

CASE NO.:
Appeal (civil) 5030 of 1999

PETITIONER:
M/s Subhash Projects & Marketing Ltd.

RESPONDENT:
West Bengal Power Development Corporation Ltd. & Ors.

DATE OF JUDGMENT: 21/10/2005

BENCH:
CJI R.C. LAHOTI, G.P. MATHUR & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T
(with C.A. No.5031/1999 and C.A. No.5032/1999)

P.K. BALASUBRAMANYAN, J.

1. These appeals arise from Writ Petition No.886 of 1997 filed by M/s Larson & Toubro ('L & T' for short), in the High Court of Calcutta. Respondent No.11 in the Writ Petition M/s Subhash Projects and Marketing Limited ('Subhash Projects' for short) was the contesting respondent. By judgment dated 3.10.1997, a learned single Judge of the High Court dismissed the Writ Petition. The Writ Petitioner thereupon filed appeal No. 559 of 1997 before the Division Bench. By judgment dated 14.7.1998, the Division Bench came to the conclusion that the appeal was liable to be allowed and the Writ Petitioner granted relief. Still, it did not grant the full relief to the Writ Petitioner, the appellant before it, but directed the contesting respondent, Subhash Projects, to pay a compensation of Rs.1 crore to the Writ Petitioner. This was on the finding that the contract based on the tender floated by respondent No.1, the West Bengal Power Development Corporation Limited (hereinafter referred to as 'the Power Corporation') ought to have been awarded to the writ petitioner-L & T and the award of the same to respondent No.11 Subhash Projects was illegal, but it was inexpedient at that stage to set aside the award of the contract and the least that should be done was to direct Subhash Projects to disgorge at least some portion of the profit it would have earned out of the illegally awarded contract and make over the same as compensation to the writ petitioner-L & T, who ought to have been awarded the contract. Feeling aggrieved, respondent No.11 in the Writ Petition, Subhash Projects, has filed Civil Appeal No. 5030 of 1999. M/s Larson & Toubro, the writ petitioner and the appellant before the High Court has filed C.A. No. 5031 of 1999 submitting that the High Court having found that the award of the contract to Subhash Projects was illegal, and it should have been awarded to L & T, ought to have gone ahead and struck down the award of the contract to Subhash Projects and ought to have directed it to be awarded to L & T. The Union of India, the Director (Thermal), Ministry of Power and the Central Electricity Authority, who were respondents 8, 9 and 10 in the Writ Petition have filed Civil Appeal No. 5032 of 1999 challenging the judgment of the Division Bench, but essentially complaining, as was disclosed at the hearing, about the remarks made by the Division Bench of the High Court about the interference of the Ministry of Power and that of the Minister of State for Power and about its impropriety. Since all the appeals arise from the same judgment, they have been heard together.

2. With the aid of the Overseas Economic Corporation Fund, Japan (hereinafter referred to as 'OECF'), the Power Corporation, decided to take up the construction of Bakereshwar Thermal Power Project. Pursuant to that decision, the Power Corporation issued a notice dated 19.7.1995 inviting tenders for the work of water intake and plant water system package for 3 x 20 m.w. units of Bakereshwar Thermal Power Project. The bid was required to be submitted in three separate covers, the first containing the earnest money deposit, the second, the techno-commercial evaluation and the third, the price bid. Pursuant to the tender notice, five bidders including Subhash Projects and L & T submitted tenders. As per the instructions issued to the bidders, bidders were not to be allowed to deviate from the principal requirements of the tender specifications. It was provided that the price quoted should remain firm throughout the period of the contract. In other words, no price variation was permissible. The procedure for opening of the tenders was also set out. Pursuant thereto, Cover-I containing the earnest money deposit and Cover-II containing the techno-commercial evaluation, were opened and the tenderers were found technically qualified. It was found that some vagueness had crept into the notice inviting tenders and that the scope of certain works remained vague or unclear. The technically qualified tenderers were called for discussion. Conferences were held. Ultimately, at a Technical Evaluation Committee meeting on 21.5.1996 for techno-commercial evaluation, it was decided to suggest seven modifications. The proposed modifications were forwarded to OECF. OECF suggested that the bidders may be allowed to submit price implications strictly limited to the seven aspects suggested at the techno-commercial evaluation and that bidders who agreed to withdraw the price variation clause must submit a positive price implication for the same. It may be noticed here that while L & T claims to have made a firm bid as per its original tender, Subhash Projects had resorted to price variation clause and had not indicated the positive price implication in its tender.

