
(2011) 10 DEL CK 0043
In the Delhi High Court
Case No : Writ Petition (C) 534 of 2011

RDS Projects Ltd.

APPELLANT

Vs

Ratangiri Gas and Power Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 17-10-2011

Acts Referred:

Citation : (2012) 1 ILR Delhi 490

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Jagdeep Dhankar, with Ms Asha Jain Madan and Mr Mukesh Jain, for the Appellant; A.S. Chandhiok, ASG with Mr S.K. Taneja with Mr Puneet Taneja and Mr Anant Kumar Sinha, Advocates for Respondent No. 1/RGPPL, Mr Gourab Banerji, ASG with Mr Ajit Puduserry and Mr Dinesh Khurana, Advocates for Respondent No. 2/GAIL, Ms Indira Jai Singh, ASG with Mr Ashok Mathur and Ms Sonam Anand, Advocates for Respondent No. 3/EIL, Mr Neeraj Chaudhari, CGSC with Mr Mohit Auluck and Mr Khalid Arshad, Advocates for Respondent No. 4/UOI, for the Respondent

Judgement

Rajiv Shakdher, J

1. This writ petition would bear testimony to the adage that truth is a conundrum wrapped in mystery surrounded by a multitude of lies. The Petitioner is in court, the second time round, much harried and exasperated. In the first round the Petitioner, i.e., RDS Projects Ltd. (hereinafter referred to as "RDS") by way of a writ petition bearing No. 8252/2010, sought to challenge the decision of Respondent No. 1, i.e., Ratnagiri Gas and Power Pvt. Ltd. (hereinafter referred to as "RGPPL") dated 04.10.2010, conveyed to it on 06.10.2010, seeking to scrap/cancel the tender bearing No. 6724/T-138/08-09/SPL/24 (hereinafter referred to as the "1st Tender") after it had been declared the lowest tenderer, i.e., L-1. RDS withdrew the said writ petition alongwith an application for grant of interim relief in view of the stand of RGPPL that it had exercised its rights as an owner under Article 28.1 of the 1st tender. Since the Petitioner apprehended his exclusion by the Respondents in the subsequent round, it sought leave and liberty of this

Court to take recourse to a legal remedy in accordance with the law. A Division Bench of this Court of which one of us (i.e., Sanjay Kishan Kaul, J) was a party, granted such liberty to the Petitioner vide order dated 14.12.2010.

2. True to form, RGPPL through aegis of Respondent No. 2, i.e., Gas Authority of India Ltd. (hereinafter referred to as "GAIL"), and respondent No. 3, i.e., Engineering India Ltd. (hereinafter referred to as "EIL"), floated a fresh tender and bearing No. 6724/T-183/10-11/SKG/28 (hereinafter referred to as the "2nd Tender"); albeit with a change/amendment. The change/amendment with which the Petitioner is aggrieved pertains to Clause 8.1.1.1. It is pertinent to mention here that Clause 8.1.1.1 deals with past experience of the bidder in executing a similar work. We would be referring to the requisites set out in Clause 8.1.1.1 with respect to qualifying work, and as one goes along, the change in specifications and brought about by amendment made in Clause 8.1.1.1 in the 2nd tender. We would not come back to the amendment in the said clause made in the 2nd tender, but before that, why the change has taken place is pertinent, as the Petitioner has pleaded malice, apart from the usual grounds of arbitrariness and unreasonableness and the lack of fairness on the part of the Respondents in bringing about the said change. We may note at the outset that the change is brought about in Clause 8.1.1.1, which found a mention in the 1st tender as compared to those which have been and incorporated in the very same clause, in the 2nd tender; even though subtle, are significant from the point of view of the Petitioner. Therefore, the reason for and narrating the background in which the Respondents issued the 2nd tender.

BACKGROUND

3. The Maharashtra State Government, it appears, wanted to resuscitate the Dabhol Power Project (in short "DPP") which had run into troubled waters; a story which has been widely recorded. The job of resuscitation was entrusted to National Thermal Power Corporation (in short "NTPC") and GAIL. The DPP, inter alia, included a gas based component, that is, a cycle power project alongwith an integrated LNG terminal with associated infrastructure facilities; situate in the district of Ratnagiri, in the State of Maharashtra. Thus, insofar as DPP was concerned, both components required revival. The first one being a power block and the second being, the LNG block. In order to execute the task entrusted to NTPC and GAIL, a joint venture company was incorporated which, resulted in the birth of RGPPL. The co-owners of RGPPL were appointed as the owners' engineers to revive the power block as well as the LNG block. The LNG terminal required protection and hence, what in technical terms is referred to as "breakwater" had to be constructed in the sea on shores of which, evidently, the LNG terminal block was situated. Since the job entailed specialized technical and engineering experience, knowledge and skill accompanied with marine facilities as its core competence, GAIL in turn engaged the services of EIL. The EIL was thus appointed as the primary project management consultant. The EIL in turn sought and obtained approval of GAIL to involve one U.K. based entity, namely,

Scott Wilson as their back-up consultant for marine works. RGPPL thus had the luxury of having at its disposal not one, not two, but three experts.

4. The extent of the role played by the experts is demonstrable from the averments made by RGPPL in its pleadings before us wherein it is averred and therefore candidly admitted, that the board of directors in their deliberations held on 04.10.2010 had come to a conclusion that in respect of aspects pertaining to: revival/completion of the power blocks as well as LNG block which would pertain to strategies for "packaging", "tendering mode", and "award recommendations" including "price negotiations" wherever required; it would have to rely on the owners engineers, i.e., NTPC and GAIL. Thus, RGPPL's formalization of award of various contracts, including the contract in issue, was to be based on the recommendation of the owner's engineers.

5. GAIL, in turn, in its pleadings before us, has taken the stand that as per the arrangement arrived at between the parties, (which inter alia includes RGPPL), EIL was to prepare the tender, float tender enquiries, evaluate offers received and finally recommend the award of contract to GAIL in respect of LNG terminal project. GAIL was thus required to examine and approve the recommendations of the various stages of the tendering process which included approving the tender, bidders evaluation criteria, approving price bids, and finally giving its recommendation for award of the contract. GAIL thus, in the pleadings, has taken the stand that in the exercise undertaken by it, of examination and evaluation of bids till the stage of forwarding the award recommendation to RGPPL - it followed its own contract in procurement procedures. It is in this background that it became relevant for us to refer from hereon the events which led the EIL to float the 1st tender; the queries raised by RGPPL; the reiteration of EIL of its evaluation, the consequent declaration of the Petitioner as L-1, and finally the curious turn-around of EIL and GAIL (though sub-silentio) in declaring that the Petitioner had been wrongly declared as L-1; a recommendation dated 01.09.2010 which apparently formed the basis of RGPPL decision of 04.10.2010 to cancel the 1st tender.

6. The 1st tender was floated by EIL on 26.06.2009. Against the said tender, bids were received from five (5) bidders, i.e., the Petitioner before us i.e. RDS, M/s ESSAR Construction Ltd., M/s Afcons Infrastructure Ltd., Joint Venture of M/s Hojgaard Punj Lloyd Ltd. and lastly the Joint Venture of M/s Hung-Hua and Ranjit Buildcon Ltd. The bids of the aforesaid five (5) bidders were evaluated by EIL alongwith their back-up consultant, Scott Wilson, U.K. Upon evaluation, it was found that Hung-Hua and Ranjit Buildcon Ltd. were not technically qualified, resultantly, the said bidder was disqualified. This resulted in four (4) bidders being left in the field. Consequently, EIL recommended to GAIL that the price bids of the said four bidders be opened. It would be pertinent to note at this stage that under the terms of the 1st tender, which are no different, we are told in the 2nd tender, the price bids could only be opened qua bids which were found to have qualified in the techno-commercial round, i.e., their bids were found

technically and commercially suitable. (See clauses 24 and 25 of the instructions to bids).

