

Tamilnadu Generation And Distribution ... vs Csepdi - Trishe Consortium, Rep. By Its ... on 18 October, 2016

Equivalent citations: AIR 2016 SUPREME COURT 4879, 2017 (4) SCC 318, (2017) 172 ALLINDCAS 13 (SC), (2016) 10 SCALE 69, (2017) 2 MAD LW 581, AIR 2017 SC (CIVIL) 119

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Bench: Shiva Kirti Singh, Dipak Misra

Reportable

SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10182-10183 OF 2016

(@ SLP(C) Nos. 28959-28960 of 2015)

Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) Rep. By
Its Chairman & Managing Director
and Anr. Etc. ...Appellant(s)

Versus

CSEPD I – Trishe Consortium, Rep. By its Managing Director & Anr. ...Respondent(s)

WITH

CIVIL APPEAL NOS. 10184-10185 OF 2016

(@ SLP Nos. 30098-30099 of 2015)

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. The appellant, Tamil Nadu Generation and Distribution Corporation Ltd (for short ‘the Corporation’) vide notification dated 06.05.2013 floated a tender for setting up of two units of 660 MW Ennore SEZ Supercritical Thermal Power Project at Ash Dyke of NCTPS, Chennai wherein four bidders including the respondents herein participated. However, two bidders out of four were disqualified as they failed to meet the Bid Qualification Requirements (BQR) as a result of which bids of Consortium of Trishe Energy Infrastructure Services Private Limited (CSEPD I) and Bharat Heavy Electrical Ltd (BHEL) were taken up for consideration. Prior to the opening of the price bid,

CSEPDI and BHEL submitted supplementary price bids on 05.02.2014. Price bids were opened on 05.02.2014 by the appellant in the presence of the representatives of the respondents, the qualified bidders.

3. The uncurtaining of facts would depict that the 1st respondent sent series of representations dated 16.06.2014, 17.06.2014, 01.07.2014 and 08.07.2014 to the appellant highlighting various aspects of the bid and the relevance of para (viii) of Clause 29.0 of the “Instructions to Bidders” (ITB) which also deals with the rejection of bids of the tenderer whose past performance/vendor rating is not satisfactory. Since the appellant paid no heed to the request made by the respondent No.1, it filed W.P. No. 19247 of 2014 seeking issue of a writ of mandamus to direct the appellant to consider the representations and comply with Tamil Nadu Transparency In Tenders Act, 1998 (for short, “the TTIT Act”). An undertaking was given before the learned Single Judge by the learned Advocate General that post- bid representations submitted by the respondent No.1 will be duly considered while finalizing the tenders and appropriate orders will be passed in accordance with the tender specifications and the TTIT Act and rules framed thereunder and in terms of the said undertaking, learned Single Judge vide order dated 31.07.2014 directed the appellant to consider and pass orders on the representations of the appellant herein after affording them an opportunity of personal hearing and directed that till such orders are passed, the tender should not be finalised.

4. Being aggrieved by the said order, the appellant filed writ appeal W.A. No. 1065 of 2014 before the Division Bench which, by judgment and order dated 19.08.2014, disposed of the writ appeal by modifying the order of the learned Single Judge only to the extent that affording of opportunity of personal hearing to the person was impermissible having not contemplated under the Rules (for short, “the rules”) and further permitted the respondent No.1 to submit additional documents raising all its objections and the appellant was directed to pass an order and communicate the same to the respondents, CSEPDI and BHEL. However, the Division Bench did not modify the direction of the learned Single Judge which was to the effect that till a decision was taken on representations of the 1st respondent, the bid shall not be finalised.

5. After the disposal of the writ appeal, the respondent No.1 sent its representation on 25.08.2014 along with necessary documents which was rejected by the appellant vide its communication dated 27.09.2014. The legal propriety of the said rejection was called in question by way of writ petition W.P. No. 26762 of 2014 seeking quashment of the same and further restraining the owner from taking steps to finalise the tender. During the hearing of the writ petition, a copy of letter dated 27.09.2014 awarding the contract to BHEL, respondent No. 2 herein, was brought on record. It was mentioned therein with regard to price negotiation meetings with the respondent No. 2. The respondent No. 1 sent a letter dated 1.10.2014 to the appellant, highlighting the arbitrariness, anomalies and inconsistencies in its reasoning and the mala-fide intent in the matter of evaluation of the bid submitted by it. However, the appellant by letter dated 10.10.2014, informed the 1st respondent that the subject tender had been finalised and awarded to BHEL.

6. The letter dated 27.9.2014 awarding the contract to respondent No. 2 and letter dated 10.10.2014 were assailed by the respondent No.1 by filing W.P. No. 27529 of 2014 for annulments of the letters and further for issue of directions to the Corporation to determine the award of the tender strictly in

terms of the Tender/Bid document and taking into account the bid of respondent No.1 and that of BHEL, the respondent No.2 herein.

7. The learned Single Judge dismissed the writ petition primarily based on the perusal of notes in the files containing the Consultant Report dated 30.05.2014 and on that basis opined that the conduct of process of evaluation of the tenders did not appear to be arbitrary, capricious or unfair; and that price bids of the bidders had been evaluated as per the parameters indicated in the tender notification by an independent consultant who was selected as per the Board Resolution that was within the knowledge of both the bidders. The reasoning of the learned Single Judge basically hinged on the Consultant's Report that had determined that the respondent No.2 herein was L1 and, therefore, the decision of the Corporation in treating BHEL as L1 and awarding the contract was neither arbitrary nor malafide.