3. Pursuant to the communication in that behalf issued by the Power Corporation regarding the seven deviations and the clarifications relating to the work made at the conferences, Subhash Projects made a firm bid but increased its tender amount. L & T indicated an increase of Rs. 35 lakhs in view of the seven deviations mentioned in the communication, but indicated that it was willing to reduce the original tender amount by Rs. 64 crores in view of the clarifications issued about the work and in view of the proper understanding of the real scope of the work. Thereafter, the price bids were opened. As per the original price offered, L & T was placed as the fifth lowest and Subhash Projects though it had resorted to price variation in the original tender, was found the lowest bidder on the basis of the firm valuation offered by it subsequent to the clarificatory letter issued by the Power Corporation. But on taking note of the reduction proposed by L & T, while responding to the subsequent communication, its bid was found to be the lowest.

4. The tenders were evaluated by the Tender Evaluation Committee. They were also scrutinized by the technical experts appointed by the Power Corporation and by OECF. Based on the assessment of all the three, it was decided at the level of the Power Corporation, that L & T with its reduced offer, was the lowest tenderer and it was recommended that the contract be awarded to L & T. At this stage, Subhash Projects handed over a letter to the Minister of State for Power in the Union Government, in person complaining that the placing of L & T as the lowest tenderer, was not justified in view of the fact that the acceptance of the reduction of Rs. 64 crores from its original bid was against the tender conditions and that no such deviation could have been permitted after the earnest deposit cover and the techno-commercial evaluation offers had been opened, even though the price bids

themselves had not been opened. Based on this letter, a letter was written by a Secretary in the Minister of State for Power to the Power Corporation, to look into the complaint of Subhash Projects. When the Power Corporation stuck to its position and the Government of West Bengal also agreed with the Power Corporation that the contract be awarded to L & T, it being the lowest tenderer, the Minister of State for Power and his ministry persisted in its direction seeking a fresh evaluation to be made on the basis of the original bids, even going to the extent of writing directly to the Government of West Bengal in that regard. Ultimately, the Government of West Bengal and the Power Corporation were compelled to make a fresh evaluation ignoring the reduction of Rs.64 crores offered by L & T and to recommend the award of the contract to Subhash Projects. On the letter in that behalf being issued to Subhash Projects, L & T approached the High Court with the Writ Petition. No stay of the working of the contract was granted, but the High Court permitted Subhash Projects to continue the work, making it clear that it would not be entitled to claim any equity, in case the Writ Petition was allowed. Thus, pending the Writ Petition, Subhash Projects did a part of the work, obviously without any claim in equity and subject to the result of the Writ Petition. Though, the learned single Judge stated that, although he had no doubt that the Power Corporation, ought not to have succumbed to the pressure of the Minister of State for Power, and awarded the contract to Subhash Projects, it was not necessary to interfere with the award of the contract in the peculiar circumstances of the case, since before the contract was actually awarded to Subhash Projects, Subhash Projects was persuaded to reduce the tender amount to just below that of the sum quoted by L & T and it was not in public interest to interfere since a part of the work had already been done by Subhash Projects. This judgment was modified by the Division Bench which also found that the award of contract to Subhash Projects was at the pressure of the Union Minister of State for Power, undue pressure at that, and that though the contract itself was not liable to be interfered with, Subhash Projects which had secured the contract by dubious means, was liable to be compelled to disgorge at least a portion of the profits that it would have earned from working the contract. The Division Bench assessed the same as Rs. 1 crore which it found would be less than 10 per cent of the profits that Subhash Projects would have earned and directed its payment to L & T.

5. It was argued by the learned Senior Counsel for the appellant-Subhash Projects that the Division Bench of the High Court was in error in finding that the award of the contract to Subhash Projects was illegal and that the due award of the contract to L & T, was unduly interfered with by the Minister of State for Power in the Union Government and that such interference by him was unwarranted and uncalled for. Learned counsel submitted that the Minister's Secretariat and the notings of the Minister had only directed the following of the guidelines and norms and issuance of such a direction could not be considered to be undue or improper interference in the matter of the award of the contract. As a representative of the public, nothing stood in the way of the Minister receiving a representation made to him personally on behalf of Subhash Projects and there was nothing sinister in the Minister receiving it or directing it to be forwarded to the Power Corporation for action. There was also nothing improper in the Minister taking up the matter with the State Government and seeking its intervention to have the directions issued by him obeyed by the Power Corporation. That apart, the offer of L & T as originally made, was higher than that of Subhash Projects and if the rebate offered by L & T of Rs. 64.40 crores was kept out, no fault could be found with the award of the contract to Subhash Projects. Learned counsel submitted that the guidelines were mandatory and clause 5.03 thereof justified the rejection of the reduced offer of L & T and in that situation, the High Court was not justified in inferring that the award of the contract to Subhash Projects was not justified in this case. There was also nothing illegal or