7. It is in this background that EIL on 24.12.2009 recommended the name of the remaining four (4) bidders for appropriate approval of GAIL in respect of their price bids. It appears that GAIL, while evaluating EIL's recommendation observed that the foreign consultant, i.e., Scott Wilson, U.K., had not accepted the adoption of "sling" methodology used by RDS for transporting, loading and placement of rock armour for construction of breakwater, in the contract evidently earlier executed by RDS. Therefore, by a communication dated 30.12.2009, GAIL sought reconfirmation from EIL, whether it ought to accept the sling methodology adopted by RDS. EIL by a return letter 31.12.2009, confirmed that RDS would not use the sling methodology while loading out and placing rock armour and that instead, it would use what is known as "hydraulic grab" technology. GAIL, however, by a communication dated 25.01.2010 called upon EIL to seek the opinion of Scott Wilson, U.K. in that regard. EIL evidently discussed the matter with Scott Wilson, U.K, and thereupon, vide letter dated 01.02.2010 forwarded the Scott Wilson, the U.K. addendum to their earlier technical evaluation report dated 29.01.2010. By virtue of this addendum, Scott Wilson, U.K. evidently confirmed the inclusion of RDS in the list of those bidders whose price bids had been recommended for being opened for appropriate evaluation. GAIL, thereupon reviewed EIL's price bid opening recommendation, and after appropriate review conveyed its approval for price bid opening of the very same bidders, who EIL had recommended in the letter dated 24.12.2009. Once again RDS was included in the list of recommended bidders.

8. Consequently, on 11.02.2010 in the presence of the said recommended bidders, the price bids were opened. It was found that RDS, i.e., the Petitioner, was the lowest bidder at (approximately) Rs 390 crores, while the next lower bidder was Afcons Infrastructure Ltd., whose price was higher by about Rs 160 crores in comparison to RDS, (having bid at Rs 550 crores). On 26.2.2010, EIL forwarded their recommendation to GAIL. It is pertinent to note that the justification cost (i.e., the estimated cost of the project) at the lower end of the spectrum, was nearly Rs 662 crores (approximately).

9. On receipt of requisite recommendation and the back-up material, GAIL upon appropriate examination and approval of the competent authority forwarded its recommendation to RGPPL vide communication dated 08.03.2010. In this communication, GAIL advised that while, executing the contract, RDS should ensure that: it would inter alia provide suitably experienced staff with sufficient equipment to ensure quality and adherence to time schedule; demonstrate and implement appropriate planning and co-ordination of resources, undertake design technical reviews to international standards; and lastly, provide site supervision staff experienced in breakwater construction; once again, to ensure quality of construction and compliance with specifications. To be noted, the communication ended by explicitly stating therein that the recommendation had

the approval of competent authority, and is generally in line with GAIL's procedure and system.

10. From the point of view of the RDS, one would have imagined that the execution of the formal contract hereon would be a given. This was, however, not so as RGPPL by a letter dated 26.03.2010 sought various clarifications including in respect of aspects mentioned in GAIL's letter dated 08.03.2010 issued to RDS, to which we have made a reference hereinabove. The interesting part is that in respect of query No. 5 raised in the aforementioned letter, RGPPL brought to attention of GAIL that the estimated cost of the project was Rs 662.80 crores plus minus 25%, whereas bid of RDS, which was declared as L-1, was lower than the estimated cost by approximately 41.17%. RGPPL went on to state that if the bid, is abnormally low, then it ought to give the owner sufficient cause to reject the bid unless after due scrutiny and analysis of the rates, it is convinced about the reasonableness of the bid. RGPPL thus sought GAIL's response to this query amongst others. It would not be out of place to mention that RGPPL also raised a doubt about RDS's ability to complete the breakwater project at hand in the given time frame of thirty three (33) months when, on its own showing, it had taken three (3) years for it to complete a breakwater project at Mus Car Nicobar, of 500 m; which incidently was shown as its qualifying work in the bid documents. In this background, since the bid was valid till 30.04.2010, a request was made by RGPPL to seek the extension of validity of the bid till 15.05.2010. RGPPL also sought a copy of the recommendation of Scott Wilson, U.K. on the aspect of the confirmation received from RDS that it would use hydraulic garb technology as against the sling method for load out and placing of rock armour. GAIL, by its letter dated 07.04.2010 gave a detailed point wise response to all eight queries, to which we have made a mention hereinabove, including queries raised pertaining to the difference between estimated cost and the bid price of RDS, and the capability of RDS to execute the project within the stipulated thirty three (33) months, given its experience in executing such like projects. The relevant part of the response on this aspect reads as follows:

...A.5 Accuracy of Cost Estimate:

The price quote of L1 bidder is reasonable as compared to lower bound cost estimate. The reasons for the same are as per Annexure -1 attached with the letter.

A.6 Project Execution time and Bidders Capability: Based on the critical review of M/s RDS Projects offer, their replies to various technical queries and detailed presentation on execution/ construction methodology for the tendered work indicates that M/s RDS Projects is capable of executing the subject tender works in the stipulated time schedule.

Further, project execution time for any breakwater project is dependent on resources mobilization, availability of query at nearby location and marine environmental conditions at site etc. and therefore project completion time

periods may differ even though project physical parameters (size and shape) may be comparable....

10.1 The communication ended with the GAIL appending the addendum to its technical recommendation dated 29.01.2010, pertaining to the issue of the technology which, RDS proposed to use for execution of the work at hand. It is pertinent to note at this stage that both the recommendation of GAIL dated 08.03.2010 whereby, RDS was recommended for award of the work and, the response dated 07.04.2010 pursuant to the first stage of queries raised by RGPPL, vide its letter dated 22.03.2010 were sent under the hand of the same officer, i.e., Mr M.B. Gohil, General Manager (Project), GAIL.

10.2 Interestingly, in the interregnum as if by co-incidence, a writ petition was filed in this Court by Ranjit Buildcon Ltd., that is, the unsuccessful bidder, inter alia, seeking a direction that RDS be declared as being "technically non-qualified" for undertaking the DPP and appropriate direction to quash any letter/ LOI issued by RGPPL in favour of RDS in respect of the said project. The affidavit appended to the said writ petition is dated 22.03.2010. This writ petition, which was numbered as WPC(C) No. 2142/2010 bears the date 23.03.2010. As indicated above, the first set of queries of RGPPL to GAIL, is also a communication, dated 22.03.2010.

11. It appears that by a letter dated 25.03.2010, RGPPL formally informed GAIL as regards institution of the writ petition by Ranjit Buildcon Ltd. This communication was based evidently on a notice dated 23.01.2010 received from the solicitors of Ranjit Buildcon Ltd. A copy of the writ petition was enclosed to the said communication of RGPPL. A detailed reply was sought by RGPPL for its purposes. GAIL in turn forwarded a copy of the writ petition to EIL vide its communication dated 29.03.2010, while recording therein that discussions with regard to the institution of the writ petition had been held in the office of Managing Director of RGPPL on 26.03.2010. This letter was also issued under the hand of M.B. Gohil. On 09.04.2010, EIL dispatched a point wise reply in respect of the averments and allegations made in the writ petition filed by Ranjit Buildcon Ltd. Apparently in respect of the qualification of RDS, the response prepared by EIL was as follows:

RDS Not Qualified (Reply to point Nos. 25, 26, 28, 29, 30, 31, 32, 33 and 34)

Requirement of Bidder's Qualification Criteria (in case of single bidder) as set out in the IFB are as follows:

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 (offshore location is defined as the area submerged in the ocean sea) of minimum length of 400m during the last 20 (twenty) years to be reckoned from the last date of submission of bids.

Documentary evidence submitted along with the bid offer conclusively

established that:

Breakwater at MUS in Car Nicobar Island is located at an offshore location (Refer Annexure - 1: Completion certificate issued by Ministry of Shipping, Road Transport and Highways - Department of Shipping, Little Andaman which mentions that "The entire work has been executed in sea (beyond low water line) by M/s RDS Projects Ltd., and they have successfully completed during June 2003.

M/s RDS has completed the entire works pertaining to breakwater at MUS in Car Nicobar island as a single entity on behalf of M/s Ellen Hinengo Ltd. (Refer Annexure -1: Completion certificate issued by Ministry of Shipping, Road Transport and Highways - Department of Shipping, Little Andaman). Hence, meeting the BQC requirement of qualifying project.

12. GAIL by a letter of even date, i.e., 09.04.2010, forwarded the same to RGPPL. RGPPL wasted no time in responding to GAIL's communication and thus, by a return communication of even date, i.e., 09.04.2010, sought the following from GAIL:

- (a) The letter of award containing detailed scope of work, contract value, payment terms, completion schedule and other contractual stipulations, and
- (b) the veracity of the completion certification submitted by RDS projects ltd., duly verified by GAIL/EIL.

12.1 These documents were sought ostensibly in order to enable RGPPL to prepare its reply in response to the writ petition of Ranjit Buildcon Ltd. GAIL by a return communication dated 12.04.2010, informed RGPPL that a work order for the qualifying project (work) had already been submitted by RDS, though detailed work order was not available with the bid documents filed by RDS. In so far as the completion certificate is concerned, GAIL stated that RDS had furnished a completion certificate issued by the Ministry of Shipping, Road Transport and Highways Department of Shipping, Government of India and, therefore, they had no reason to doubt the veracity of the document.

