SUPREME COURT OF INDIA

Ratnagiri Gas Power Pvt. Ltd.

Vs.

RDS Projects Ltd.

C.A.No.7593 of 2012

(T.S.Thakur and Gyan Sudha Misra JJ.)

18.10.2012

JUDGMENT

T.S. THAKUR, J.

1. Leave granted.

2. These appeals arise out of a common judgment and order dated 17th October, 2011 passed by the High Court of Delhi whereby Writ Petition (C) No.534 of 2011 filed by the respondent has been allowed and the rejection of the tender submitted by it quashed with a mandamus to the appellant- company to take a fresh decision on the subject in the light of the observations made by the High Court.

3. The factual matrix leading to the filing of the writ petition by RDS Project Ltd. (hereinafter referred to as 'RDS' for short) has been set out at considerable length in the order passed by the High Court. We do not, therefore, consider it necessary to re-count the same all over again except to the extent the same is absolutely necessary for the disposal of these appeals. Suffice it to say that Government of India has entrusted the task of reviving and restructuring of the Dabhol Project to Gas Authority of India Ltd. (GAIL) and National Thermal Power Corporation ('NTPC' for short) both Government of India undertakings who have in turn formed a joint venture company in the name and style of Ratnagiri Gas Power Pvt. Ltd., the appellant in this appeal, for short referred to as 'RGPPL'. The appellant-RGPPL is charged with the duty of completing the balance work at LNG Terminal of the Dabhol Power project and of commissioning and operating the same. The appellant has, for that purpose, engaged GAIL as its Engineer who has in turn

appointed Engineers India Limited (EIL) as their Primary Project Management Consultant. Scott Wilson a U.K. based entity was also kept in the loop as a backup consultant for marine works.

4. In terms of an international competitive bidding notice, issued by it on 26th June, 2009, EIL invited tenders from eligible parties for completion of, what is called "Breakwater" at LNG Terminal at RGPPL site, Dabhol, Maharashtra. The construction of the breakwater was left incomplete by a previously employed contractor appointed for the purpose on account of the stoppage of the work by the Dabhol Power Company. The earlier contractor had, according to the appellant, constructed only 500 meters of breakwater length leaving the balance of nearly 1800 meters incomplete and a certain length thereof untouched.

5. Apart from stipulating other terms and conditions, Clause 8.1.1.1 of the tender required that Single Bidders responding to the invitation should have experience of successfully completing as a single bidder or "as a lead of a Consortium/Joint Venture", at least one project of a breakwater in an offshore location with a minimum length of 400 meters. Clause 8.1.1.1 of the Tender document was in the following words:

> "The bidder shall have experience of having successfully completed, as a single bidder or as a lead of a Consortium/Joint Venture, at least one project of a breakwater in an offshore location (as defined at Clause No.8.1.2.5 below) of minimum length of 400m during the last 20 (twenty) years to be reckoned from the last date of submission of bids. The scope of work of the proposed qualifying project work should comprise of the design, engineering, project management and construction of the breakwater."

6. In response to the notice inviting tenders, EIL received five tenders from five different entities viz. RDS the respondent in this appeal, M/s ESSAR Construction Ltd., M/s Afcons Infrastructure Ltd., joint venture of M/s Higgard Punj Lloyd Ltd. and joint venture of M/s Hung- Hua/Ranjit Buildcon Ltd.

7. With the tender submitted by it RDS enclosed the requisite documents such as Form-B in which details of specific work experience, on the basis whereof it claimed to be satisfying the Bid Qualification Criteria ('BQC' for short), were also given. It also enclosed along with its tender, completion certificate dated 5th April, 2008 issued by Deputy Chief Engineer-IV, Andaman Harbour Works under the Ministry of Shipping, Road Transport and Highway, Government of India

certifying that RDS had completed breakwater of 500 meters against a tender dated 26th May, 1999. Completion certificate dated 30th June, 2003 issued by the Senior Executive Manager of Ellen Hinengo Ltd. a Tribal Society (EHL) and letter dated 10th November, 2000 addressed by the said Ellen Hinengo Ltd. to RDS asking it to commence work for construction of breakwater at Mus in Car Nicobar Island pursuant to tender dated 3rd November, 2000 were also produced by RDS apart from a certificate issued by EHL about the offshore location of the breakwater.