8. Aggrieved by the order of the learned Single Judge, the respondent No.1 preferred writ appeals before the Division Bench. The Division Bench took note of the various pleas raised by the respondent No.1 including violation of the statutory provisions, arbitrariness, adoption of unfair and non-transparent procedure, erroneous delineation of the consultant's report by the learned Single Judge and non-consideration of public interest.

9. The Corporation, in its turn, contended before the Division Bench that there was no violation of procedure and the award of the contract was not amenable to judicial review in the obtaining factual matrix and any interference would only delay the execution of the work. It was also urged that Tender Accepting Authority (TAA) had accepted the lowest tender and negotiations were held only with lowest bidder; that Clause 25.4 of the Instruction to Bidders did not permit the bidder to change the substance of the bids after the bids were opened; that though the respondent No.1 had offered lower rate on interest, the original interest rate offered was not in accordance with tender terms, for as per clause 14.0(d)(5) the rate of interest quoted should be fixed, whereas the CSEPD I had not specified the fixed rate of interest; that there was no perversity or arbitrariness in the decision taken as per the terms of the tender, prevalent banking practice and the Term Sheet given by the lender; that the Consultant was appointed pursuant to the Board Resolution dated 28.01.2012 who participated in all pre-bid and post-bid meetings and the minutes had been signed by all the parties and the consultant and, therefore, CSEPD I was very much aware of appointment of the consultant and the role played by consultant could neither be criticised nor ignored.

10. The 2nd Respondent herein contended that respondent No.1 lacked credibility to make any allegation against it; that design was the core area of leader of the consortium and they have no experience in India insofar as supercritical Thermal Power Projects are concerned; and that the work was under progress and they had expended substantial amount.

11. After hearing the rival contentions, the Division Bench placed reliance on Jagdish Mandal v. State of Orissa[1] and observed that the approach of the owner was unfair in the tendering process. It further analysed the scheme of Section 10 of the TTIT Act and held that the Tender Accepting Authority (TAA) has a role to cause objective evaluation of the tenders. Referring to Section 10(6) of the TTIT Act, it held that the Corporation had not complied with the said provision and it was a case

of procedural impropriety, unfair approach and arbitrariness. The appellate Bench referred to the authority in *Star Enterprises v. City and Industrial Development Corporation of Maharashtra Ltd.*[2] and declined to accept the stand of the Corporation by opining that reasons for rejection of 1st respondent's representations could not be treated as reasons for rejection of its bid and hence, the decision making process was flawed and in breach of Section 10(7) of the Act. It further held that in the "Tender Bulletin", absence of reasons for acceptance of tender, no statement of evaluation of tenders and no comparative statement of tenders received and, decision thereon was in clear violation of the requirements of Section 6(1) read with Section 10 of the TTIT Act and Rule 30(3) of the TTIT Rules. On the interest component and commitment fee, the Division Bench held that the approach was wholly arbitrary and the intention was to oust the respondent No.1, for the evaluation process adopted was meant to suit one and reject the other. It further held that the process adopted and the decision taken by the owner was arbitrary, unfair, irrational, biased and mala fide and did not serve the larger public interest. In view of the said analysis, the Division Bench allowed the appeals and directed the Corporation to evaluate the price bid of the respondents in the light of its findings and taking into consideration all relevant parameters including the representations/documents submitted by respondent No. 1 and to record detailed reasons for the decision and communicate the same to the respondent No.1 so as to comply with the requirement of the provisions of the TTIT Act and TTIT Rules and various decisions of this Court.

12. Being aggrieved by the aforesaid judgment, the corporation and the successful bidder, by way of special leave, have preferred separate appeals.

13. We have heard Mr. Mukul Rohatgi, learned Attorney General and Mr. Parag P. Tripathi, learned senior counsel for the appellant-BHEL and Mr. Subramonium Prasad, learned senior counsel for the appellant-Corporation, and Mr. Kapil Sibal, learned senior counsel for respondent No.1 and Mr. Sriram Panchu, learned senior counsel for the respondent No. 2.

14. It is apposite to note that in course of hearing it has been opined that the singular issue that is required to be addressed is "whether the Evaluation Report dated 30th May, 2014 by the Consultant, is prima facie erroneous, requiring interference within the parameters of judicial review". Such a singular point was required to be focused as Mr. Mukul Rohatgi, learned Attorney General appearing for BHEL and Mr. Subramonium Prasad learned senior counsel appearing for the Corporation had submitted as the subsequent offers either by BHEL or by the 1st respondent need not be considered. At that juncture, Mr. Kapil Sibal learned senior counsel appearing for the 1st respondent, the contesting party, had submitted that the Consultant's Report would graphically exposit that the respondent No.1 was entitled to be declared as L-1 even if it is scrutinized within the limited parameters of the judicial review. The Court had directed for handing over the Consultant's Report to the learned counsel appearing for the 1st respondent. In view of the aforesaid submission, the opinion expressed on other issues by the learned Single Judge or by the Division Bench need not be adverted to.

15. On a perusal of the facts brought on record, it is manifest that the Corporation in its meeting held on 30.1.2014 had decided to open the price bids on both the bidders and thereafter the supplementary price bids were obtained from both the parties for the additional implications items

in respect of technical deviation quoted by both parties and thereafter the price bids were opened on 05.2.2014. As the factual matrix would reveal, the price bids were evaluated by the Consultant. The learned Single Judge has adverted to price evaluation report submitted by the Consultant. Certain paragraphs from the report of the Consultant that were reproduced by him are as follows:-

“4.0 Evaluation 4.1 BHEL BHEL has arranged finance from M/s. Power Finance Corporation of India.