12.2 RGPPL reiterated its request for work order vide letter dated 28.04.2010. EIL, on its part sent an email dated 24.05.2010 and 30.04.2010 seeking a copy of the work order of its qualifying work. GAIL, by a letter dated 21.05.2010 informed RGPPL that though they had not received the work order from EIL, they had been following up the issue.

12.3 Interestingly, RGPPL, it appeared, was looking for information which perhaps, it already had in its possession by virtue of the Comptroller and Auditor General (in short "CAG") report number 2/2002 which seemed to suggest that the qualifying work, i.e., the breakwater constructed at Mus Car Nicobar Island in the Andaman Nikobar Island had been constructed in "phases". Therefore, while the website of Andaman Lakshdeep Harbour Works observed that there was only one breakwater at Mus Car Nicobar Island with a length of 490 m, it desperately

wanted the work order to establish the fact that RDS had executed the qualifying work/project not at one go but in different phases by virtue of the separate contracts. Therefore, by a letter dated 26.05.2010, RGPPL once again sought the copy of the work order. It is in this letter that RGPPL for the first time, revealed the information that it had in its possession by virtue of what was available on the website of Andaman Lakshdeep Harbor Works, and that which it found contained in the CAG's report. It may be noted that GAIL evidently referred to contents of this letter to EIL vide email dated 27.05.2010. RGPPL, on the other hand, raised pointed queries for the first time with respect to qualification criteria provided in Clause 8.1.1.1. In the context of the qualification criteria provided therein, it sought to know from GAIL that the GAIL had declared RDS as qualified based on a certificate dated 05.04.2008 issued by the Dy. Chief Engineer, Andaman Harbour Works. It was put to GAIL that since the certificate referred to a tender of 26.05.1999, the certificate did not state the scope of the qualifying work involved construction of a breakwater of 500 m length. It went on to say that viewed in the background of the CAG's report (which is a report of 2002), the scope of the tender was limited to 290 metre, therefore, it questioned the conclusion arrived at by GAIL that RDS had the requisite experience of constructing 500 metre breakwater. The communication ended with RGPPL invoking Clause 9 of the instruction for bidder (in short "IFB") which empowered it to seek further documents from the bidder. Based on this clause, RGPPL asserted its rights to receive a copy of the work order. It appears that GAIL sent a communication dated 09.06.2010 on the aspects on which queries had been raised by RGPPL. RGPPL on its part seems to have sought and obtained clarifications from the Dy. Chief Engineer-IV, Andaman Harbour Works. The said Dy. Chief Engineer-IV vide its letter dated 05.06.2010 issued its clarification which were forwarded for consideration of GAIL and EIL. The said communication being crucial for the purposes of adjudication of matter in issue, for the sake of convenience, the relevant portion is extracted herein below:

With reference to the above, it is to inform that the work in question, "Construction of Breakwater and Wharf at Mus in Car Nicobar Island" was executed under Deputy Chief Engineer-IV circle. Most of the office records which were maintained in Little Andaman and Car Nicobar Island were washed away during Tsunami waves on 26th December 2004. The following details were furnished based on the available information.

It is reiterated that the subject breakwater was completed in June 03 and has witnessed Tsunami in the Dec 04 wherein entire establishment at Nicobar was washed away thus no records are available due to old case and havoc created by Tsunami. Thus clarification as asked for cannot be given as per format attached. However, it will be my endeavour to give details at my best.

Briefly it is submitted that this only offshore breakwater of 22-490 mtr. Length (Constructed length of 500 mtr.) at Mus Car Nicobar was constructed in two phases/ contracts both of which were awarded to M/s EHL a tribal society of Car

Nicobar Island in continuation i.e., before the first work completed the second was awarded.

First contract bearing No. EEM/LA/DB/A-10/95-96 dated 5.6.1995 valuing 14.10 crores, was awarded to M/s EHL with all items of work connected with construction of breakwater i.e., mining and supply of boulders of various sizes, Tetrapod casting and placing mining/ crushing aggregates etc. 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. EOT granted to M/s EHL as delay not attribute table to them. Therefore, finally the balance work including left over items of 1contract was put to tender and awarded to M/s EHL vide DCE/LA/DB/T-2/99-2000 Vol. IV 3318 dated 3rd Nov. 2000 valuing 30.01 crores for final completion of the structure. No EOT involved. It is hereby certified that M/s RDS Project Ltd. was the sole construction agency for and on behalf of M/s EHL, for undertaking all activities under these contracts to which their performance had been exemplary.

(emphasis is ours)

13. EIL on its part, examined the certificate dated 05.04.2010 issued by the Deputy Chief Engineer-IV, Andaman Harbour Works, in the light of the queries raised by RGPPL and the clarification issued on 05.06.2010 by the said Deputy Chief Engineer. In this regard, the CAG report number 2/2002 was also noticed wherein it had been stated that the work had been completed in "phases". After reviewing the material placed before it, EIL vide its communication dated 10.06.2010 concluded that even though the qualifying work at Mus Car Nicobar Island had been completed in two phases, its recommendation did not "necessitate any revision in the award recommendation". It is pertinent to note that the said communication of 10.06.2010, which reviewed the material placed before it by RGPPL, inter alia, the CAG report and the clarification dated 05.06.2010 issued by the Deputy Chief Engineer -IV, Andaman Harbour Works indicating that the qualifying project at Mus Car Nicobar Island, had been executed by RDS in two phases and by virtue of two separate contracts, was signed off under the hand and signatures of Sh. R.K. Bhandari, General Manager (Projects), EIL. The reason why we have referred to the signatories would become clear as we progress further with our narrative.

14. The communication dated 10.06.2010 was not, it appears, to the liking of RGPPL. Consequently, RGPPL vide another communication dated 15.06.2010, returned GAIL's recommendation of 08.03.2010 on the ground that documentary evidence substantiating that the RDS met the Bidder Qualification Criteria (in short "BQC"), had not been furnished. In this communication, RGPPL went on to say that the GAIL's recommendation was conditional (these so called conditions have already been referred by us hereinabove in the earlier part of our judgment). It directed RGPPL to withdraw these conditions appended to their recommendation. It also went on to note that the clarification issued by the Deputy Chief Engineer - IV, Andaman Harbour Works vide letter dated

05.06.2010 was not backed by any institutional data. In the context of all this, it sought documentary evidence to establish "beyond doubt" (i) whether the RDS was a single bidder for the qualifying (work) project; (ii) whether the RDS had successfully completed one project of breakwater of minimum length of 400 meter; and (iii) whether the qualifying project breakwater was in an offshore location as per BQC.

15. The letter dated 15.06.2010 was followed by RGPPL's letter dated 22.06.2010. It now sought clarification regarding non-submission of audited financial statements by RGPPL for the immediately preceding financial year, i.e., 2008-09. The purpose being: evidently to analyze the financial credentials of RDS. GAIL, as in the past, by a communication dated 23.06.2010 written under the hand of Mr M.B. Gohil, General Manager (PD-GP), forwarded the same to EIL. This time the communication was addressed to one Shri Ravi Saxena, Dy. General Manager (Project). Earlier, communications were addressed to Mr. R.K. Bhandari, General Manager (Projects). As is evident, RGPPL had again changed the goal post as it now sought to inquire as to whether the net worth of RDS was positive during the financial year 2008-09. EIL vide letter dated 1.07.2010 once again sent a comprehensive reply to the RGPPL's letter dated 26.06.2010. EIL confirmed that the RDS met the financial criteria, as stipulated in the tender. As regards non-availability of the balance sheet for the financial year 2008-09 was concerned, EIL informed that since the unpriced bid was opened on 16.09.2010, the tenderers, whose financial year closed thereafter, were at liberty to submit the audited financial statements of those three (3) years which preceded the said date. Nevertheless, audited financial statements of RDS of 2008-09 were also obtained and furnished to GAIL for onward transmission to RGPPL. In order to put the matter "beyond doubt", GAIL on its part, sought in the interregnum, the opinion of the Attorney General of India on 28.06.2010. Suffice it to say, that the Attorney General vide his opinion dated 30.06.2010, opined that RDS qualified the single bidder qualification criteria provided in the 1st tender. It is pertinent to note at this stage that even though the documents pertaining to the execution of the qualifying work at Mus Car Nicobar Island had been obtained including the report of the CAG and the clarificatory letter dated 05.06.2010 of the Dy. Chief Engineer-IV, Andaman Harbour Works - the query on which the opinion of the learned Attorney General was sought by GAIL, was in the light of the fact that the qualifying work having been awarded to Ellon Hinengo Ltd. (in short "EHL"), whether RDS could be considered as the person who had executed the contract. In other words, in the context of the fact that the work had been awarded to EHL, whether RDS would stand in the position of a sub-contractor.