8. Tenders received from different parties were techno commercially evaluated by EIL all of whom were found to be technically qualified except Hung-Hua Ranjit Buildcon Ltd. who went out of the reckoning at that stage itself. Names of only four bidders found techno commercially eligible were recommended by EIL for the approval of GAIL the owner's engineer. The price bids of the four bidders were pursuant to the said recommendation opened on 11th February, 2010 in which RDS was found to be the lowest bidder having quoted a price of Rs.390 crores only, which was less than the estimated cost of the project by Rs.160 crores. GAIL accordingly recommended RDS to the appellant-company for award of the contract. Recommendation received from GAIL notwithstanding the appellant-company appears to have expressed apprehensions about the capability of RDS to complete the project in time having regard to the fact that RDS had taken three years to complete a breakwater with a length of mere 500 meters whereas the appellant-company's breakwater project stretched over a length of 1800 meters and had to be completed within a period of 33 months only. Reservations about the viability of the rates quoted by RDS which were found to be abnormally low were also expressed.

9. While a final decision regarding award of the contract had yet to be taken, Hung-Hua/Ranjit Buildcon Ltd. who was one of the bidders and whose bid was not found to be techno-commercially qualified, filed a writ petition in the Delhi High Court, inter alia, alleging that while they had been wrongly disqualified, RDS who did not satisfy the qualifying criteria had been wrongly held to be qualified. Questions regarding validity of certificates submitted by RDS were also raised in the writ petition.

10. In response to the above writ petition filed by Hung-Hua, the appellant company filed a short affidavit in which it disputed the averments made in the writ petition and took the stand that the documents filed by RDS along with its bid showed that breakwater at Mus in Car Nicobar Island was built at an offshore

location and that RDS had completed the entire work as a single entity on behalf of M/s Ellen Hinengo Ltd.

11. While the writ petition filed by Hung-Hua was pending before the High Court, the appellant sought from GAIL the work order issued to RDS in respect of the qualifying project at Car Nicobar to verify the credentials of the RDS. RDS was accordingly asked by EIL to produce the documents in support of its qualification such as the work order for the Andaman Harbour works. The appellant-company also sought the details about the contracts to verify the correctness of the certificates submitted by RDS along with its bid in response to the tender notice.

12. A further development in the meantime took place in the form of the CAG forwarding a report in which certain adverse observations regarding the completion of the breakwater at chainage 22M to chainage 200 M in the Andaman and Nicobar Project were made. The report revealed that in January, 1998 the contractor had completed only 15 to 47 percent of the work and that in April, 1998 the Executive Engineer had taken out a part of the unexecuted work for awarding it to another contractor. The CAG found that due to delay in the construction of a portion of the breakwater coupled with non-compliance of contractual terms, the department had suffered a loss of Rs.2.61 crores, apart from increase in cost of the work by Rs.3.55 crores.

13. The report of the CAG was forwarded by the appellant to GAIL with the request to arrange copies of work order, and satisfactory evidence of the credentials of RDS. GAIL was also informed that in the absence of satisfactory evidence furnished by RDS, the appellant was not in a position to place the matter for award of contract before the Board of Directors.

14. While correspondence between RGPPL, GAIL and EIL was being exchanged on the subject the appellant received certain documents under RTI Act including the work order placed by Andaman Harbour Works on EHL and those placed on M/s Recon International for a part of the Andaman Project for chainage 22-200 meters. These documents were quickly sent to EIL for review who examined the matter again and submitted its observations in terms of letter dated 18th September, 2010 stating that RDS did not meet the basic qualifying conditions of offshore breakwater of a minimum length of 400 meters. GAIL then forwarded that opinion to the appellant to take appropriate action on the subject.

15. On receipt of the letters aforementioned, the appellant requested GAIL to forward its own recommendations. GAIL, however, reiterated that since all the relevant information on the subject was available with the appellant, it could take an appropriate decision in the matter in its capacity as the owner of the project.

16. A resolution was accordingly passed by the Board of Directors of the appellant company on 4th October, 2010, whereby it decided to annul the Breakwater tender in exercise of its power under Clause 28.1 of the Bidding Document on the ground that RDS did not qualify the BQC criteria which fact had, according to the appellant, come to light only after the opening of the price bids. From the minutes of the meeting of the Board of Directors it is further evident that the Board had taken note of the CVC guidelines and declined to award the contract to the next lowest tenderer in view of the huge price difference between L1 L2 and opted to go for fresh tenders. By a separate communication dated 6th October, 2010 the appellant- company conveyed to RDS the reasons for rejection of its tender.