They are arranged to finance 75% of the total cost as debt at an interest rate of 12.25% p.a. Attached Annexures 1 to 5 indicate the methodology adopted in calculating the various components required for evaluation like IDC-Debt, IDC-Equity, IDC-UF Fess, Debt Repayment Schedule etc. 4.2 CSEPD - TRISHE CSEPD-TRISHE has arranged finance from M/s. ICBC, China.

They have arranged a finance 85% of the total cost as debt at an interest rate of 7.2% p.a. Attached Annexures 6 to 12 indicate the methodology adopted in calculating the various components required for evaluation like IDC-Debt, IDC-Equity, IDC-UF Fess, Debt Repayment Schedule etc. 5.0 Evaluated Lower Cost | | | | BHEL | CSEPD-TRISH | | | | E | | | | All figures | All figures | | | | in Rs. | in Rs. | | | | (Crores) | (Crores) | | Capacity | 1320 MW | 1320 MW | | A | Total EPC cost | 7762.977 | 9207.264 | | excluding VAT | | | | B | EPC Debt | 75% | 5822.233 | 7826.174 | | C | EPC Equity | 25% | 1940.744 | 1381.090 | | D | IDC Debt | 12.25% | 1295.079 | 1228.378 | | E | EPC Debt | 7117.311 | 9054.552 | | Including IDC | | | | (B + D) | | | | F | Upfront Fees | 8.925 | 801.180 | | Including | | | | Interest | | | | G | Total Debt (E +) | 7126.237 | 9855.732 | | (F) | | | | H | Interest on | 14% | 509.597 | 456.606 | | Equity | | | | I | Total Equity (C | 2450.341 | 1837.695 | | + H) | | | | J | Total Project | 9576.578 | 11693.427 | | Cost (G + I) | | | | K | Total Cost per | 7.255 | 8.859 | | MW | | | | L | PV – Debt | 7553.364 | 8464.318 | | M | PV – Equity | 2809.403 | 2106.984 | | N | Total PV | 10362.767 | 10271.302 | | O | PV Cost per MW | 7.851 | 7.781 | | P | Loading for | 10.287 | 173.229 | | Deficiency | | | | Q | Total (N+P) | 10373.054 | 10444.531 | | R | Evaluated Bid | 7.858 | 7.913 | | Price per MW | | | | Paragraphs 4.0 and 5.0 of the “Price Evaluation Report” submitted by the Consultant, which I have extracted above, show that the Consultant took into account only the interest rate of 12.25% per annum for the debt component arranged by BHEL from the Power Finance Corporation of India. The Consultant did not take note of the reduced rate namely 12.15, subsequently offered by BHEL, for arriving at the conclusion that the “Evaluated Bid Price” of BHEL was the lowest.”

16. There is no dispute that as per the Price Evaluation Report by the Consultant, the EPC price of the respondent No. 1 was Rs.9207.264 crores and respondent No.2 to whom the contract was awarded was Rs.7762.977 crores. Thus, the difference between the two EPC price is Rs.1444.287 crores. The 1st respondent disputed the Price Evaluation Report by the Consultant on the ground that it wrongly loaded the sum towards (a) the commitment fee, (b) interest on management fee during IDC period; and (c) interest of guarantee fee during IDC period in its bid amount which had led to the evaluation of quoted financial charges with interest to Rs.801.18 crores.

17. As regards the commitment fee, learned counsel for the appellant submits that the contention of the respondent No.1 that since commitment fee was the fee to be charged on the unutilised amount

of the loan meaning thereby if the appellant failed to draw the loan amount as undertaken, then only the commitment fee would be charged and, therefore, the determination after addition of the same was without any rationale as the respondent No.1 had quoted in the 'Calculation Sheet for Financial Cost' in the supplementary bid commitment fee to the tune of Rs.164.72 crores which was to be charged @ 1% p.a. on accrued drawals and if no commitment fee was required to be paid, the respondent No.1 should have mentioned the same to be nil or zero. To show that the commitment fee is a part of the financial charges, learned senior counsel has drawn our attention to clause 14(d) 6 of the Instruction to Bidders under the tender, which reads as follows:-

“6. Financing Charges : All financing charges of any nomenclature relating to financing of the project including but not limited to Finders Fees, Commitment Fees, Arrangement Fees, Management Fees, Up Front Fees, Syndication Fees, Service Charges, Guarantee Charges, Other Fees and Taxes, if any should be clearly outlined in the Financing Term Sheet. No variation in Financing Charges is permitted during the tenor of loan.

3.37 “Financing Cost” means all financing charges of any nomenclature relating to financing of the project including but not limited to Finders Fees, Arranger’s Fees, Commitment Fees, Management Fees, Up Front Fees, Syndication Fees, Service Charges, Guarantee Charges, Other Fees and Taxes, if any.”

18. At this juncture we may also refer to clause 3.37 of Section 2 that deals with the General Terms and Conditions of the Contract. It defines the “Financing Cost” as follows:-

“Financing Cost” means all financing charges of any nomenclature relating to financing of the project including but not limited to Finders Fees, Arranger’s Fees, Commitment Fees, Management Fees, Up Front Fees, Syndication Fees, Service Charges, Guarantee Charges, Other Fees and Taxes, if any”.

