IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 13.09.2017

Coram

THE HON'BLE MR.JUSTICE RAJIV SHAKDER
&
THE HON'BLE MR.JUSTICE ABDUL QUDDHOSE

W.A.No.943 of 2015
and
M.P.No.1 of 2015

1.Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO)
Rep. By its Chairman and Managing Director
144, Anna Salai, Chennai - 600 002.

2.The Chief Engineer/Civil,
Projects and Environment,
TANGEDCO, Third Floor, Eastern Wing,
NPKRR Maaligai, 144, Anna Salai,
Chennai - 600 002.

3.The Chief Engineer/Projects,
TANGEDCO, Fifth Floor, Western Wing,
NPKRR Maaligai, 144, Anna Salai,
Chennai - 600 002. ... Appellants

Vs.

1.CSEPDI - TRISHE CONSORTIUM
Rep. By its Managing Director,
Mr.Sanjay K.Pillai,
No.6, Kasturi Rangan Road,
Alwarpet, Chennai -18.

2.Bharat Heavy Electricals Limited (BHEL)
Rep. By its Chairman, BHEL House,
Siri Fort, New Delhi - 110 049. ...Respondents

Writ Appeal filed under clause 15 of the Letters Patent, against the interim order made in M.P.No.2 of 2015 in W.P.No.9592 of 2015, dated 01.07.2015.

MP.2/2015 in WP.9592/2015:
Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to grant an order of Interim Injunction, restraining the respondents, their men, officers, agents, servants, representatives, assigns, consultants and/or anyone acting or claiming through or under the respondents from pursuing any

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steps to invite, publish or proceed in any manner with any kind of tender for the udangudi Thermal Power Project, Pursuant do closing/Lodging the Tender bearing SPEC.NO.SE/C/OP/EEI/OT no.1/2013-214 in respect of the 2x660 MW udangudi Super critical Thermal Power Project which is under challange, Pending WP.9592/2015.

For Appellants :Mr.Manishankar,
Additional Advocate General
Assisted by Mr.Abdul Saleem

For Respondents:Mr.Shriram Panchu, Senior Counsel for
Assisted by Mr.N.L.Rajah for R1
Mr.A.L.Somaiyaji, Senior Counsel for
M/s.S.Ramasubramaniam & Associates for R2

JUDGMENT

(Judgment of the Court was made by RAJIV SHAKDER, J)

1. This is an appeal filed against an interim order dated 01.07.2015 passed by the learned Single Judge. The appellant, before us, is a Public Sector Undertaking, i.e., Tamil Nadu Generation and Distribution Corporation Limited (in short "TANGEDCO").

2. The brief facts, necessary to dispose of the appeal, are noticed hereafter:

2.1. It appears that two separate tenders were floated by the appellant/TANGEDCO for setting up two Thermal Power Projects; one at Ennore and the other at Udangudi. The tenders, interalia, contemplated setting up of the Thermal Power Projects by adopting EPC cum Debt Financing methodology. As regards the Ennore project there was litigation between parties herein which attained quietus with the judgement of the Supreme Court rendered in Tamil Nadu Generation And Distribution Corporation Limited (TANGEDCO) vs CSEPDI - Trishe Consortium Represented by its Managing Director & Another (2017) 4 SCC 318.

3. Insofar as the present appeal is concerned, we are concerned only with Udangudi project. Tender, for this project, was issued on 07.04.2013. Upon evaluation being carried out, both respondent No.1 and respondent No.2 were shortlisted. It appears, the appellant/ TANGEDCO, took a decision on 13.03.2015 to scrap the tender, which propelled respondent No.1 to institute a writ petition under Article 226 of the Constitution.

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It is this writ petition, which is numbered as W.P.No.9592 of 2015, and in which, the impugned judgment and order has been passed by the learned Single Judge.

3.1. It would also be relevant to note that during the pendency of the writ petition, the appellant/TANGEDCO decided to call for a new tender. This decision was taken by the appellant/TANGEDCO on 21.04.2015.

4. Admittedly, respondent No.1 chose not to participate in the fresh tender floated by the appellant/TANGEDCO. However, respondent No.2, i.e, Bharat Heavy Electricals Limited (in short "BHEL") along with other bidders filed its bid, in respect of the fresh tender. The record shows that respondent No.2/BHEL has been declared successful in respect of the fresh tender.