16. Given the response of EIL and the opinion of Attorney General received by GAIL, GAIL by a communication dated 10.07.2010 forwarded the synopsisized response of EIL that; (i) the entire work of construction of breakwater at Mus in Car Nicobar Island was executed by RDS on behalf of EHL; (ii) the contracted length of the breakwater was 500 meters; (iii) the entire work was executed in sea (beyond low water line) by RDS; (iv) the work was successfully completed in

June, 2003; (v) the qualifying work was executed by RDS as a single bidder which met the BQC stipulated under the first tender; (vi) Even though the CAG report No. 2/2002 and the clarificatory letter of the Deputy Chief Engineer - IV, Andaman Harbour Works dated 05.06.2010 suggested that the work had been completed in two phases/ contracts both of which were awarded to EHL; the additional information did not necessitate any revision in the recommendation for award of work to RDS; (viii) the completion certificate dated 05.04.2008 is considered as adequate evidence of the qualifying work having been executed; (vii) Learned Attorney General had opined that RDS having done the entire work, was qualified under the expression "single bidder" in relation to the 500 meter breakwater project by RDS in Mus Car Nicobar Island; (ix) the conditions thus far referred to in GAIL's letter dated 08.03.2010, were advisory in nature, as indicated in GAIL's letter dated 09.04.2010; therefore, GAIL's recommendation could not be construed as a conditional recommendation; (x) RDS met the financial criteria, as was indicated in EIL's letter dated 01.07.2010; (xi) it specifically referred to item No. 6.2.3 in the agenda of the 6board of directors meeting of the RGPPL, wherein it had been in particular observed that RGPPL would have to rely, inter alia, on the recommendations of NTPC and GAIL qua the LNG block; and (xii) finally, after recording the aforesaid, GAIL once again reiterated its recommendation of 08.03.2010 and called upon RGPPL to re-consider the award of the said work to RDS.

16.1 The communication ended by noting that without the breakwater, capacity utilization of LNG terminal would be limited to the extent of 20% and that consequently the daily loss because of the failure to utilize the terminal to its full capacity was working out to Rs 1.50 crores. The communication, however, ended by putting the onus back on RGPPL by indicating therein that since RGPPL was the owner, it would have a final view in the matter. This communication was once again issued under the hand of Mr M.B. Gohil of GAIL. The letter contained enclosures such as GAIL's recommendation dated 08.03.2010 (in original), copies of EIL's letters dated 10.06.2010 and 01.07.2010 alongwith annexures and opinion of Attorney General of India dated 30.06.2010.

17. It appears that in the meanwhile, RGPPL had preferred an application under the Right to Information Act, 2005 (in short "RTI") with the Andaman Harbour Works. Seeking information and documents vis-?-vis the qualifying work; this included the work order dated 27.04.1995 awarded to EHL and the scope of work of the qualifying tender. The documents obtained were forwarded to GAIL by RGPPL vide its letter dated 26.07.2010. It would be important to note that a perusal of the record submitted by RGPPL would show that just prior to issuance of the letter dated 26.07.2010, its Board of Directors had convened a meeting on 20.07.2010. A perusal of the minutes would show that one of the Directors had raised an objection as to why the Managing Director had initiated the agenda on the LNG terminal while in respect of other LNG terminals meetings had been initiated at the behest of the Dy. M.D. The Managing Director of RGPPL seems to have suggested that the Board note had been prepared with the knowledge of

the Dy. M.D. and all versions of the draft notes had been shared with him. The Dy. M.D., however, took the stand that since the Board note contravened the opinion of the "GAIL Directors", he would not be amenable to appending his signatures on the Board note. As a matter of fact, two Directors took the position that since the owners' Engineers had opined that RDS fulfilled the BQC requirements, the contract ought to be awarded to RDS. The Managing Director took a contrary position. The events which followed hereafter would show that this dissent for some curious reasons disappeared, even though there was no material change in circumstances. Importantly, there is no reference to these minutes in the affidavit filed by RGPPL. GAIL, on its part furnished, by a letter of even date i.e., 26.07.2010, the said information to Mr R.K. Bhandari, General Manager (Projects) of EIL. By this letter, GAIL called upon EIL to review its recommendation based on the documents received through the RTI route, particularly, in the context of its earlier evaluation of RDS as conforming to the BQC under the 1st tender. This letter was sent under the hand of Mr M.B. Gohil, General Manager, GAIL, and as indicated above, addressed to Mr R.K. Bhandari, General Manager (Projects) in EIL. Since in the meanwhile, as noticed above, Ravi Saxena had been given the task of evaluation on behalf of EIL, he did the needful and communicated his assessment vide email dated 11.08.2010. After "critically" reviewing the material at hand, which RGPPL had obtained through the RTI route, EIL opined as follows:

1. During the evaluation stage, M/s RDS offer was evaluated based on the documents furnished in their offer which include completion certificate No. DCE/LA/GI-20/928 dated 5.4.2008 issued by Dy. Chief Engineer - IV Andaman harbor Works Little Andaman. As the said completion certificate contained all the requisite information as per bid stipulations, M/s RDS was considered as qualified bidder.

2. Information which has now been made available to us additionally has been critically reviewed and it is found that contents of documents are not inconsistent with each other and therefore, we may not take cognizance of the said documents. Moreover, though the work of breakwater at MUS has been carried out in two phases under two separate work orders, it may be considered as single project as Completion Certificate (No. DCE/LA/GI-20/928 dated 5.4.2008) issued to M/s RDS is for the entire breakwater length. This fact is further corroborated by the letter No. DCE-IV/LA/ALHW/CAMP:PBF-35/764 dated 05/06/2010 issued by the office of Deputy Chief Engineer-IV which enumerates that M/s RDS was the sole construction agency for and on behalf of M/s EHL for undertaking all activities under these contracts to which their performance had been exemplary and also by the extract of CAG Report No. 2 of 2002 (Civil).

(emphasis is ours)

17.1 The communication included the opinion that no revision in the award recommendation was necessitated at this stage.

18. Curiously, despite this emphatic stand, EIL took a complete u-turn on 01.09.2010 in response to GAIL's letter dated 26.07.2010 which had already been replied by EIL vide its e-mail dated 11.08.2010. Based on the same material, which as per the e-mail of 11.08.2010 had been critically reviewed, it came to an entirely different conclusion and the person who came to this conclusion was the very same gentleman, i.e., Ravi Saxena, who had issued the earlier communication, i.e., e-mail dated 11.08.2010. In his communication of 01.09.2010 the officer opined as follows:

Considering the facts as brought out from above mentioned documents, it is evident that Ministry has awarded project for construction of breakwater from chainage 22 to 200 meters and project for construction of breakwater for chainage 200 to 330 meters subsequently extended to 490 meters as separate projects. In view of the documents made available and having perused all the documents in concurrence with each other, it emerges that since both the phases have been considered as separate projects by the Ministry, M/s RDS can not club the experience of having executed two separate projects to qualify the BQF which requires that the bidder should have experience of at least one project of a breakwater in an offshore location of minimum 400 m. In light of above, it is concluded that experience submitted by M/s RDS can not be taken as execution in "single project" and therefore, M/s RDS does not meet the BQC requirement.

19. This aspect of the matter troubled us immensely. Therefore, in the hearing held before us, we had put to the Learned Counsel for EIL, Mr Ashok Mathur as to how on the very same material, the same person i.e., Ravi Saxena, Deputy General Manager (Projects), EIL could have come to a diametrically converse conclusion. Mr Mathur had no answers, till he was guided by an officer of EIL by drawing his attention to a legal opinion on record of one Ms Smita Sehgal dated 26.08.2010. We had put to Mr Mathur during the course of hearing, as to whether this aspect had been disclosed in the counter affidavit filed by EIL in court. Mr Ashok Mathur quite fairly conceded that this aspect had not been referred to in the counter affidavit filed by EIL. In these circumstances we had put to Mr Mathur whether at this point in time, when Respondent No. 3/EIL had already concluded its submissions in reply, would it be fair to refer to those documents or allow the said legal opinion to be placed on record in the midst of the hearing when the Petitioner had no opportunity to deal with it in the rejoinder placed on record. EIL having been caught on the wrong foot, however, persisted in its efforts. Consequently, towards this end, an application was filed and moved before us on 12.09.2011 when, after recording our observations that there ought not to have been any need to file the said additional affidavit (which was sought to be done by way of an application) as EIL was aware of the case set up by the Petitioner, and therefore, our queries, could not have come as a surprise -the application was allowed and EIL was permitted to place the documents filed on record even at that fag end of the hearing, only to enable EIL to have its complete say; though the analysis of the effect of the document was made subject to the final outcome of the case. The application was allowed with

cost of Rs 50,000/-. Liberty was granted to the Petitioner to meet this new development by way of an oral rejoinder at the hearing to follow.