19. Clause 14 that deals with the conditions for a Binding Debt Financing Term Sheet, which needs to be reproduced in entirety. It reads as follows:-

“14.0 Conditions for a Binding Debt Financing Term Sheet Bidder shall enter into a Memorandum of Understanding (MoU) with the Lender for the Debt Financing agreeing to provide Financing for the Project and making payments directly to the Bidder based on bills certified by TANGEDCO as per the terms of payment clause.

The MoU shall be submitted by the Bidder along with their offer for signing of the loan agreement.

The Bidder shall be responsible for arranging the required financing and achieving Financial Closure of the project within 4 (Four months) from the date of Letter of Intent (LoI).

a. The Bidder and Lender shall furnish a joint undertaking to fulfill the commitment made in the offer for Debt Financing arrangement from the Lender subject to due diligence.

TANGEDCO will furnish the following documents to the lender for processing of Debt Financing to the successful bidder.

1. Profile of TANGEDCO

2. Audited Balance Sheet of TANGEDCO for the last three financial years

3. MOU entered between TANGEDCO & MMTC for long term supply of coal of this project.

4. Tariff order for sale of power.

5. Copy of DPR b. It shall be understood that the Financing Term Sheet shall be based on preliminary appraisal of the project jointly by the Bidder and the Lender satisfying themselves on the project financial viability.

c. It shall be understood that the Award of Contract to the Bidder is contingent upon successful Financial Closure based on the Terms and Conditions provided in the Financing Term Sheet and in the event of the Financial Closure does not materialize due to reasons attributable to the Bidder or the Lender or in the event of withdrawal by the Lender from the Project, the Bidder will forfeit the security deposit.

d. The Term Sheet should be full and complete with all material terms of financing including but not limited to:

1. Loan Amount : At least 75% of the Total EPC Cost + 100% of Interest during construction and Financing Cost.

2. Currency of Loan: INR/USD/Euro or a combination thereof.

3. Tenor of the Loan : From the date of first drawal of the Loan upto 6 months from COD of the 1st or 2nd unit whichever is later and 15 years thereafter.

4. Rate of Interest.

5. Fixed Rate of Interest till the entire tenor of the loan after taking into account the hedged cost.

6. Financing Charges : All financing charges of any nomenclature relating to financing of the project including but not limited to Finders Fees, Commitment Fees,

Arrangement Fees, Management Fees, Up Front Fees, Syndication Fees, Service Charges, Guarantee Charges, Other Fees and Taxes, if any should be clearly outlined in the Financing Term Sheet. No variation in Financing Charges is permitted during the tenor of loan.

7. Terms and conditions for draw down schedule.

8. Moratorium for Repayment of Installment, Interest and Financing Charges:

All cash outflow obligation of TANGEDCO towards repayment of Installment, Interest and Financing Charges should be in INR (fully hedged) for the entire tenure of the loan and the repayment will commence only after 6months from the date of COD of later unit.

9. Repayment Period: 15 years post IDC and moratorium in 60 equated quarterly installments

10. Project Cash Flows and Installment Repayments statement should be submitted and will form part of the Financing proposal. The Bidder shall indicate Draw Down Schedule of finance to match the supply and erection schedule of project activities.

11. Equity requirements and related covenants.

12. Security: Against Security the following can be made available by TANGEDCO a. Hypothecation of all 100% Project Assets b. Government Guarantee for the repayment of loan

13. Validity period of the Term Sheet will be co-terminus with the validity of the bid.”

20. The stand of the respondent as regards the interpretation of Clause 14(d) 6 is that it only outlines all fees, but it does not mean that every such fee is to be loaded for evaluating the bid to determine L1 and no commitment fee can be loaded for such evaluation. It is also put forth that there can be no question of loading interest on commitment fee.

21. As has been stated earlier, the issue pertaining to correctness of Consultant’s report has to be adjudged and scrutinized within the scope of limited power of judicial review in the obtaining factual score. The Division Bench in the impugned judgment has taken exception to the process adopted in the identification of L1. It has referred to its order dated 19.8.2014 wherein the 1st respondent was granted the time to submit additional documents. The impugned order takes note of the fact that at that point of time, the Corporation had never averred that tender had been finalized. It has referred to the earlier order of the Division Bench that representations were to be considered and till then the bid should not be finalized. It has referred to the letter of the Chairman-cum-Managing Director of the Corporation dated 20.7.2014 and opined that it appears to be a misstatement of fact.

22. Be it stated that the Division Bench has posed two questions:-

“(i) Whether interest offered by appellant is vague; and

(ii) Whether the reduction of interest from 7.2% to 6.2% should be accepted.”

23. While dealing with the said issue, the Division Bench has referred to the publication in the tender bulletin stating about the decision on tender:-

“1. Name of the Tender: Chief Engineer/Civil/Projects & Environment, Inviting Officer, 3rd Floor, NPKRR Maaligai, 144, Anna Salai, Chennai – 600

002.

2. a) Name of the Project/Detail of Purchase & Works:

Establishment of coal based 2 x 660 MW Ennore SEZ Supercritical Thermal Power Project in the ash dyke of existing NCTPS under Single EPC cum Debt Finance basis. Vayalurvillage, Thiruvallur District, Tamil Nadu.