improper in permitting Subhash Projects to reduce its offer to below that of L & T once it was found that Subhash Projects was the lowest tenderer and there was a decision to award the contract to it. Learned counsel submitted that in the matter of award of contracts, the 'jurisdiction of the High Court was limited and it was not as if the High Court was sitting in appeal over the evaluation and award of the contract. There was, therefore, no justification in the High Court directing Subhash Projects to pay compensation to L & T on the basis that the contract ought to have been awarded to L & T. To a question put to him specifically, he has submitted that in case, at the end of it, this court came to the conclusion that the submissions on behalf of the Subhash Projects are not sustainable, he would prefer the judgment of the Division Bench of the High Court to be left as it is, rather than the accepting of the appeal filed by L & T and setting aside the award of the contract to Subhash Projects since the adoption of such a course may lead to other consequences which would be more serious as far as Subhash Projects is concerned.

6. On behalf of the Union of India, the learned Additional Solicitor General submitted that the inference by the High Court that there was undue interference by the Minister of State for Power in the Union Government was not justified. Learned counsel submitted that the strong observations made are not warranted in the circumstances of the case. He submitted that the Minister had acted only in public interest and he had no axe to grind in the matter. The receiving of a representation personally, or the forwarding of it for being considered could not be said to be acts not befitting a Minister, a representative of the people. Thus, he submitted that C.A. No.5032 of 1999 filed by the Union of India was liable to be allowed at least to the extent of removing the observations about the role played by the Minister of State for Power in the Union Government and his Ministry.

7. On behalf of L & T, which has also filed the appeal C.A. No. 5031 of 1999, it was submitted that this was a case where the original tender notification was not clear, the scope of the work was not precisely made known; that conferences had to be held, discussions had to take place, clarifications had to be issued, scope of the work had to be defined and the tenderers apprised of the real extent and nature of the work. In that situation, the tenderers had necessarily to clarify their offers especially since firm offers were not made by some of the tenderers, including Subhash Projects who had resorted to price variation clause. He submitted that the consultants appointed by the Power Corporation, the OECF, and the Tender Evaluation Committee had recommended the award of the contract to L & T and the Central Electricity Authority on being apprised of all the relevant facts, had also agreed with that view and the State Government had concurred with the proposal and it was only the undue and persistent interference by the Minister of State for Power in the Union Government, without even seeking properly, the opinion of the OECF in that regard by apprising it of all the factors relevant to the issue and without taking into account the opinion of the Central Electricity Authority, that had resulted in the contract being awarded to Subhash Projects and in that situation, the High Court ought to have struck down the award of the contract to Subhash Projects and should have directed the award of the contract to L & T. He pointed out that clause 5.03 relied on had been given the go-by and had no application to the case on hand and if one were to go strictly by the tender conditions, the bid of Subhash Projects was liable to be rejected and Subhash Projects should not have been permitted to sub-contract or directed to sub-contract, against the terms of the original notice inviting tenders. He pointed out that whereas the stand was taken that the reduction offered by L & T should not be taken note of, Subhash Projects was permitted to reduce its offer to a figure little below that offered by L & T and that the whole exercise was mala fide and was at

the instance of the Minister of State for Power in the Union Government and the action in that behalf has been rightly found to be not proper by the High Court. He pointed out that the learned single Judge has also held that pressure had been brought to bear on the Power Corporation by the Minister of State for Power in the Union Government. He submitted that logically, the award of contract to Subhash Projects should be set aside and it should be directed that the contract be awarded to L & T. As regards the appeal C.A. No. 5030 of 1999 filed by the Subhash Projects, learned counsel submitted that in any event, there was no reason to interference with the judgment of the High Court awarding a sum which was not even 10 per cent of the profits that Subhash Projects would have earned out of the contract. He referred to the decision in M/s A.T. Briji Paul Singh & Ors. Versus State of Gujarat [(1984)4 SCC 59] to submit that in such cases, the profit could be normally estimated at 15 per cent of the contract amount and here, the High Court had taken a gross figure, which was only two-thirds of that.

