
(2010) 12 SHI CK 0004
In the High Court Of Himachal Pradesh
Case No : L.P.A. No. 31 of 2010

State of Himachal Pradesh and Another	APPELLANT
Vs	
Gamon India Ltd. and Others	RESPONDENT

Date of Decision : 15-12-2010

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2011) 1 ShimLC 354

Hon'ble Judges : V.K. Sharma, J; R.B. Misra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.B. Misra, J.—The present Letters Patent Appeal has been preferred against the judgment dated 5.1.2010, passed by learned Single Judge in CWP No. 2838 of 2008 (Gammon India Limited and others v. State of Himachal Pradesh and others) whereby learned Single Judge has been pleased to set aside order dated 16.9.2008 canceling the "Tidong-II (60 MW) Hydro Electric Project", in District Kinnaur, by the Principal Secretary (Power), State of Himachal Pradesh and setting aside subsequent allotment order dated 24.10.2008 of the above project in favour of H.P. Power Corporation Ltd.

2. The State of Himachal Pradesh invited global bids vide advertisement dated 30.10.2005 for execution of Tidong-II (60 MW) Hydro-electric Project. The bid was allocated to M/s. Torrent & Gammon Power AEC Ltd. Mumbai. The offer letter was issued in favour of Gammon India Limited and Torrent Power Limited i.e. respondents No. 1 and 2 on 9.4.2007, upon showing their willingness to sign the Memorandum of Understanding (in short "MOU") on 21st April, 2007, they were informed on 24th April, 2007 by the Principal Secretary (Power) to sign MOU. In the meantime, respondent No. 1 asked the Principal Secretary (Power) to allow it to make all arrangements including payment of upfront premium, corporate approvals etc. and the Principal Secretary (Power) informed respondents No. 1 and 2 that the MOU would be signed on 21st May, 2007 at 11 A.M. Principal

Secretary (Power) also informed petitioner No. 1 that the "MOU" will be signed by the Managing Director respondent No. 1 only on any working day after 25th June, 2007 and respondent No. 1 vide its letter dated 3rd August, 2007 sent a demand draft of Rs. 60,00,000/- in favour of Principal Secretary (Power), Government of Himachal Pradesh. The respondents No. 1 and 2, in the meantime, had also incorporated new special purpose vehicle (company) on 21st August, 2007 in the name and style of "Tidong Hydel Power Limited" and representation dated 24th September, 2007 was made on their behalf asking the State Government for fixing the date for signing "MOU", so much so, respondents No. 1 and 2 filed writ petition No. 23 of 2008 in this Court, which, however, was withdrawn subsequently. A show-cause notice dated 28th February, 2008 was issued, which was responded by respondents No. 1 and 2 and in the meantime. Cabinet of State of Himachal Pradesh took a decision on 8th August, 2008 to cancel the allotment of project made in favour of respondents No. 1 and 2 and in that sequence, cancellation order dated 16th September, 2008 was passed and on 24th October, 2010 work was allotted in favour of H.P. Power Corporation Ltd.

3. Being aggrieved, respondents No. 1 and 2 preferred CWP No. 2838 of 2008 (titled Gammon India Limited and others v. State of Himachal Pradesh and others) mainly with the following prayers:-

(i) Issuance of writ of mandamus or any other appropriate writ or direction setting aside the order passed on 16.9.2008 canceling the allotment of the Tidong (ii) HEP (60 MW) Project;

(ii) Writ of mandamus or any other appropriate writ or direction directing the State and its authorities to cancel the allotment order dated 24.10.2008 allotting the Tidong II (60 MW) HEP in favour of H.P. Power Corporation Ltd.

(iii) Issuance of writ of mandamus or any other appropriate writ or direction directing that the decision taken by the Cabinet on 8.8.2008 may be set aside;

4. The submissions advanced on behalf of the writ petitioners before learned Single Judge, were that the action of the Department of MPP & Power, Government of Himachal Pradesh, not signing the "MOLT and cancellation of the allotment in favour of respondents No. 1 and 2 herein on 16th September, 2008 was illegal, arbitrary, discriminatory and violative of Article 14 of the Constitution of India and de-hors the principles of natural justice and issuance of show-cause notice dated 28th February, 2008 was only a ritualistic formality and post decisional hearing afforded to respondents No. 1 and 2 herein was contrary to law as respondents No. 1 and 2 herein had participated in the bid process by forming a consortium and had also constituted a new special purpose vehicle on 21st August, 2007, so much so, the special purpose vehicle was only to be incorporated after signing of "MOLT, as such, it was not open to the appellant State herein, to straightway make allotment of the said project in favour of H.P. Power Corporation Ltd. on 24th October, 2008, moreso, when the latter one has

not made large scale investment in sequence to the allotment order in its favour.

5. Endeavour was made on behalf of the State to controvert the above submissions advanced on behalf of respondents No. 1 and 2 herein by stating that respondents No. 1 and 2 herein have failed to sign "MOU" and the complaint received from H.P. Power Corporation Ltd. was looked into before issuance of cancellation order dated 16th September, 2008 in question, respondents No. 1 and 2 were heard and they have also failed to form a special purpose vehicle. After taking into consideration the pleadings of the writ petitioners and the rival contentions of the appellants/State herein, learned Single Judge allowed CWP No. 2838 of 2008 in favour of respondents No. 1 and 2 herein. It is relevant to extract contents of the notice dated 28th February, 2008 as below:-

12. Now, therefore, in view of the mentioned position, the State Government is left with no option but to cancel the allotment for development of Tidong-II (60 MW) HEP on BOOT basis made by you vide this office letter dated 9th April, 2007. However, before this order of cancellation is made, you are hereby given this opportunity to show cause why the allotment in your favour-should not be cancelled. Your reply in the matter should reach this office within a period of 15 days from the issue of this notice failing which it shall be presumed that you have nothing to say in the matter and action deemed fit in the facts and circumstances of the case shall be taken by the Government.