Sl. No	Details	Tender Value	Decision on Tender
1	M/s. Bharat Heavy Electricals Limited, BHEL House, Sirifort, New Delhi – 110 049	7840.087 Crores & Lender: Power Finance Corporation Limited Rate of Interest: 12.25%	Out of four bids received for this work and among the qualified two bidders, negotiation was called for & held with the lowest bidder viz M/s.BHEL. After negotiation, tender value of Rs. 7788 Crores, Rate of Interest at 12.15% was accepted by the Chief Engineer/Projects and order for acceptance of the tender issued vide this office issue Lr.No.CE/P/SE/M/EE-10/E/ File. 2x660MW Ennore SEZ STPP/D.No.60/dt.27.09.2014
2	Consortium of Central Southern China Electric Power Design – Ms. Trishe, 668, Minz Road, Ughan, China – 430 071	9716.5974 Crores & Lender: Industrial & Commerce Bank of China Rate of Interest: 7.2% (USD @ Rs. 59.26 at SBI Bill selling rate)	

Finally, M/s. BHEL/New Delhi offered bid for Rs. 7788 Crores was accepted by the Chief Engineer/Projects/Chennai and order for acceptance of the tender was issued vide this officer Lr.No.CE/P/SE/M/EE-10/ E/File.2x660MW Ennore SEZ STPP/D.No.60/dt. 27.09.2014.”

24. Thereafter, the Division Bench has recorded as follows:-

“31.3 While it is the plea of the appellant that fixed rate of 7.2-7.5% per annum or LIBOR floating rate has been quoted by them, it is the case of the learned Advocate General that Clause 12.1 of the Instructions to Bidders stated that interest is to be quoted at fixed rate and it is not subject to change, and since the interest quoted is variable, it is not possible to evaluate the bid.

31.4 It is seen from the records, that subsequently, based on a query from the first respondent, the appellant had confirmed that it would be fixed rate of interest at 7.2%. the same was also confirmed in the Repayment Schedule and the same rate of interest was taken into consideration by the Consultant in his report dated 30.5.2014. He did not find fault with the rate of interest. It is to be noted that the Term Sheet was submitted during July, 2013 and tender was evaluated in the year 2014. The contention of vagueness in rate of interest does not appeal to us. When the Consultant’s report dated 30.5.2014 is accepted by TANGEDCO for the purpose of evaluation, it has to be accepted for all purposes, though we have reservation on the Consultant’s report dated 30.5.2014. There is, therefore, no vagueness in the rate of interest quoted at 7.2%.

31.5 The second issue relates to the reduction of rate of interest. It is not in dispute that various meetings were held between the appellant and the TANGEDCO. The learned Advocate General states that the Consultant was appointed based on the 21st Board Meeting on 28.1.2012 and the Consultant participated in all pre-bid and post-bid meetings and minutes were signed by all parties, including BHEL and the appellant. He stated that the appellant was aware of the Consultant’s appointment and his role. This only fortifies the fact that there have been series of consultation between both the bidders. The finding of the learned Single Judge that the appellant acted on inside information is demolished by the stand of the learned Advocate General as above. The insinuation has no basis.

31.6 Coming to the issue of reduction of rate of interest, taking into consideration the prevailing market rate, the appellant offered to reduce the rate of interest from 7.2% to 6.2% on 5.6.2014, even prior to any form of litigation. When such an offer was given by the appellant the tender was not accepted in terms of Section 10(6) of the Act. To recapitulate, what has happened earlier is that the writ petition in W.P. No. 19247 of 2014 was filed on 17.7.2014, subsequent to the offer made on 5.6.2014. The

first interim order was passed on 18.7.2014. The second interim order was passed on 31.7.2014. The Division Bench passed an order on 19.8.2014. At that point of time, there was never a statement by the TANGEDCO that L1 was identified and discussion was going on. We have also clearly stated that the statement of the Chairman-cum-Managing Director of TANGEDCO that the representations of the appellant will be duly considered by the Board of Directors while finalizing the tender and appropriate orders will be passed strictly in accordance with the tender specifications and by following the provisions of TTIT Act and TTIT Rules.

31.7 Therefore, the issue relating to reduction of rate of interest should have been considered. This reasoning of ours is also based on the fact that we have clearly held that the third respondent could not be ascertained as L1 on 2.6.2014 as per the statement of TANGEDCO or on 30.5.2014 as per the finding of the learned Single Judge. Once there is no identification of L1, TANGEDCO is bound to consider the reduction in rate of interest of both the appellant in their offer dated 5.6.2014 and that of the third respondent dated 27.6.2014, reducing the rate of interest from 12.25% to 12.15%.

31.8 Even otherwise, by virtue of the power under Clause 25.3 of the Instructions to bidders, which states that “The Purchaser reserves the right to relax or waive any of the conditions of this Specification in the best interests of the TANGEDCO”, the TANGEDCO could have considered such reduced rate of interest offered by the appellant and the third respondent.”

25. With regard to commitment fee, the analysis of the Division Bench is worth referring to:-

“It clearly states that Commitment Fee is only on the cancelled portion of the loan. That apart, even as per the Drawdown Schedule, the fee is to be paid only if the loan amount is not drawn by the 18th, 30th and 42nd month. Moreover, the appellant in the letters dated 13.6.2014, 16.6.2014 and 17.6.2014, clarified that Commitment Fee is only on the unused credit line and that there shall be no Commitment Fee if the loan amount is fully utilized as per the Drawdown Schedule. All these representations sent by the appellant were not considered by TANGEDCO, despite there being a specific direction by the Division Bench of this Court to consider the same. It is a clear case of arbitrariness in approach and intended to oust the appellant. This act of the TANGEDCO is nothing but a case of malafide in evaluation process to suit one and reject the other.”