4.1. Furthermore, we are informed that the fresh tender while adopting EPC route has done away with debt financing.

5. In view of the fact that a fresh tender was called, respondent No.1, filed an interlocutory application being M.P.No.2 of 2015, qua which, the impugned judgment and order was passed. The learned Single Judge, it appears, after examining, inter alia, the report of the consultant, restrained the appellant/TANGEDCO and respondent No.2/BHEL from proceeding further with the fresh tender, which was published in the State Tender Bulletin, on 26.03.2015.

6. The appellant/TANGEDCO being aggrieved, preferred the instant appeal.

7. The record shows that the predecessor bench, vide order dated 30.10.2015, modified the impugned judgment and order dated 01.07.2015. The operative directions of the Division Bench, which are contained in the order dated 30.10.2015, read as follows:

> "34.Therefore, in view of the above, we pass the following interim order, in modification of the interim injunction granted by the learned judge:
>
> (i) The appellant may proceed to process the bids received pursuant to the fresh tender notification dated 21.04.2015.
>
> (ii) The award of the contract to any successful bidder alone shall await further orders to be passed in this petition for stay.
>
> (iii) The first respondent may file a counter within two weeks
>
> (iv) The Registry is directed to post the Miscellaneous Petition for further hearing on 16.11.2015."

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8. Mr.Manishankar, learned Additional Advocate General , who appears for appellant/TANGEDCO has submitted, before us, that since more than two (2) years have elapsed, this matter needs to be taken up urgently.

8.1. Based on his submission, we had proceeded with the hearing in the matter.

8.2. However, Mr.Shriram Panchu, learned Senior Counsel along with Mr.Raja, Senior Advocate who appear for respondent No.1, submit that since the appeal is against an interim order, the writ petition pending adjudication before the learned Single Judge will have to be disposed of. We had indicated to both Mr.Shriram Panchu and Raja that if all parties are agreed, the counsels could mention the matter before the learned Single Judge, and if, the learned Single Judge was so inclined, the writ petition itself could be placed before us for adjudication, having regard to the urgency in the case and the time, which has elapsed since the tender was floated. This suggestion was also put to Mr.Somaiyaji, who appears for respondent No.2/BHEL. While, Mr.Manishankar and Mr.Somaiyaji, were agreeable to the suggestion, Mr.Shriram Panchu and Mr.Raja submitted that respondent No.1 would not like to lose the right of filing an intra Court appeal, in case, it were to fail before the learned Single Judge.

9. Given these circumstances, we are of the view that, at this juncture, the only possible directions which can be issued are as follows:

(i) The Writ Appeal is disposed of with a request to the learned Single Judge to take up the writ petition for hearing and final disposal.

(ii) Pending disposal of the writ petition, the interim order dated 30.10.2015 passed in the instant appeal will continue to operate.

(iii) In case, respondent No.1 were to fail in the writ petition, the learned Single Judge, will workout the equities and issue appropriate directions including direction to award compensatory costs if thought fit in favour of the respondent No.1 and/or respondent No.2. It is made clear, however, that before such a direction is issued, parties would be heard on this aspect of the matter as well.

(iv) Parties and their Counsels will appear before the learned Single Judge on 18.09.2017. The learned Single Judge will either hear the matter on that day, if found convenient or, fix another date, which would be proximate to the date indicated above.

(v) we request the learned Single Judge to dispose of the writ petition within the shortest possible time, though, not later than three (3) weeks from the date indicated above.

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10. Consequently, connected application will stand closed. There shall, however, be no order as to costs.

Sd/-
Asst.Registrar (CS VIII)

/true copy/

Sub Asst. Registrar

To

1.The Chairman,
Bharat Heavy Electricals Limited (BHEL)
BHEL House,
Siri Fort, New Delhi - 110 049.

2. The Chairman and Managing Director
Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO)
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4.The Chief Engineer/Projects,
TANGEDCO, Fifth Floor, Western Wing,
NPKRR Maaligai, 144, Anna Salai,
Chennai - 600 002.

5.The Section Officer,
Writ Section,
High Court, Madras-104.

+1cc to Mr.S.Ramesubramanian & Associates, Advocate sr.66727

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