20. It would be, therefore, important to deal with this aspect of the matter which evidently brought about change of heart and mind in the EIL's officer led by Ravi Saxena. The affidavit accompanying the appeal adverts to the fact that pursuant to email dated 11.08.2010 issued by Ravi Saxena of EIL, the then Dy. General Manager (Projects) an internal meeting was held to ascertain the view, (we assume of the legal department), in the light of additional material made available to EIL. A decision was taken at this meeting evidently to refer the matter to the legal department for their opinion. To be noted, the date of this internal meeting is not adverted to in the additional affidavit dated 06.09.2011 filed by Ms Smita Sehgal. The affiant, however, adverts to an inter-office memorandum dated 20.08.2010, whereby the material was forwarded to the legal department seeking its opinion. It is in that background that legal department on 26.08.2010 opined that RDS did not meet the BQC requirement of the 1st tender. We may only notice that the opinion concludes by stating that since the Ministry had awarded the project for construction of breakwater (qualifying project) from chainage 22 to 200 meters, and the project for construction of breakwater from chainage 200 to 300 meters (subsequently extended 490 meters), RDS had experienced not of a "single project" but of "two projects", and hence did not qualify the BQC requirement of the 1st tender which required the bidder to have experience of at least one project of a breakwater in an offshore location of minimum length of 400 meters. The author of the opinion is also the affiant to the additional affidavit. Ms Sehgal pivots this view on the strict construction of the language of the document in issue and goes on to say that however "harsh" "absurd" or even contrary to common perception the conclusion may be, that is the only conclusion she could draw on the construction of the document. What is even more interesting is that this very legal opinion bears the endorsement dated 27.08.2010 of Mr. Grover Director (Projects) - calling upon Mr R.K. Bhandari, General Manager (Projects) to follow the opinion of the legal department. It is important to remind ourselves at this juncture that till 10.06.2010, it was the same R.K. Bhandari, who opined based on the very same additional information, (which formed the edifice of Ms Smita Sehgal's opinion) that material forwarded did not necessitate revision in award recommendation. There is no averment in the affidavit as to whether Mr. Grover called a meeting of Mr. R.K. Bhandari and Mr. Ravi Saxena to discuss the opinion of the legal department. Mr Grover's endorsement suggests quite clearly that he left no scope for debate or discussion.

21. On receipt of EIL's revised recommendation of 01.09.2010, GAIL vide communication dated 18.09.2010 simply forwarded the opinion of EIL to RGPPL. In its communication, GAIL made it clear that since RGPPL was the owner under the contract, it should take appropriate action at their end. The RGPPL was, at this stage, not happy with the communiqu? of GAIL whereby, the onus for the final decision was put on it, therefore by a letter dated 20.09.2010 it called upon

GAIL to forward its recommendation based on the communication of EIL dated 01.09.2010. This letter of RGPPL dated 20.09.2010 is not on our record, though it finds mention in paragraph 37 of the affidavit filed by Mr. M.B. Gohil. GAIL, however, did not oblige as is evident from its letter dated 22.09.2010. GAIL after giving reference to its earlier recommendation dated 08.03.2010, and also letters dated 09.04.2010, 21.04.2010, 09.06.2010 and 10.07.2010, put the onus back on RGPPL to take a decision in the matter being the owner of the project as it had in its wisdom, all the relevant information, on the subject, available with it. The author of letters dated 18.09.2010 and 22.09.2010 is one Sh. S.C. Khetan, Dy. General Manager (PD), in GAIL, who appears to have taken over from M.G. Gohil. It appears that given the stance of GAIL, RGPPL proceeded to take a stance in the matter. Consequently, by email dated 07.10.2010, RGPPL informed GAIL that they had taken a decision at their Board of Directors meeting held on 04.10.2010 to annul the 1st tender. It also indicated in the said communication that by a letter dated 06.10.2010, this decision had also been conveyed to RDS. Since RDS had been disqualified, their EMD was also sought to be returned. GAIL, by this very communication had been asked to re-float a fresh tender. The email of 07.10.2010 was followed by a letter dated 13.10.2010 of RGPPL to GAIL broadly conveying the same information. Consequent thereto, GAIL informed EIL vide letter dated 19.10.2010 to initiate a fresh tender process for construction of breakwater works at the LNG terminal. On 31.12.2010, EIL forwarded the NIT alongwith international competitive bidding (in short "ICB") and the BQC for fresh tender (i.e., the 2nd tender) to GAIL for approval. The tender committee, comprising of the executive director, approved the issuance of the said documents with the amended Clause 8.1.1.1. This document was further approved by the competent authority, i.e, the Director (Marketing). The approval was obtained on 06.01.2011. Based on the above, EIL floated the 2nd tender inquiry on an ICB basis on 12.01.2011. It is this 2nd tender which contains the amended clause 8.1.1.1 which is the cause of grievance in the present writ petition.

SUBMISSION of COUNSELS

22. In the background of the aforesaid facts and circumstances, submissions were made by counsels for parties. The arguments have been addressed before us on behalf of Petitioner/RDS by Mr Jagdeep Dhankar, senior advocate; on behalf of RGPPL by Mr A.S. Chandhiok, Addl. Solicitor General (ASG); on behalf of GAIL by Mr Gourab Banerji, ASG; and on behalf of EIL by Mr Ashok Mathur, Advocate. Ms Indira Jai Singh, learned ASG made submissions on behalf of EIL in support of the application filed, to bring on record the legal opinion, which has been referred to above by us. Mr Neeraj Choudhari, CGSC made submissions on behalf of UOI.

23. Mr Dhankar in his submissions has taken us minutely through those very documents which we have referred hereinabove to show how the owners engineers, GAIL as well as EIL till 11.08.2010 consistently adhered to the stand

that their recommendation to award the contract to RDS did not require any revision. He submitted that the change which was brought about on 01.09.2010 was made with a malafide intention only to oust the Petitioner. The decision in respect of the said change was recommended by Ravi Saxena on behalf of the EIL, who was also the author of the earlier communication dated 11.08.2010, wherein he had conveyed to GAIL and through GAIL to RGPPL that notwithstanding the qualifying work having been executed by the Petitioner in "two phases" under two contracts, the Petitioner was eligible and its recommendations for award of contract to RDS did not require a revision. Mr Dhankar submitted that the action of the Respondent was fraught with malice, arbitrariness and lacked complete fairness, in as much as, the only intent of RGPPL was somehow to get the EIL and GAIL to change their opinion so that RDS was ousted from the work in issue. Having achieved in its design, RGPPL presented this Court with fate accompli when the Petitioner/RDS filed a writ petition bearing No. 8252/2010 to challenge RGPPL's decision of 04.10.2010 by cancelling the 1st tender altogether. The Petitioner/RDS was thus left with no option but to withdraw the petition and take its chance in a fresh round if and when the work were to be awarded. The RDS's apprehension, which is recorded in the court's order dated 14.12.2010, came true, when in the fresh 2nd tender floated by the Respondents, the eligibility criteria contained in Clause 8.1.1.1. in the 1st tender, was significantly changed to ensure its complete exclusion from the race, so to speak. Given the facts and circumstances of the case in this matter, the court could come to no other conclusion but that the Respondents' action were malicious, unfair and contrary to justice and equity. We may only note here that at the request of Mr Dhankar, Mr Chandhiok, learned ASG had accorded an opportunity to the Petitioner to inspect briefly, RGPPL's record in court; based on which Mr Dhankar brought to our notice, a significant fact, which is that on 17.09.2010, RGPPL had received a copy of the completion report dated 09.08.2005 from the concerned authorities i.e., Deputy Chief Engineer-IV, which clearly indicated that the breakwater work (i.e., the qualifying work) at Mus Car Nicobar Island had been constructed and completed. Mr Dhankar submitted that RGPPL, while issuing its communication on 20.09.2010 to GAIL, called upon it to submit its recommendation (and not simply forward that which EIL had given vide its communication dated 01.09.2010) - which ordinarily would have meant that it wanted its independent input on the issue at hand; and therefore, in order to ascertain its view, it ought to give every material it had at hand, including the completion report dated 17.09.2010, if its action were not motivated. Mr Dhankar submitted that otherwise, all this while, RGPPL had been furnishing documents to GAIL to opine on the matter, however, this crucial document had been withheld by RGPPL because by this time, it had already received an opinion which it was so desperately seeking, which was the ouster of RDS.