17. With the annulment of the entire tender process Writ Petition No.2142 of 2010 filed by Hung-Hua/Ranjit Buildcon Ltd. inter alia challenging the acceptance of the technical bid submitted by RDS was dismissed as withdrawn by the High Court in terms of order dated 30th November, 2010. That order came to be passed on an application filed by the appellant-RGPPL stating that the entire tender process having been scrapped with a decision to invite fresh tenders Writ Petition No.2142 of 2010 did not survive for consideration. The High Court took note of the subsequent events and dismissed the writ petition as not pressed in view of the fact that the tender process had been scrapped and a decision to invite fresh tenders had been taken.

18. In Writ Petition (C) No.8252 of 2010 which was filed by RDS to challenge the annulment of the tender process and the rejection of its techno commercial bid as non-responsive a similar order was made by which the writ petition was dismissed as withdrawn reserving liberty to the respondent-RDS to take recourse to seek redress in accordance with law if it was excluded from consideration in the fresh tender which RGPPL had decided to issue. We shall presently refer to the writ petition and the effect of its withdrawal in greater detail. Suffice it to say that the maintainability of Writ Petition No.534 of 2011 filed by RDS out of which the appeal arises was assailed by the appellant herein on the ground that the earlier petition filed by it having been withdrawn the second petition filed by RDS was not according to the appellant maintainable insofar as the same sought to question the validity of the decision taken by the Board of Directors on 4th October, 2010

cancelling the tender process and the communication of the said decision with reasons for rejection of the bid submitted by RDS on 6th October, 2010. The High Court has in the judgment under appeal rejected that contention and not only held that the writ petition filed by RDS was maintainable but also that the decision to reject the tender submitted by it was not legally valid nor was the annulment of the entire tender process. The High Court found that the action taken by the appellant on both counts was vitiated by mala fides especially when the fresh tender notice issued by the appellant made an attempt to exclude RDS from competing for the works in question.

19. We have heard learned counsel for the parties at considerable length. The following questions, in our opinion, fall for our determination:

> (1) Whether Writ Petition No.534 of 2011 filed by RDS challenging the rejection of its tender and annulment of the entire tender process was maintainable in the light of the withdrawal of writ petition No.8252 of 2010 previously filed by it?
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> (2) Whether the rejection of the tender submitted by RDS and the decision to annul the entire tender process was vitiated by mala fides? (3) Whether the condition of eligibility stipulated in the second tender notice issued by the appellant-RGPPL unfairly excluded the appellant from bidding for the allotment of the work in question? and; 4) Whether respondent-RDS was eligible in terms of the first tender notice to compete for the works in question having executed a minimum breakwater length of 400 meters in a single project required vide Clause 8.1.1.1.
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> We propose to deal with the questions ad-seriatim.
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> In Re: Question No.1

20. Writ Petition (C) No.8252 of 2010 questioned the validity of the appellant-Board's decision dated 4th October, 2010 regarding rejection of the bid submitted by RDS in terms of the former's letter dated 6th October, 2010 as also the annulment of the entire tender process for the completion of the "Breakwater" at LNG Terminal at RGPPL site, Dabhol, Maharashtra. It also prayed for a mandamus directing the appellant to formalise the award of contract for the Dabhol project to RDS. For the sake of clarity it is useful to extract the prayer made by

RDS in the said writ petition: "In the premises mentioned above it is most respectfully prayed that this Hon'ble Court be pleased to:-

> (A) Issue an appropriate writ, order or direction, quashing the action of the Respondents, and in particular the decision dated 4.10.2010 of the Respondent No.1, as communicated to the Petitioner vide letter dated 6.10.2010 whereby bid of the Petitioner has been rejected and the entire bidding process for the completion of the breakwater of LNG Terminal of Dabhol Power Project, Maharashtra, has been annulled; and
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> (B) Issue a Writ of Mandamus or any other appropriate writ, order or direction, directing the Respondent No.1 to formalise the awarding of the contract for the DABHOL PROJECT to the Petitioner; and
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> (C) Issue any other appropriate writ, order or direction, as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

21. When the above petition came up before the High Court on the 14th December, 2010 learned counsel for RDS withdrew the writ petition and the accompanying application reserving liberty to seek redress in case the tender which is floated sought to exclude RDS in any manner from competing for the allotment of the work in question. Since the answer to question No.1 above depends on the interpretation of the said order we may extract the same in extenso:

> "Learned senior counsel for the petitioner submits that though the tender process has been scrapped on 4.10.2010, the same was followed up by a letter dated 6.10.2010 of the respondents setting out the reasons why the petitioner was held not to meet the BQC requirements of having completed at least one project of breakwater in an offshore location of a minimum length of 400 mtrs; which was a stipulation in the contract. Learned senior counsel for the petitioner has serious objection to the contents of this letter and thus submits that the objection was only to somehow ensure that the petitioner does not get the contract because the petitioner had made the technical qualifications and thereafter the price bid was opened in which the petitioner was L-1.
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> The learned counsel for respondents No.1, on the other hand, disputes the aforesaid and submits that on analysis of the matter it was deemed proper to

scrap the tender process itself exercising the rights of an owner under article 28.1 of the terms conditions of the tender.

In view of the aforesaid, taking into consideration the fact that the tender process now stands scrapped, learned counsel for the petitioner fairly states that he would like to withdraw the writ petition and the application at this stage but that in case the tender which is floated seeks to exclude the petitioner, in any manner, so as to prevent the participation in the tender, the petitioner should have leave and liberty to take recourse to legal remedy in accordance with law. Liberty granted.

Dismissed as withdrawn."

22. Two distinct features of the above order may be noticed immediately. These are (a) The writ petition specially questioned the validity of the Board resolution dated 4th October, 2010 and the rejection of the bid offered by RDS, by letter dated 6th October, 2010 meaning thereby that the same squarely related to the issues that were sought to be agitated in the subsequently filed writ petition No.534 of 2011 in which too RDS had prayed for quashing of the resolution dated 4th October, 2010 and communication dated 6th October, 2010 rejecting the bid offered by RDS. There is thus almost complete identity of the subject matter and the issues raised in the two writ petitions and the grounds urged in support of the same, and (b) The challenge to the Board resolution dated 4th October, 2010 and communication dated 6th October, 2010 was withdrawn in toto, with liberty reserved to RDS to file a fresh petition for redress only in case the fresh tender to be floated by the appellant for allotment of the works in any manner sought to exclude RDS from participation in the same. This necessarily implies that if RDS was allowed to participate in the fresh tender process it would have had no quarrel with the annulment of the entire tender process based on the first tender notice. Conversely if the fresh tender notice sought to disqualify RDS from bidding for the works it could seek redress against such exclusion. Liberty granted by the High Court to file a fresh petition was in our considered opinion limited to any such fresh challenge being laid by RDS to its exclusion in terms of any fresh tender notice. The order passed by the High Court did not permit RDS to re-open and re-agitate issues regarding rejection of its bid pursuant to the earlier tender notice and the annulment of the entire tender process, even if the second tender notice sought to disqualify it from competition by altering the conditions of eligibility to its disadvantage. In fresh Writ Petition No.534 of 2011 filed by RDS not only were the amended conditions of the tender notice assailed but the validity of the

resolution dated 4th October, 2010 and letter dated 6th October, 2010 was also sought to be re-opened no matter the same was already concluded with the withdrawal of Writ Petition No.8252 of 2010. RDS sought to use the liberty to challenge the amended terms of eligibility to re-open what it could and indeed ought to have taken to a logical conclusion in Writ Petition No.8252 of 2010. If the intention behind withdrawal of the Writ Petition No.8252 of 2010 was to come back on the issues raised therein there was no need for any such withdrawal, which could if taken to their logical conclusion have given to RDS the relief prayed for in the latter writ petition without even going into the question whether exclusion of RDS in the second tender notice was legally valid. Besides, the withdrawal of the earlier writ petition was a clear acknowledgment of the fact that the grievance made by RDS regarding the rejection of its bid had been rendered infructuous as the works in question remained available for allotment in a fresh tender process with everyone otherwise eligible to compete for the same being at liberty to do so. Inasmuch as and to the extent writ petition No.534 of 2011 filed by RDS challenged the rejection of the tender and the annulment process in a second round despite withdrawal of the earlier writ petition filed for the same relief, it was not maintainable. The scope of writ petition no.534 of 2011 was and had to be limited to the validity of the amendment in the conditions of eligibility introduced by RGPPL in the second tender notice issued by it. Question no.1 is answered accordingly. In Re: Question No.2

23. This question no longer survives for consideration in view of what has been observed by us while answering question no.1 above. If writ petition no. 534 of 2011 could not have re-agitated issues touching the validity of annulment of the tender process, there was no occasion for the High Court to go into the question whether or not the decision to refer to the bid and annul the process was vitiated by malice in law or fact. The findings recorded by the High Court on the question of mala fides are, therefore, liable to be set aside on that ground alone.