26. While dealing with the consultant’s report, the Division Bench has proceeded to state thus:-

“33.3 Even as per the Consultant’s Report the difference between the bid of the appellant and the third respondent is around Rs.71 Crores. That being the case, if either the Commitment Fee of Rs.156.184 Crores or the interest on Management Fee and Guarantee Fee for the 36 month construction period is not loaded on the

appellant, it will have a bearing on deciding which one of the two is the lowest bid. Assuming the Consultant's report is of any value, such report without considering the relevant material is of no use. The approach to add these figures without taking note of the representations and additional particulars/documents is, therefore, arbitrary and tainted in bias. This is in violation of the Division Bench judgment as well as the orders of the learned Single Judge in the first round of litigation."

27. And again:-

"The financial implication in respect of two tenderers has been specified by the Consultant. The issue is what factors mean and how it impacts the bid. We find that the Repayment Schedule submitted by the appellant with regard to interest on management fee and guarantee fee during IDC period is an accepted document by the Consultant. If nothing more is to be paid beyond that and that is clarified in the course of representation in clear terms, we fail to understand as to how this amount could be included in the cost when there is no implication. The Consultant, as we have held, did not have the benefit of considering the representation and other documents on the financial implications in this issue. His opinion is therefore not based on relevant document/representation. This we have held is not in conformity with the order of the learned Single Judge in the first round of litigation, which was confirmed by the Division Bench. Withholding such a factor and to obtain an evaluation from the Consultant loading the bid of the appellant is clearly a case of bias. It is an unreasonable approach and an unfair gesture which crumbles the spirit of transparent tender." "33.6 We, therefore, have no hesitation to hold that the first respondent had erroneously added interest on Management Fee and Guarantee Fee when there is none and there is no ambiguity or vagueness. Once the appellant has indicated in the representation, in clear terms, as to how it should be treated, in the light of the order of the Division Bench, which TANGEDCO accepted to consider the bid of the appellant, the first respondent ought not to have loaded this amount on the basis of the Consultant's Report. In all fairness, the Tender Accepting Authority of the first respondent should have excluded this amount, if both the bidders are to be treated on the touchstone of fairness and on the doctrine of level-playing field. This becomes necessary because the entire tender is tested on the larger public interest, that is to say, the implementation of the project in a time bound manner where cost is another important factor to be considered in the decision making. In a Welfare State, public authority cannot decide arbitrarily to throw away such an offer which they agreed to consider in the course of judicial proceedings, which we have referred to above. These factors, namely, adding interest on Management Fee and Guarantee Fee, have to be eschewed for the purpose of considering the bid of the appellant, otherwise, it will suffer from the vice of unreasonableness and irrationality."

28. Eventually, it was directed as follows:-

“The TANGEDCO is directed to evaluate the appellant’s price bid along with the bid of the third respondent, in the light of our findings as above and also taking into consideration in all required parameters and the clarifications submitted by the appellant in its various representations, as directed by the Single Judge in the order dated 31.7.2014 and that of the Division Bench in its order dated 19.8.2014, afresh, at the earliest.”

29. Before this Court, the consultant’s report is criticized by the 1st respondent stating thus:-

“2.3 The Consultant has made the following errors in the calculation of the said ‘Upfront Fees Including Interest’ in respect of CSEPD’s bid:

Error 1 : Included Commitment Fees Error 2 : Calculated and loaded interest on (a.) Guarantee Fee, (b.) Management Fee and (c.) Commitment Fee during the construction period of 36 months, i.e., IDC (Interest During Construction) 2.4 In 5.0 Item F – ‘Upfront Fees Including Interest’, the Consultant has loaded BHEL with Rs.8.925 Crores and CSEPD with Rs. 801.180 Crores. The break-up of this Rs. 801.180 Crores in the Consultant’s Report is as follows:

a. Guarantee Fee : Rs. 371.743 Crores

b. Management Fee : Rs. 117.393 Crores

c. Commitment Fee : Rs. 156.184 Crores

d. Interest for 36 months

on a,b,c (Rs. 127.613 Crores)

e. Interest from 37th to 42nd month: Rs.155.860 Crores on a,b, & c (Rs. 28.247 Crores)

Total : Rs. 801.180 Crores

2.4.1 There is no issue on entries a. and b. above

2.4.2 The issue is with regard to entries c. and d. above.

2.4.3. As regards c., no Commitment Fee can be loaded, for the reasons explained below.

2.4.4 As regards d., no interest can be loaded for the construction period of 36 months on Guarantee Fee and Management Fee, for the reasons explained below. The question of interest on Commitment Fee does not arise at all because no Commitment Fee can be loaded in the first place for evaluation of CSEPD’s bid.

2.4.5 e. above will stand reduced as it depends on c. and d.

2.5 If the Consultant had correctly evaluated CSEPDI's price bid by not including Commitment Fee and Interest on Guarantee Fee, Management Fee and Commitment Fee for the construction period of 36 months, then CSEPDI would be L1 by Rs. 171.600 Crores. Neither TANGEDCO nor BHEL have disputed this fact.

x x x x x 2.7 The Consultant has confused Commitment Fee with an Upfront Fee.

Commitment Fee, as stated above, is a contingency fee payable if the scheduled drawal does not take place. An Upfront Fee is levied by the lender as a definite fee without any contingency. This is made clear by PFC (BHEL's lender) letter dated 30-04-2015 showing Commitment Fee and Upfront Fee as distinct alternatives. The Consultant has loaded BHEL with Upfront Fee. The Consultant has erroneously treated Commitment Fee as an Upfront Fee for CSEPDI and has in fact applied the label Upfront Fee in Item F".

30. With regard to the commitment fee, various financial nuances have been stated. We think it apt to reproduce some of them:-

"2.8.3 When the earmarked funds are drawn, the interest agreed is payable. When the earmarked funds are not drawn, the interest is not payable but instead the Commitment Fee has to be paid on the amount not drawn.