24. On behalf of GAIL, Mr Gaurab Banerji took us through a series of documents and correspondence which had been exchanged amongst the parties on the aspect pertaining to the qualifying work and its impact on the eligibility of RDS.

Mr Banerji laid special emphasis on the fact that the RDS had made a misrepresentation, in as much as, in its bid document filed in respect of the 1st tender against query No. 6, it had stated that it had executed a breakwater of total length of 500 metres at Mus Car Nicobar Island; the milestone dates being: date of award - November, 2000; commencement of work - November, 2000; the scheduled date of completion - June, 2003; and lastly, the actual date of completion - June, 2003. According to the learned ASG, the said information given in the aforementioned document by RDS had been confirmed against query No. 10 raised in the very same document. Mr Banerji submitted that by way of evidence, the only proof that RDS provided to establish the veracity of the said information concerning qualifying work, was the certificate of the Government of India, Ministry of Shipping, Roadways and Highways dated 05.04.2008. Since the material collected by RGPPL demonstrated that the qualifying work had in fact commenced in 1995, and that it got concluded in 2003, demonstrated that RDS had misrepresented facts which led both GAIL and EIL into believing that the RDS was eligible. Mr Banerji laid stress on the fact that the contract in issue, i.e., the 2nd tender envisaged execution of the work in three (3) years. He submitted that if Petitioner had taken eight (8) years to complete a breakwater of 500 metre length then both the experts, i.e., GAIL and EIL including the owner had the right to review their decision and cancel the contract as under the 2nd tender, a successful bidder would be required to construct a breakwater of 1800 m length in thirty three (33) months. Mr Banerji submitted that, the given the facts and circumstances of the case and the documents on record, it could not be said that Respondents have taken a decision with the malicious intent or, that it was unfair and arbitrary.

25. Mr Mathur, in his brief submissions, dittoed the arguments of Mr Banerji. As indicated above, Mr Mathur had very little to say on the change of opinion of EIL between 11.08.2010 and 01.09.2010. The reason for the opinion; which is also noticed by us above, was the opinion obtained from the legal department of EIL.

26. Mr Chandhiok, learned ASG appearing for the RGPPL argued that under Clause 28.1 of the IFB read with Clause 19, RGPPL as the owner was entitled to cancel the 1st tender. Mr Chandhiok submitted that under Clause 9 of the ITB the owner was entitled to seek additional information from the bidders. It was his case that this information was sought from time to time from RDS through the aegis of owners' engineers, who in turn prevailed upon EIL to seek this information. Despite, several communications beginning from March, 2010, the said information was not made available by RDS. RGPPL had to obtain the information from various sources, including the RTI route. It was the information which RGPPL had gathered, i.e., the CAG Report, and the information available on the website of Andaman Harbour Works, which gave a clue to the fact that RDS had neither constructed entire 500 metres of the qualifying work, purportedly executed at Mus Car Nicobar Island, nor had it been executed under one single contract in a single phase, as was the requirement of Clause 8.1.1.1 of the 1st tender. It was Mr Chandhiok's submission that, given this

misrepresentation, RGPPL as the owner, in public interest, was entitled to cancel the 1st tender. Mr Chandhiok raised certain issues on the "maintainability" of the reliefs sought in the writ petition. In this regard, Mr Chandhiok drew our attention to the reliefs claimed by RDS whereby it sought a direction from this Court to quash the decision taken by RGPPL's board of directors on 04.10.2010, cancelling the 1st tender. Learned ASG submitted that this relief could not be sought by RDS, in the present writ petition, in view of the fact that RDS had withdrawn its earlier writ petition, i.e., WP(C) No. 8252/2010 without seeking liberty to file a fresh writ petition to challenge the very same decision. In order to buttress this submission, Mr Chandhiok submitted that, at best, RDS could seek to challenge the 2nd tender by way of the present writ petition, wherein allegation made is that the Petitioner was wrongfully excluded. It was the ASG's submission that liberty sought and granted by this Court by its order dated 14.12.2010 was of a limited nature. In order to buttress his submission, learned ASG referred to an application bearing No. 13791/2010 dated 07.10.2010, filed by RGPPL, in the writ petition filed by Ranjit Buildcon Ltd. (WP(C) No. 2142/2010). Learned ASG referred to paragraphs 3, 5, 6, 7 and 10 of the said application. Based on the assertion made therein, wherein broadly, it has been stated that RDS had been declared ineligible for failure to meet the qualifying criteria - Mr Chandhiok submitted that a Division Bench (which included one of us i.e., Sanjay Kishan Kaul, J) of this Court had by an order dated 30.11.2010 dismissed the writ petition as withdrawn. Mr Chandhiok submitted that even though the application contained allegations against RDS, (which was impleaded as Respondent No. 2 in the said writ petition), no caveats were entered by RDS when it came up for hearing. For all these reasons, it was Mr Chandhiok's submission that RDS is neither entitled to assail the decision of RGPPL dated 04.10.2010 nor could it seek a writ of mandamus calling upon RGPPL to award the contract in its favour.

27. On behalf of UOI, Mr Neeraj Choudhary adverted to only the averments made in the counter affidavit filed by the UOI.

REASONS

28. Having heard the Learned Counsel for the parties and facts noticed hereinabove, it is quite clear that after RDS was declared as L-1, a concerted attempt was made to oust the RDS. Under the terms of the 1st tender, the job of evaluating the eligibility of the bidders was that of EIL. EIL made its recommendations, as regards techno-commercial qualification of RDS and that of three (3) other bidders, as far back as, 24.12.2009. GAIL, after evaluating EIL's recommendation sought its opinion on the technology that RDS would use for loading out and placement of rock armour. GAIL insisted, that EIL should get the back-up consultant, i.e., Scott Wilson, U.K to opine on the matter. EIL did the needful and forwarded an addendum in that regard generated by Scott Wilson, U.K. to its report on 29.01.2010. This cleared the way for opening the price bid. It is not disputed, as it cannot be, that the price bid under the tender conditions

(i.e., the 1st tender) could only been opened in respect of those bidders who were considered to be techno-commercially qualified. On 10.02.2010, GAIL gave its approval to EIL to open the price bid of the four (4) bidders who had qualified the techno-commercial round. Ranjit Buildcon Ltd., which had been disqualified in the techno commercial round, stood aggrieved in the meanwhile. On 11.02.2010, when price bids were opened, it was undisputedly found that RDS was the lowest bidder at Rs 390 crores (approximately). It is also not in dispute that the difference between the next lowest bidder, which was Afcons Infrastructure, is a sum of Rs 160 crores (approximately). The EIL conveyed its award recommendation to GAIL vide its letter dated 26.02.2010. GAIL in turn forwarded its award recommendation, (after due examination of the award recommendation of EIL) on 08.03.2010. Mr M.B. Gohil, on behalf of GAIL communicated that recommendation. RGPPL, it appears was not happy with this state of affairs. RGPPL raised various queries by its letter dated 22.03.2010; to which we have already made a reference. This was followed by a series of letter dated 09.04.2010, 26.05.2010 and 26.07.2010. In between, RGPPL had obtained a CAG report No. 2/2002. A perusal of RGPPL's record would show that on 14.05.2010 it had written to CAG that it had downloaded its audit report No. 2/2002 with respect to construction of breakwater at Mus Car Nicobar Island and that it be given a certified copy of the same alongwith any additional record with regard to the same. The CAG obliged evidently vide its letter dated 17.05.2010 by forwarding a copy of its report No. 2/2002. What is not known is when did RGPPL for the first time download a copy of the report from the website despite the fact that the matter had been hanging fire since 08.03.2010. More pertinently, these letters are not referred to in the affidavit filed by RGPPL. It evidently, also became wise to the information available on the website of the Andaman Harbour Works, which indicated that the qualifying work at Mus Car Nicobar Island, which the RDS claimed as its experience in executing the instant work, was only of a length ad-measuring 490 metres. GAIL, at the insistence of RGPPL, conveyed this information to EIL. It is pertinent to note that, keeping in mind the information that RGPPL had, it called upon GAIL to obtain the work order issued in respect of breakwater evidently constructed by RDS at Mus Car Nicobar Island. Other queries were also raised (to which we have made a reference above) by RGPPL, in its letter dated 08.06.2010. In the interregnum, RGPPL had also received a letter from the Deputy Chief Engineer - IV, Andaman Harbour Works dated 05.06.2010. This letter of Deputy Chief Engineer - IV Andaman Harbour Works was also forwarded for consideration of the EIL. Sh.R.K. Bhandari, on behalf of EIL, in his letter dated 10.06.2010 remained firm on his stand that the material placed before him, which included CAG's report number 2/2002 as also the letter of the Deputy Chief Engineer -IV, Andaman Harbour Works dated 05.06.2010, did not require a revision in EIL's award recommendation qua RDS. Not being satisfied, RGPPL by a letter dated 15.06.2010 issued a missive to GAIL, in which it inter alia observed therein for the first time (after nearly three (3) months) that its initial recommendation of 08.03.2010 was conditional. GAIL, in the meanwhile, also sought the opinion of