6. From the above said notice, it appears that status of respondents No. 1 and 2 herein was within the knowledge of Principal Secretary (Power), State of Himachal Pradesh and it appears the State Government has already made up its mind and has taken decision to cancel the allotment of Tidong-II (60 MW) HEP and in the garb of such decision, respondents No. 1 and 2 were given opportunity to show-cause why the allotment be not cancelled. It appears the post decisional hearing was intended to be given and not the pre-decisional hearing and the Principal Secretary (Power) has also not taken into consideration the response dated 12th March, 2008 of respondents No. 1 and 2 in reference to show-cause notice. It also appears that in reference to reply dated 12th March, 2008 of respondents No. 1 and 2, the Cabinet of the State of Himachal Pradesh has taken decision on 8th August, 2008 and has decided the matter against respondents No. 1 and 2. However, in sequence to such decision dated 8th August, 2008, the Principal Secretary (Power) on 16th September, 2008 cancelled the allotment of Tidong-II (60 MW) HEP made in favour of respondents No. 1 and 2 with immediate effect mainly on the following aspects:-

Firstly, that the respondents No. 1 and 2 have failed to form special purpose vehicle for the execution of the project; secondly, the "MOU" with the Government of Himachal Pradesh was not signed by the parties and thirdly, reply dated 12th March, 2008 to show-cause notice dated 28th February, 2008 was filed by Gammon India and Torrent India and not by Torrent & Gammon Power AEC, Ltd.

7. On perusal of the pleadings and the materials on record, we notice that after taking into consideration the financial and technical bids, the allotment letter was issued on 9th April, 2007 in favour of respondents No. 1 and 2 and State Authorities knew throughout that respondents No. 1 and 2 have formed joint consortium and respondents No. 1 and 2 have also incorporated a special purpose vehicle (company) on 21st August, 2007 in the name and style of Tidong-II, Hydel Electric Project and before issuance of show-cause notice dated 28th February, 2008, it appears that the State of Himachal Pradesh has already made up its mind and the State Authorities had not taken into consideration the full text of the reply of respondents No. 1 and 2 and has passed the cancellation order dated 16th September, 2008 in question in reference to the Cabinet decision dated 8th August, 2008. The grounds taken in response to the show-cause notice have also not fully been dealt with by the Principal Secretary (Power), State of Himachal Pradesh while canceling the allotment order dated 16th September, 2008 and subsequent allotment in favour of H.P. Power Corporation Ltd. vide order dated 24th October, 2008 was made hastily, whereas, H.P. Power Corporation Ltd. has also not invested heavily towards the implementation of the project.

8. We have carefully gone through the contents of the writ petition, pleadings and the rival contentions of the parties and have also perused the impugned judgment of the learned Single Judge. In our considered view, respondents No. 1 and 2 have participated in the entire bidding process as consortium and the allotment letter has been made in their favour on 7th April, 2009 and it was throughout in the knowledge of the State of Himachal Pradesh that the allotment of the project was in favour of respondents No. 1 and 2 and the correspondences were being made in favour of respondent No. 1 as it was the leading partner and there was lapse on the part of the State Government to sign the "MOU" with the respondents No. 1 and 2 and unnecessary deferments were made. The correspondences for fixing the date of signing the MOU were exchanged between the Principal Secretary (Power) and respondent No. 1. Respondents No. 1 and 2 had even shown their willingness to sign the "MOU" as per the contents of correspondences exchanged between the two. The respondents No. 1 and 2 have also sent a demand draft of Rs. 60 lacs as payment of upfront premium along with letter dated 3rd August, 2008. The special purpose vehicle (company) was to be incorporated after signing the "MOU" and it has also come on record that a separate special purpose vehicle (company) was incorporated on 21st August, 2007 itself.

9. In our considered view the respondents No. 1 and 2 ought to have been given pre-decisional hearing instead of post-decisional hearing. There is apparent violation of principle of natural justice in passing the cancellation order dated 16th September, 2008 in sequence to the earlier decision of the Cabinet dated 8th August, 2008 canceling the allotment of project in favour of respondents No. 1 and 2 herein. The Principal Secretary (Power) has not taken into consideration the complete response of respondents No. 1 and 2 in reference to the show-

cause notice. No equity could be said to have arisen consequent upon the allotment of the project in favour of H.P. Power Corporation Ltd. subsequently as the allotment in its favour has not been properly made for the reason that cancellation in favour of respondents No. 1 and 2 was not legally justifiable. The learned Single Judge has rightly arrived at the conclusion that the order of cancellation dated 16th September, 2008 is hit by the principles of natural justice and subsequent allotment order is not legal.

10. In the facts and circumstances, there is no scope for any interference in the impugned judgment dated 5th January, 2010 passed by the learned Single Judge in CWP No. 2838 of 2008, as such, the present letters patent appeal, being devoid of any merit, is dismissed.