24. Even otherwise the findings recorded by the High Court on the question of mala fides do not appear to us to be factually or legally sustainable. While we do not consider it necessary to delve deep into this aspect of the controversy, we may point out that allegations of mala fides are more easily made than proved. The law casts a heavy burden on the person alleging mala fides to prove the same on the basis of facts that are either admitted or satisfactorily established and/or logical inferences deducible from the same. This is particularly so when the petitioner alleges malice in fact in which event it is obligatory for the person making any such allegation to furnish particulars that would prove mala fides on the part of the

decision maker. Vague and general allegations unsupported by the requisite particulars do not provide a sound basis for the court to conduct an inquiry into their veracity. The legal position in this regard is fairly well-settled by a long line of decisions of this Court. We may briefly refer to only some of them. In State of Bihar v. P.P. Sharma1992 Supp. (1) SCC 222, this Court summed up the law on the subject in the following words:

> "50. Mala fides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fide involves two questions, namely (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.
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> 51. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand."
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> (emphasis supplied)

25. We may also refer to the decision of this Court in Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia and Ors. (2005) 7 SCC 764 where the Court declared that allegations of mala fides need proof of high degree and that an administrative action is presumed to be bona fide unless the contrary is satisfactorily established. The Court observed:

> 56. … … … It is well settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy". (vide E.P. Royappa v. State of T.N. (1974) 4 SCC 3) There is every presumption in favour of the administration that the power has been exercised bona fide and

> in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in Gulam Mustafa v. State of Maharashtra (1976) 1 SCC 800 (SCC p. 802, para 2): "It (mala fide) is the last refuge of a losing litigant."

26. There is yet another aspect which cannot be ignored. As and when allegations of mala fides are made, the persons against whom the same are levelled need to be impleaded as parties to the proceedings to enable them to answer the charge. In the absence of the person concerned as a party in his/her individual capacity it will neither be fair nor proper to record a finding that malice in fact had vitiated the action taken by the authority concerned. It is important to remember that a judicial pronouncement declaring an action to be mala fide is a serious indictment of the person concerned that can lead to adverse civil consequences against him. Courts have, therefore, to be slow in drawing conclusions when it comes to holding allegations of mala fides to be proved and only in cases where based on the material placed before the Court or facts that are admitted leading to inevitable inferences supporting the charge of mala fides that the Court should record a finding in the process ensuring that while it does so, it also hears the person who was likely to be affected by such a finding. Decisions of this Court have repeatedly emphasised this aspect, which is of considerable importance. In State of M.P. and Ors. v. Nandlal Jaiswal and Ors. (1986) 4 SCC 566, speaking for the Court, P.N. Bhagwati, J., as His Lordship then was, disapproved the observations made by the High Court attributing mala fides and corruption to the State Government without there being any foundation in the pleadings for such observations. The Court declared that wherever allegations of mala fides are made, it is necessary to give full particulars of such allegations and to set out material facts specifying the particular person against whom such allegations are made so that he may have an opportunity to controvert such allegations. The following observations of the Court are apposite:

> "39. Before we part with this case we must express our strong disapproval of the observations made by B.M. Lal, J. in para 1, 9, 17, 18, 19 and 34 of his concurring opinion. The learned Judge made sweeping observations attributing mala fides, corruption and underhand dealing to the State Government. These observations are in our opinion not at all justified by the record. In the first place it is difficult to appreciate how any such observation could be made by the learned Judge without any foundation for the same being laid in the pleadings. It is true that in the writ petitions the petitioners

used words such as "mala fide", "corruption" and "corrupt practice" but the use of such words is not enough. What is necessary is to give full particulars of such allegations and to set out the material facts specifying the particular person against whom such allegations are made so that he may have an opportunity of controverting such allegations. The requirement of law is not satisfied insofar as the pleadings in the present case are concerned and in the absence of necessary particulars and material facts, we fail to see how the learned Judge could come to a finding that the State Government was guilty of factual mala fides, corruption and underhand dealing."