8. The voluminous correspondence and materials produced by the parties have been adverted to and evaluated both by the learned single Judge and by the Division Bench of the High Court. The learned single Judge of the High Court, in fact, found that clause 5.03, Part II of the guidelines of OECF, had no application in the case in the circumstances referred to by him. He also found that contemporaneous documents clearly showed that all concerned preceded on the basis that clause 5.03, part II of the guidelines, would not be applicable. This view was not disagreed to by the Division Bench. It appears to us that while issuing the notice inviting tenders, the Power Corporation had not clarified the scope and the extent of the work that was being tendered. Offers were made by the tenderers. Obviously, there was considerable confusion and clarificatory meetings and conferences had to be held, clarifying the scope of the work and clarifying other technical details. Ultimately seven deviations were also proposed in writing and the offers of the bidders invited based on those seven variations. This was, therefore a case where considerable confusion prevailed and the bidders, including Subhash Projects were forced to make renewed offers including the deletion of the price variations clause. It must be noticed that the price bids had not been opened when these negotiations were being carried on and the tenderers were given an opportunity to make revised offers in the light of the clarifications and in the light of the seven deviations made. In that sense, the bids had not been opened, since the relevant bid, the price bid, still remained to be opened. If, at that stage, the tenderers, on understanding the real scope of the work and the magnitude of the work, offered to reduce the amount that had originally been offered on the basis of misconceptions arising out of the confusion created by the vagueness in the notice inviting tenders, it could not be said that such offers were liable to be rejected on the ground that they were variations against the terms of clause 5.03 of the guidelines. This aspect has also been found by the learned single Judge in his judgment. The argument on behalf of Subhash Projects that the variation in the offers should have been ignored cannot, therefore, be accepted. In any event, when after consulting its own consultants and the independent consultants appointed by OECF and based on the evaluation of its own Tender Evaluation Committee, the Power Corporation placed L & T as the lowest tenderer, there was no justification at all in the Ministry of State for Power harping on that aspect, on the facts of the case, even without obtaining a proper opinion from OECF and Central Electricity Authority after appraising them of all the relevant facts. The persistence of the Ministry of State for Power and the manner of it, in the circumstances, looks strange.

9. Even as regards Subhash Projects, it was given an opportunity to make a firm offer which, in fact, it was bound to do on the terms of the notice inviting tenders and it was also given an opportunity

to reduce its price even from the one subsequently quoted by it as its firm offer, before the award of the contract to it. Therefore, this was a case where in any event, all the tenderers should have been invited and given an opportunity to reduce their bids before accepting the most competitive of them in public interest and in the interest of the project. The learned single Judge has, in fact, stated, "A revised bid also became necessary in view of the changed situation, namely, alterations, amendments and clarification in the schedules and the drawings, resulting in alternations and amendments both in respect of part-A i.e. supply of materials and part-B i.e. service." The said finding could not be successfully assailed by Subhash Projects or by the Union of India, in their appeals.

10. It is in this context that the Division Bench of the High Court came to the conclusion that the consultants of the Power Corporation, the foreign consultants of OECF, the tender evaluation committee and the Central Electricity Authority, were justified in coming to the conclusion that the offer of L & T as revised, was the lowest and in recommending that its tender be accepted. It was in this context that the court also found that approval of this recommendation by the State Government was also justified. It is in this context that we have to consider the act of the Minister of State for Power and his Ministry, in persisting in the stand that clause 5.03 should be adhered to. The Division Bench of the High Court called for the relevant records from the Ministry and has noticed that the concerned file was never put up before the Minister for Power and there was nothing to show that Minister of State for Power had been delegated any function in such matters. In fact, the Division Bench found that except as involving public interest, the matter concerned, might not even have been within the purview of the Minister of State for Power. We do not want to go further into that aspect, but we must notice that the Ministry of State for Power, was not fair in not apprising OECF of the entire facts with reference to the documents and seeking its advice before taking a stand on the matter of identification of the lowest tenderer on the facts and in the circumstances of the case. The manner in which the Minister of State for Power in the Union Government went about it, has led to the observations of the High Court, complained of in the appeal by the Central Government. On the materials, we are not in a position to say that the Division Bench of the High Court was not justified in drawing the inference it had drawn.