the Attorney General on the issue raised by RGPPL that since work at Mus Nicobar had been awarded to EHL could it be said that RDS had executed the work as, it was only a sub-contractor, and therefore did it come within the ambit of the expression "single bidder". The Attorney General, however, to the misfortune of RGPPL as it would appear, clearly opined that RDS was eligible and fell within the meaning of the expression "single bidder". The rationale broadly given was that even though qualifying work had been awarded to EHL, it did not have the necessary wherewithal, the work having been executed by RDS, it could not be said that it was sub-contractor. It may, however, be pertinent to emphasize the fact that the query put to the learned Attorney General was restricted to whether RDS could be considered a sub-contractor in view of the fact that the works had been awarded by the Government of India to EHL.

28.1 The point to be taken note of is, that even though opinion of the learned Attorney General was sought on 08.06.2010 when the CAG report of 2002/or at least letter dated 05.06.2010 issued Deputy Chief Engineer-IV, Andaman Harbour Works was available, no query was raised about the eligibility of RDS in the context of the fact that the qualifying work had been executed at Mus Car Nicobar Island in two (2) phases under two (2) contracts. The query to the learned AG was confined to whether RDS fit the bill of a "single bidder".

29. RGPPL even at this stage did not let the matter lie. It evidently collected material through the RTI route by making an application in that regard with the Andaman Harbour Works. The information obtained was transmitted to GAIL, under the cover of its letter dated 26.06.2010. EIL once again was called upon to give its recommendation. EIL, by an email dated 11.08.2010, after a critical review, came to the conclusion that, the mere fact that the qualifying work at Mus Car Nicobar Island had been carried out in two (2) phases, it could not be said that RDS was not a single bidder. EIL stuck to its decision that no revision in the award recommendation was necessitated at this stage. Then of course, came the internal meeting of EIL - as to when it was held is not disclosed in the additional affidavit filed. The affidavit does not advert to the fact as to who all participated in this internal meeting. At the internal meeting, the matter was evidently referred to the legal department of EIL. The legal department gave an opinion on 26.08.2010, stating therein that principle of strict construction had to be applied to the contract documents, and on application of the said principle it had to be concluded that RDS had not fulfilled the BQC requirement stipulated in the tender, (i.e. the 1st tender), however, "harsh" or "absurd" such conclusion may be. It was submitted before us that this opinion became the edifice for the change of view that the EIL took on 01.9.2010. We may note at the outset that the opinion is completely converse to the stand taken by the EIL up to 11.08.2010. It is pertinent to note (a fact we were told in the hearing) that the said legal opinion bears the endorsement of Mr. Grover, Director (Projects) calling upon Mr. R.K. Bhandari, General Manager (Project), EIL to simply comply with the view taken by the legal department. As noticed here in above by us, Mr. R.K. Bhandari was the same gentleman, who on 10.06.2010 had opined that no

revision in the award recommendation in favour of RDS was called for. The crucial question which arises, is that, was Mr. R.K. Bhandari given a chance to express his view on the opinion rendered by the legal department. This is a pertinent aspect of matter to our minds since Mr. R.K. Bhandari, followed by Mr. Ravi Saxena, in EIL and, Mr. M.B. Gohil in GAIL, were people who would have dealt with such like contract on a number of occasions. Being experts in their respective fields, they would know what was intended when terms like "single project" and "single bidder" were put in Clause 8.1.1.1. Therefore, for the legal department of EIL to take a contrary, though "absurd" and "harsh" view, required at least a modicum of response from the expert, which was none other than Mr. R.K. Bhandari dealing with the issue till 10.06.2010. Mr. Grover Director (Projects) did not deem it fit to even ask for his comments. Therefore, the integrity of entire process is suspect to say the least. In any event, in our view, the opinion is completely contrary to the plain language of Clause 8.1.1.1. At this juncture we may note the relevant provisions of Clause 8.1.1.1 as they obtained in the 1st tender:

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 400 m 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.

30. A perusal of the clause would show that a bidder, would have to have experience of having successfully completed as a single bidder or as a leader of a consortium at least one project of breakwater of a minimum length of 400 metre located in an off shore location, during the last twenty (20) years to be reckoned from the last date of submission of bids. Plain language of the said clause would show that a project could be executed in different phases. The ordinary meaning of the word "project" would be "planned undertaking or scheme" (See The Concise Oxford Dictionary Ninth Edition, 1995). Therefore, the fact that the qualifying project at Mus Car Nicobar Island was executed by RDS in two (2) phases could not have ousted it. In understanding the meaning of the words and expression used in a contract, courts would ordinarily go by the meaning given to the words by those who administer and operate the contract, unless that meaning is completely at variance with the understanding of a common prudent person. Both the experts, who dealt with the evaluation of the bids, i.e., GAIL and EIL, despite receipt of material in the form of CAG report and the Deputy Chief Engineer-IV, Andaman Harbour Works letter, which indicated that qualifying contract had been executed in two (2) phases, came to the conclusion that RDS was eligible and, therefore, the award recommendation did not require a review. We fail to understand how the legal department could take a view, on this matter, contrary to what the persons, who operate these contracts, understood the expression to mean. In a construction of commercial contract (if one were to

assume for a moment that construction of contract was required to ascertain the intention of parties), the accepted rule is that if semantic and syntactical construction is at variance with the business common sense, then it must yield to business common sense. The observations in *Antaios Cia. Naviera S.A. v. Salen Rederierna A.B.* (1985) A.C. 191 been apposite are extracted below:

While deprecating the extension of the use of the expression "purposive construction" from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators' award and I take this opportunity of restating that, if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

30.1 The purpose of construction has been described felicitously by Lloyd L.J. in *The Sounion* (1987) 1 Lloyd's Re. 230 as follows: "Designed to separate the purposive sheep from the literalist goats."

30.2 We may note at this stage that we 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 metres. 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 now 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. Chandhiok appearing on behalf of RGPPL took the stand that RDS had not even constructed the required minimum 400 metres length of the qualifying work. We may also point out at this stage the stand of the UOI in its affidavit. UOI has categorically supported its certificate dated 05.04.2008 and the clarification issued on 05.06.2010 by the Deputy Chief Engineer-IV, Andaman Harbour Works. Therefore, this argument of RGPPL cannot be accepted.

31. The submission made on behalf of the Respondents, in one form or the other, that there had been a misrepresentation by RDS, in as much as, in the bid document it had disclosed that the qualifying work had commenced in 2000 and was completed in 2003, was put by us to Mr Dhankar. Mr Dhankar informed us that the RDS somehow misconstrued the information sought in the bid document. On being queried as to why RDS had withheld the work order, Mr Dhankar submitted that since most of the records of the Andaman Harbour Works had got swept in the tsunami of the December, 2004, it had become difficult to recoup the work order. Mr Dhankar submitted that, nevertheless, the said information was available with the Respondents by July, 2010 and, therefore, they had every opportunity to examine the effect of the same prior to issuance of recommendation dated 11.08.2010.