27. To the same effect is the decision of this Court in Smt. Swaran Lata v. Union of India Ors. (1979) 3 SCC 163, where the Court emphasized the need for particulars supporting the allegations of mala fides, in order that the Court may hold an inquiry with the same. Absence of such particulars was held to be sufficient for the Court to refuse to go into the allegations. The Court said:

"57. ……. The Court would be justified in refusing to carry on investigation into allegations of mala fides, if necessary particulars of the charge making out a prima facie case are not given in the writ petition. The burden of establishing mala fides lies very heavily on the person who alleges."

28. The above was reiterated in a recent decision of this Court in Nirmal Jeet Singh Hoon v. Irtiza Hussain Ors. (2010) 14 SCC 564 and All India State Bank Officers' Federation v. Union of India (1997) 9 SCC 151. In the latter case this Court observed:

"22. There is yet another reason why this contention of the petitioners must fail. It is now settled law that the person against whom mala fides are alleged must be made a party to the proceeding. The allegation that the policy was amended with a view to benefit Respondents 4 and 5 would amount to the petitioners contending that the Board of Directors of the Bank sought to favour Respondents 4 and 5 and, therefore, agreed to the proposal put before it. Neither the Chairman nor the Directors, who were present in the said meeting, have been impleaded as respondents. This being so the petitioners cannot be allowed to raise the allegations of mala fides, which allegations, in fact, are without merit." (emphasis supplied)

29. In the case at hand there was no allegation of "malice in fact" against any individual nor was any individual accused of bias, spite or ulterior motive impleaded as a party to the writ petition. Even Mr. Sudhir Chandra and Jagdeep Dhankar, learned Senior Counsels appearing for RDS fairly conceded that RDS had not alleged malice in fact against any individual who had played any role in the decision making process. What according to them was alleged and proved by RDS was malice in law, which did not require impleading of individual officers associated with the decision making process. We will presently examine whether a case of malice in law had been made out by the respondent-RDS. But before we do so we wish to point out that the High Court had in the absence of any assertion in the writ petition and in the absence of the officers concerned recorded a finding suggesting that the officers had acted mala fide. The High Court named the officers concerned and concluded that the integrity of the entire process was suspect. We shall subsequently extract the passage from the impugned judgment where the High Court has even without an assertion of any malice against the officers named in the judgment, recorded a finding which was wholly unjustified in the circumstances of the case especially when the High Court was making out a case for RDS which it had not pleaded when nor were the officers concerned arrayed as parties to the writ petition, in their individual capacities.

30. Coming then to the question whether the action taken by the appellant-RGPPL was vitiated by malice in law, we need hardly mention that in cases involving malice in law the administrative action is unsupportable on the touchstone of an acknowledged or acceptable principle and can be avoided even when the decision maker may have had no real or actual malice at work in his mind. The conceptual difference between the two has been succinctly stated in the following paragragh by Lord Haldane in Shearer v. Shields (1914) A.C. 808 quoted with approval by this Court Additional District Magistrate, Jabalpur v. Shivkant Shukla (1976) 2 SCC 521: "410.

> Between 'malice in fact' and 'malice in law' there is a broad distinction which is not peculiar to any system of jurisprudence. The person who inflicts a wrong or an injury upon any person in contravention of the law is not allowed to say that he did so with an innocent mind. He is taken to know the flaw and can only act within the law. He may, therefore, be guilty of 'malice in law', although., so far as the state of ins mind was concerned he acted ignorantly, and in that sense innocently. 'Malice in fact' is a different thing. It means an actual malicious intention on the part of the person who has done the wrongful act."

31. Reference may also be made to the decision of this Court in State of AP Ors. v. Goverdhanlal Pitti (2003) 4 SCC 739 where the difference between malice in fact and malice in law was summed up in the following words:

> "11. The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means 'something done without lawful excuse'. In other words, 'it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others'.[See Words and Phrases legally defined in Third Edition, London Butterworths 1989].
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> . Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all, it is malice in legal sense, it can be described as an act which is taken with a oblique or indirect object..."
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> (emphasis supplied)

32. To the same effect is the recent decision of this Court in Ravi Yashwant Bhoir v. District Collector, Raigad and Ors (2012) 2 SCC 407 where this Court observed:

> "MALICE IN LAW:
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> 37. This Court has consistently held that the State is under an obligation to act fairly without ill will or malice- in factor in law. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. "Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law. (See:Addl. Distt. Magistrate,

Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207;Union of India thr. Govt. of Pondicherry and Anr. v. V. Ramakrishnan and Ors.,(2005) 8 SCC 394; and Kalabharati Advertising v. Hemant Vimalnath Narichania and Ors., AIR 2010 SC 3745)."