2.8.4 CSEPDI's Term Sheet clearly mentions that the Commitment Fee is payable on the cancelled portion of the loan.

2.8.5 The term 'Accrued Drawal' refers to the amount accrued and available for drawal, but not drawn.

2.8.6 Commitment Fee is therefore only a contingent fee leviable if the funds are not drawn as per the Drawdown Schedule. It is more in the nature of a penalty in the event of a default by the borrower TANGEDCO and is payable by TANGEDCO. This cannot be added to the project cost for evaluation of the price bid.

x x x x x x

2.8.8 The Repayment Schedule sets out the entire amount to be paid by

TANGEDCO in the form of 48 Equated Quarterly Installments (EQI) starting from the 43rd months of the date of financial closure for 12 years. If there is one document to be termed as most important to evaluate the Price Bid, it is this Repayment Schedule. The Repayment Schedule is part of the Price Bid and is absolutely crucial as it caps the amount TANGEDCO has to pay. Not a single rupee needs to be paid over and above the amounts mentioned in the Repayment Schedule.

2.8.9 The EQI in the Repayment Schedule is based on the figure of Rs.

15,038.2914 Crores, which comprises of interest Rs. 5,025.3628 Crores on the Net Loan amount of Rs. 10,012.9286 Crores. The components of this Net Loan amount are:

a. Loan amount (85% of Total EPC Cost of 9709.3822 Crores) : Rs. 8252.9748/-

b. Interest at 7.2% p.a. on the above loan amount during the Construction Period of 36 months : Rs. 896.2032/-

c. Guarantee Fee : Rs. 392.0163/-

d. Management Fee : Rs. 123.7946/-

Moratorium Period interest for 37th to 42nd month (interest at 7.2% p.a. for 6 months on the total of a,b,c and d. above) : Rs. 347.9396/-

Total : Rs.10,012.9286/-*

*The Price Bid submitted by CSEPDI was Rs. 9709.3822 Crores and the above calculations were on that basis. However the admitted position is that of this sum, Rs. 509.339 Crores was disallowed by TANGEDCO and the Price Bid was arrived at Rs.9207.264 Crores. The Consultant has also evaluated CSEPDI's bid at Rs. 9207.264 Crores".

31. With regard to no interest on guarantee fee and management fee during the construction period of 36 months and no interest on Commitment fee, the stand of the 1st respondent has been put forth in various compartments. We think it apt to reproduce the relevant grounds:-

"2.9.1 The Consultant ought not to have loaded interest on Guarantee Fee and Management Fee during the construction period of 36 months, for the evaluation of CSEPDI's Price Bid.

2.9.2 The very same Repayment Schedule calculation set out above shows that no interest is being charged on Guarantee Fee and Management Fee during the construction period of 36 months and does not form part of the amount which TANGEDCO has to repay. Not a single rupee needs to be paid over and above the amounts mentioned in the Repayment Schedule.

2.9.3 The only interest payable during the construction period of 36 months is interest calculated at 7.2% p.a. on the basic loan amount (85% of the EPC cost) and not on any other amount like Guarantee Fee and Management Fee. This is made clear in the specific calculation sheet for Interest During Construction submitted by CSEPDI in its Price Bid.

2.9.4 The Term Sheet submitted by CSEPDI outlines the fees required to be paid by TANGEDCO and the circumstances in which they are payable. In the very nature of this contract, the items chargeable have to be mentioned, not the items not chargeable. The contract requires to be evaluated based on what the bidder is charging TANGEDCO.

2.9.5 In CSEPDI's Term Sheet, mention is made of Management Fee and SINOSURE Re-insurance (Guarantee Fee). No mention is made of interest on Management Fee and Guarantee Fee for the construction period of 36 months.

2.9.6 As far as interest on Commitment Fee is concerned, the same does not arise as Commitment Fee itself cannot be loaded for evaluating CSEPDI's bid."

32. The 1st respondent has also put forth that the Consultant was not right in loading on CSEPDI bid the values for Commitment Fee and interest thereon and Interest on Guarantee Fee and Management Fee during the construction period of 36 months, because that Clause 14.d.6 only states that details of the Financing Charges should be clearly outlined in the Financing Term Sheet and does not state that it should be included in the price evaluation; that the reference to Commitment Fee in the Term Sheet clearly indicates that it is only on the cancelled portion of the loan; that the fee is to be paid only if the loan amount is not drawn by the 18th, 30th and 42nd months in accordance with the Drawdown Schedule; that Clause 12.1 and Clause 32.1.1 makes no mention of interest on Financing Charges (i.e., on Management Fee and Guarantee Fee) during the IDC period; that the words 'Interest and Financing Charges' cannot mean interest on financing charges; that there is absolutely no variance between the Term Sheet and Repayment Schedule submitted by CSEPDI; that the Term Sheet and the entire Financial Proposal/Price Bid, including the Repayment Schedule, are to be read together; that the CSEPDI's Term Sheet only mentions that a Management Fee is to be paid but does not mention any interest on Management Fee for the 36 month construction period (IDC period) and that the Consultant ought not to have loaded the disputed amounts for evaluating the price bid of CSEPDI. It is also the stand that on a perusal of the Comparison Sheet filed would indicate that CSEPDI is L1 by Rs.171.600 crores if the evaluation is done correctly. That apart, the 1st respondent has raised other grounds which we need not refer to in detail.

