same to Mus Car Nicobar and unloading the same from ship in anchorage into barrages and placing as directed in the breakwater alignment.

94. It may be true that balance work of Phase-I when tender dated March 26, 1998, was floated was completed with the involvement of M/s. Ellon Hinengo Ltd. but at the same time it cannot be ignored that of the original tender value of Phase-I was in sum of Rs. 14.10 crores and work awarded to M/s. Reacon International Ltd. was in sum of Rs. 6.275 crores. It may be true that M/s. Reacon International Ltd. did not design Phase-I of the breakwater and did not either fabricate or put into anchorage tetrapods, but it cannot be ignored that a substantial part of execution of the work was performed by M/s. Reacon International Ltd. when it performed the work of unloading the stones from ship in anchorage into barrages and placing as directed in the breakwater alignment.

Thus, it cannot be said that Phase-I of the work was exclusively executed by M/s. Ellon Hinengo Ltd. The claim of the petitioner, even if true, that works awarded to M/s. Ellon Hinengo Ltd. were actually performed by it, would require it to be held that Phase-I of the project i.e. construction of the breakwater from Chainage 22 mtrs. to 200 mtrs. was not exclusively executed by the petitioner. This by itself would mean that the petitioner had not exclusively constructed a breakwater having length of not less than 400 mtrs.

95. The argument of the petitioner that the object of the clause was to determine the engineering skills of the bidders, which would mean aligning tetrapods; placing Quarry stones being an incidental activity, is unsound in law, for the reason Quarrying of stones and dropping them in the sea was not a mundane activity. Stones of sizes 5 kg. upto 300 kg had to be chiseled in a particular shape so that they could so interlace with each other so as to form a kind of a web; requiring expertise in chiseling the stones to achieve the requisite size and shape. Further, the stones had to be dropped in the sea from a ship with precession so that, floating to the bottom of the sea, the stones would drop in a particular orientation for only then the stones would entangle each other to form a web. By no means said work would be ancillary or trivial. The work is an integral part of constructing a breakwater. I concur that the writ petition has to be disposed of with a finding returned that the petitioner has failed to demonstrate having executed a breakwater having length segment 400 mtrs. as claimed, and thus the petitioner was not an eligible bidder as per the requirement of clause 8.1.1.1.