11. We were taken elaborately through a large number of documents including the valuation process undertaken by the evaluation committee and the opinions expressed by the other responsible bodies and a reappraisal of those materials, only supports the conclusion of the Division Bench on the matters in controversy. It may be noticed that the learned single Judge had also rejected the contentions of Subhash Projects, and had held that it was difficult to understand as to how the Power Corporation overlooked the original defect in the tender of Subhash Projects which included a price variation clause and not a firm price as stipulated and how it held negotiations only with it at the price bid stage when Subhash Projects admittedly lowered its bid so as to make its offer nearer to the offer of L & T, despite the restriction in that regard as contained in OECF letter dated 1.7.1996 made much of to support the contract given to it and how Subhash Projects was permitted to enter into sub-contracts with other contractors, and that too, even prior to the entering into an agreement by Subhash Projects itself. The learned single Judge had also found that in any event, price variation became necessary in view of the alterations, amendments and clarifications to the tender schedule. The Division Bench had, by and large, agreed with that finding. These findings are seen to be justified on the materials available on record and there is no justification in this Court interfering with those findings in these appeals. Thus, it was a case where different yardsticks

were being used at different stages and the persistence of the Ministry of State for Power in raising objections until Subhash Projects was chosen as the lowest tenderer does look strange.

12. Thus, on a reappraisal of the relevant materials in the light of the submissions before us, we are not satisfied that any interference is called for with the judgment of the Division Bench in these appeals. Since we are inclined to agree with the conclusion of the Division Bench that the award of the contract to Subhash Projects was not legal, we see no reason to interfere with the course adopted by the Division Bench in the matter of awarding compensation to L & T payable by Subhash Projects. We also find the sum fixed reasonable and to the advantage of Subhash Projects. We are not inclined to entertain the plea of L & T in its appeal that the award of the contract to Subhash Projects itself must be set aside and the contract directed to be awarded to L & T or to order a fresh tender to be invited for the work. The adopting of such a course would be counter productive in the circumstances, considering the nature of the project and the steps that had already been taken and the completion of the project itself during the pendency of these appeals.

13. One aspect remains to be considered. The Division Bench had directed the Power Corporation to pay out the sum of rupees one crore to L & T out of the payments to be made to Subhash Projects. This Court while issuing notice on 31.8.1998 on the petition for special leave to appeal filed by the Subhash Projects, stayed the direction regarding the payment of compensation. Thereafter, on 10.9.1999, leave to appeal was granted. According to Subhash Projects, the project was completed and the final bill was submitted for payment. The payment was not made by the Power Corporation without Subhash Projects depositing the sum of one crore in a Fixed Deposit and handing over that receipt to the Power Corporation. Thereafter, Subhash Projects filed a petition for release of the Fixed Deposit receipt for Rs.1 crore retained by the Power Corporation. On 8.8.2003, this Court permitted the Power Corporation to return the Fixed Deposit Receipt to Subhash Projects "subject to the condition that Subhash Projects through its Managing Director will execute an undertaking before the Registry of this Court to refund any amount that becomes payable in the event of the above appeal being dismissed by this Court within four weeks from that date." The Subhash Projects has, thus, got back the Fixed Deposit Receipt for Rs. 1 crore in the light of the undertaking given by Subhash Projects through its Managing Director. Pursuant to the order of 8.8.2003 and in view of our conclusions, Subhash Projects has to be directed to deposit a sum of Rs. 1 crore in this Court, so that the same could be disbursed to L & T. Subhash Projects has had the benefit of the money which should have been disbursed to L & T in the light of the directions of the High Court, which we have confirmed. So, Subhash Projects should be directed to pay some reasonable interest to L & T for the amount. We feel that interest at the rate of five per cent per annum would be reasonable under the circumstances. We, therefore, direct Subhash Projects to deposit in this Court within four weeks from today the sum of rupees one crore with interest thereon at five per cent per annum from 8.8.2003 till the date of its deposit. The amount will then be disbursed to L & T. It will be open to Subhash Projects to pay the sum of rupees one crore with interest as aforesaid by way of a bank draft to L & T within four weeks and to file an affidavit in this Court testifying to that fact. The affidavit should be filed within six weeks from today. In case Subhash Projects does not pay the amount of Rs. 1 crore with interest as ordered to L & T by way of draft or deposit the same in this Court within four weeks as originally undertaken by it, the amount of Rs. 1 crore will carry interest at the rate of 10 per cent per annum (instead of five per cent per annum as stipulated) from the date of the judgment of the Division Bench of the High Court till the date of its recovery. L & T would be entitled to execute this order for recovery as if it were a decree through the

concerned district court in Calcutta, charged on the assets of Subhash Projects and on the properties of its Directors and personally from them.

14. In the result, C.A. No. 5030 of 1999 filed by Subhash Projects is dismissed with costs. C.A. No. 5032 of 1999 filed by the Union of India is dismissed with no order as to costs. C.A. No. 5031 of 1999 filed by L & T is also dismissed, subject to the direction regarding the payment of Rs. 1 crore with the provision for interest and the recovery of the amounts as provided hereinbefore. In this appeal also, the parties will suffer their respective costs.

JUDIS