33. The Corporation in support of the Consultant's Report has stated that the stand of the 1st respondent that Net Loan Amount in the repayment schedule provided by respondent No.1 gives no break up of how the said figure has been reached; that one cannot find out from a bare perusal of the said Repayment Schedule as to whether the respondent No.1 has factored the component of Commitment Fee in the Net Loan Amount; that the respondent having not been declared as L1 bidder as a post facto contention, now say that Commitment Fee shall not be taken for evaluation in spite of the fact that they themselves have quoted Commitment Fees for Rs.164.702 crores with split up details in the price bid and the above post facto contention is against all tenets of fairness and justice; that had the respondent No.1 become L1, they would have insisted that Commitment Fee being a financial charge forms part of the loan and therefore is payable by the borrower i.e., the Corporation as per their price bids submitted by respondent No.1; that since the respondent No.1

had not been evaluated as L1, a contention is advanced that Commitment Fee should not be taken for evaluation citing universal definition.

34. On interest on management and guarantee fee, the stand of the Corporation is that the CSEPDI-TRISHE CONSORTIUM have quoted Rs. 123.9746 crores as Management fees and Rs. 392.0163 crores as Guarantee fee in their Price bid. There is no dispute on the quantum of fees. The Consultant during the evaluation have worked out interest @ 7.2 per annum on the above fees as per the term sheet of the Industrial and Commercial Bank of China Limited from the date on which they fall due since the above fees form part of the debt to be repaid by the appellant; that it is clear from the Tender Conditions as well as the Term Sheet provided by Industrial and Commercial Bank of China Limited and the clarification dated 21.10.2013 (issued by Industrial and Commercial Bank of China Limited) that appellant herein would be bound to pay the interest on the whole loan amount which will include the financial charges.

35. The Corporation has quoted the relevant tender conditions from the Term Sheet submitted by Industrial and Commercial Bank of China Limited which are reproduced below:-

“Clause 14(d)1 of the Instruction to Bidders under the Tender defines the “Loan Amount” to include at least 75% of the total EPC cost + 100% of interest during construction and Financing Cost. As per clause 14(d) 6 of the Instruction to Bidders under the Tender management fee and guarantee fee is part of the financial charges/financial cost.

Under the term relating to “Interest rate” in term sheet submitted by Industrial and Commercial Bank of China it is clearly provided that the Borrower will pay interest on the full loan amount at a fixed rate per annum.

Under the terms defined as “management fee” in the term sheet submitted by Industrial and Commercial Bank of China Limited it is specified that Management fee of 1.5% flat on the Loan Amount will be payable to the lender within a period of 60 days from the date of financial closure. Six months is the time given for financial closure and so 8 months in case of management fee in view of outer limit of 60 days.

Similarly, under the terms relating to “Conditions Precedent”, the condition (d) the term sheet specifies that petitioners will be charged guarantee fee (termed as Insurance Policy in the term sheet) at the rate of 5% on 95% of the loan amount and the same will be payable from the end of the 6th month.

According to the term sheet the amounts get debited to the Petitioners account at the end of the 8th month and 6th month respectively.

All financial costs form part of the debt taken from the Industrial and Commercial Bank of China Limited. As per the clarification dated 21.10.2013 issued by Industrial and Commercial Bank of China Limited which is the Lender institution for

Respondent no.1 all costs and fee charged by ICBC will form part of the debt financing”.

36. From the aforesaid, it is vivid that the Consultant has analysed the offers regard being had to the tender conditions. Be it ingeminated that the analysis and determination made by the financial consultant has been carried out before receipt of any additional document from either side. The documents were called for by the owner from both the qualifying bidders in a transparent manner and the same have been considered at the time of evaluation by the Consultant. Submission of Mr. Sibal is that the evaluation is ex facie defective inasmuch as the Consultant has loaded certain charges as a consequence of which the price has gone up. Mr. Rohatgi, learned Attorney General appearing for BHEL and Mr. Prasad, learned senior counsel appearing for the Corporation would submit that the evaluation is founded on definitives leaving nothing to any kind of contingency. They have referred to the Term Sheet and what is put up by Industrial and Commercial Bank of China Limited. At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's assessment. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd.

37. Before parting with the case we are constrained to add something. We do so with immense pain. The respondent, before finalization of the financial bid submitted series of representations and seeing the silence of the owner it knocked at the doors of the writ court which directed for consideration of the representations. We are disposed to think that the High Court at that stage should have exercised caution. If the courts would exercise power of judicial review in such a manner it is most likely to cause confusion and also bring jeopardy in public interest. An aggrieved party can approach the Court at the appropriate stage, not when the bids are being considered. We do not intend to specify. It is appreciable the owner in certain kind of tenders call the bidders for negotiations to show fairness transparently. But the present case is not a one of such nature. Once the price bid was opened, a bidder could not have submitted representations on his own and seek a mandamus from the Court to take certain aspects into consideration. We have stressed this aspect only to highlight the role of the Court keeping in mind the established principle of restraint.

38. In view of our preceding analysis we are of the considered opinion that the Division Bench through the delineation has adopted the approach of an appellate forum or authority and extended the principle of judicial review to certain areas to which it could not have and, therefore, the judgment and order of the Division Bench followed the path of error in continuum. Consequently, the inevitable conclusion is unsettlement of the impugned order and we so direct. In the ultimate eventual the appeals stand allowed. There shall be no order as to costs.

.....J. (Dipak Misra)J. (Shiva Kirti Singh) New Delhi;

October 18, 2016.

[2] (2007) 14 SCC 517 [4] (1990) 3 SCC 280