32. Having examined the matter closely, we got a distinct impression that RGPPL was somehow attempting to find a way around the recommendation issued by GAIL and EIL. Even though the information given against the query No. 6 of the bid document filed by RDS was not completely accurate, it did appear to us that RGPPL had with it the information that the qualifying work at Mus Car Nicobar Island had commenced in 1995 and that it was awarded in two (2) phases, under two (2) separate contracts. This distinct impression we get as the information with regard to the fact that the qualifying work had been executed in two (2) phases was available in the CAG report of 2/2002. Some part of the information was also available on the website of the Andaman Harbour Works. Therefore, whether the information given against query No. 6 in the tender documents actually misled RGPPL is, in the facts and circumstances obtaining in the case, difficult to believe. Notwithstanding this, the said information lost its materiality in view of the fact that, the said information was sought to be used by RGPPL only to say that RDS was not eligible as the qualifying work had been executed in two (2) phases. The aspect pertaining to the time taken in the execution of the qualifying the work; was a factor which did not even figure in the mind of the Evaluator i.e., EIL on 01.09.2010; though Mr. Banerjee true to his craft had attempted to make this an issue. The fact remains, that despite this information being available, on review and examination at length, both GAIL and EIL came to the conclusion that their initial recommendation of 08.03.2010 did not require a revision. Therefore, for the EIL to have turned turtle, so to say, on 01.09.2010, based on a legal opinion generated by its legal department, belies credibility to say the least. What is interesting, is that, even though GAIL, up to a point took the stand that in respect of all recommendations qua award of contract for DPP; RGPPL would have to rely upon on it - it collapsed under the weight of RGPPL or perhaps threw up its hands in complete frustration, as it appears after 11.08.2010. This is evident from the fact that after the EIL's u-turn on 01.09.2010, GAIL refused to give its own view in the matter, which it was required to do under the terms and conditions of the tender. RGPPL sought its recommendation by its letter dated 20.09.2010, despite which, GAIL refused to do so, as is evident from its return communication dated 22.09.2010, wherein it called upon RGPPL to take the decision in its capacity as the owner in view of the fact that the entire material was available with it. We have no doubt in our minds that in this background, the decision taken at the Board of Directors' meeting of RGPPL on 04.10.2010 was pregnant with malice, and that it had been taken for considerations other than those which are in accord with good conscious, equity and fairness. The new Clause (which is the amended version of Clause 8.1.1.1 obtaining in the 1st tender) was undoubtedly introduced in the fresh tender, (i.e., the 2nd tender), to completely oust RDS. For the sake of convenience the amended clause is extracted herein below:

8.1.1.1 The bidder must have completed in a single contract, as a single bidder or as a leader of a consortium, at least one breakwater (using marine spread - refer Note 1) of minimum length of 400 m located in sea during the last 20

(twenty) years to be reckoned from the last date of submission of bids. The scope of work of the above referred qualifying job should comprise of design, engineering, construction and project management of the breakwater. Land connected breakwater having a minimum length of 400m located in sea is also acceptable provided construction has been carried out using marine spread as mentioned above.

33. A bare perusal would show that the Respondents have called for bids only for those bidders who have completed in a single contract as a single bidder or as a leader of a consortium/ joint venture one project of a breakwater, located in sea, of minimum length of 400 metre during the last twenty (20) years to be reckoned from the last date of submission of bids. At the end of this amended clause, there is also the insertion of the following provision "...Land connected breakwater having a minimum length of 400 metre located in sea is also acceptable provided construction has been carried out using marine spread...".

33.1 The Respondents know-fully well that RDS can never apply or be found eligible in respect of the 2nd tender as: the qualifying work which RDS had executed, is a subject matter of two (2) contracts and not a single contract; and that project was an offshore project as against one located in sea. The additional provision of a land connected breakwater which was not an option available in the 1st tender is, according to RDS, deliberately inserted to accommodate bidders who missed the bus, so to speak, in the first round. Since there is no material in respect of the last part, we are not impressed by the same but it is definitely apparent to us that the words "single contract" as also that the "qualifying work should be located in sea", have been introduced in the facts and circumstances of the case to exclude RDS. This is a clear case of malice in law which occurs when a person or an entity commits a wrongful act intentionally without just cause or reason. The following observations of Viscount Haldane in *Shearer v. Shield* (1914) AC 808 have been cited with approval in *West Bengal State Electricity Board v. Dilip Kumar Ray* (2007) 14 SCC 568, para 19 at page 582:

... "A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently.

33.2 It is quite apparent that RGPPL exercised its power solely with the object of achieving a pre-meditated object to the detriment of the aggrieved party, i.e., the RDS. The action of RGPPL was thus geared to achieve an "authorized purpose" which in our view could be construed as malice in law (see *R.S. Garg Vs. State of U.P. and Others*,). That malice in law is an incident or "dimension" of fair play in action; is now well established (see *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*,).

34. Mr Chandhiok's submission that RDS could not lay a challenge to the decision of the Board of Directors of RGPPL dated 04.10.2010 based on a fact that RDS had withdrawn its writ petition (WP(C) 8252/2010) without liberty to file a fresh writ petition is, according to us, completely misconceived and untenable. The reason for that is simply the fact that the court did not adjudicate upon the issues raised in the said writ petition. It would be important to note that prior to the said writ petition being filed by RDS, one Ranjit Buildcon Ltd. had filed a writ petition No. 2142/2010, in which, RGPPL had filed an application, wherein broadly, it had been averred that the RDS had been declared ineligible in respect of the 1st tender for its failure to meet the qualifying criteria. The said writ petition of Ranjit Buildcon Ltd. was dismissed as withdrawn. RDS was impleaded as a Respondent in this writ petition.

34.1 RDS could have said very little in the matter, the petition being of Ranjit Buildcon Ltd.. It is for this reason perhaps, that RDS instituted a separate and independent writ petition being No. 8252/2010 seeking to challenge essentially the decision of the board of directors of RGPPL dated 04.10.2010. When it was put to the Learned Counsel for RDS that nothing would survive since the tender by itself had been cancelled by RGPPL in exercise of its powers under Article 28.1 of the said tender, it withdrew the writ petition with the caveat that if a fresh tender is floated by RGPPL, it ought to have liberty to have recourse to an appropriate legal remedy, in accordance with law, to challenge such a tender if it sought to exclude the RDS. Said liberty was granted by the court in the order dated 14.12.2010.

34.2 In view of these factors it could hardly be contended by RGPPL that while seeking to challenge the amended Clause 8.1.1.1 (now inserted in the 2nd tender) that RDS could not demonstrate that the decision arrived at by RGPPL's board of directors on 04.10.2010 is fraught with malice in law and was otherwise contrary to the principles of fairness, equity and good conscience. The submissions of Mr Chandhiok on this count, in our view, are also without merit.

35. Given the aforesaid, in our view, we have no hesitation in moulding prayer (A) in the writ petition and declaring that the amended Clause 8.1.1.1 (inserted in the 2nd tender) in the given facts and circumstances of this case is bad in law. Similarly, for the reasons given above, we quash the decision taken by the RGPPL in its board of directors' meeting held on 04.10.2010, whereby the bid of RDS in the 1st tender was rejected and the bidding process in the 1st tender was annulled. This would really mean that RGPPL would have to revisit the issue in the light of observations made by us hereinabove. It would, while doing so, bear in mind the fact that the GAIL has not given its opinion in the matter - which it is required to render, given the fact that it is the owner's engineer.

36. This brings us to the last relief sought in the writ petition seeking a direction against RGPPL to formalize award of contract in favour of RDS in respect of DPP. We are afraid that we cannot grant this relief for the reason that over the years the courts have demarcated certain boundaries for itself which includes not

issuing directions to the States and its instrumentalities to award contracts in favour of one or the other party, however, aggrieved that party may be. It appears to us this may at times seem frustrating to a litigant. At the end of day the litigant wants, and rightly so, the fruits of litigation. It is no relief to the Petitioner to get, in a manner of speaking, a certificate from the court that the actions of the Respondents are illegal or invalid in law, but then being told that an appropriate direction to do justice in the matter would flow finally from the Respondent state. It appears to us the reason and the rationale for this is that the State and its instrumentalities at the end of the day, it is believed have the interest of the republic in mind. It is believed that having erred, once the State would correct its course. The State or its instrumentalities cannot but act in the interest of the republic. Whether they do so or not is ordinarily left to those who govern them. We say no more but leave it to the conscious of the superior officers and the members of the Board of Directors" of the Respondents, i.e., RGPPL, GAIL and EIL to take a decision in accordance with fairness, equity and justice keeping the interest of the State in mind. While taking the said decision, it would be wise to revisit the entire issue including the fact that the RDS has offered a price which is Rs 160 crores less than that of Afcons Infrastructure (i.e., L-2); and that despite queries being raised that this was below the estimated cost of Rs 662 crores, both experts in the field had granted its approval to the bid of RDS.

37. Before we part, we may also observe that we had directed both parties to file their respective bill of cost. The bill of costs filed on behalf of the RDS suggests that they have incurred on counsels' fee a sum of Rs. 33,22,000/-. Since RDS has succeeded to a large extent, we direct payment of 3/4th of the costs in its favour. The three Respondents, i.e., RGPPL, GAIL and EIL shall pay a sum of Rs. 24,91,500/- to RDS by way of cost in equal proportion. With the aforesaid observations the petition is disposed of.