33. In the case at hand the final decision to reject the tender submitted by RDS was taken by the appellant-RGPPL in its capacity as the owner of the project. GAIL and EIL performed only an advisory role whose opinions were recommendatory and meant to assist the owner to take a final call. The appellant-RGPPL had from the date of receipt of the recommendations made to it by EIL and GAIL till the end maintained a consistent stand and expressed reservations about the capacity of RDS to undertake the work. Correspondence exchanged between RGPPL and GAIL and EIL bears testimony to that fact. In the challenge mounted before the High Court by Hung Hua/Ranjit Buildcon Ltd. to the decision holding RDS techno commercially responsive, RGPPL had no doubt filed a short affidavit supporting its decision holding RDS eligible but discovery of material in proceedings under the RTI Act and an adverse CAG report instead of clearing the mist had created further confusion in the process, supporting what may have been a mere hunch or apprehension in the beginning about the capacity of RDS to handle a major project having regard to the fact that it had overshot the time schedule for completion of a much lesser project in Car Nicobar. In that backdrop and as owner of a project being executed at a colossal cost running into hundreds of crores of rupees, RGPPL was perfectly justified in adopting a careful approach to ensure that those found eligible by its technical experts and consultants were indeed so qualified and possessed the necessary wherewithal, experience and expertise to execute the project at Dabhol. It was also well within its right to demand documentary proof from RDS to support its claim that it had indeed executed the project at Mus in Car Nicobar area so as to make it eligible for claiming award of the works in question. In the course of the hearing we had on several occasions asked learned counsel for RDS to furnish documentary evidence to probabilize if not conclusively establish that RDS had indeed undertaken the execution of the work involving construction of 400 meters of breakwater which it claimed to have executed. Besides, we had directed the Central Government Counsel to produce before us the relevant record relating to the project at Car Nicobar in response to which Mr. Gulati had produced a few files. These files, according to Mr. Gulati, did not show that RDS had indeed executed the breakwater Project of 400 meters length in Car Nicobar. More importantly Mr. Gulati was unable to disclose the basis on which the certificates, which RDS had produced to prove its eligibility, were issued by the engineers concerned. The files that were produced did not bear any testimony to the issue of

any such certificates or the basis on which the same were issued. Our effort to resolve the issue regarding the eligibility of RDS in these proceedings, therefore, remained fruitless, no matter we were keen to give a quietus to the controversy which is delaying indefinitely a project of national importance. The task of finding an answer to the question of eligibility was rendered all the more difficult by the fact that the High Court has not adverted to and resolved that issue on merits and by reference to the available material. We will advert to this aspect in some detail a little later. Suffice it to say for the present that RGPPL as the owner acting as a prudent and responsible public authority discharging public trust obligations was well within its rights to raise questions and seek answers on an important matter like the eligibility of RDS to participate, no matter EIL and GAIL had on the basis of the certificates produced before them recommended RDS as an eligible bidder. There was in that view no justification for either RDS or the High Court to raise an accusing finger against RGPPL simply because it had demanded proof regarding the claim of eligibility from RDS or collected relevant information under RTI Act and referred the material so collected to GAIL and EIL for evaluation and opinion. The final decision to scrap the project being within its powers under the terms of the tender notice RGPPL's invocation of that power was not in the facts and circumstances vulnerable to challenge on the ground of malice in fact or law, on the grounds set out by the High Court even assuming that writ petition No.534/2012 was maintainable notwithstanding the withdrawal of the earlier petition filed by RDS.

34. Independent of what has been said above we may point out that the High Court has rested its finding on malafides entirely on the conflict between recommendations made by EIL in its letter dated 8th March, 2010 holding RDS to be techno commercially responsive and letter dated 1st December, 2010 by which the said recommendation has been reversed. The High Court has while dealing with the change in the view taken by the EIL, inspired as it was by the legal opinion tendered to it on the subject, observed:

> "It was submitted before us that this opinion became the edifice for the change of view that the EIL took on 1.9.2010. We may note at the outset that the opinion is completely converse to the stand taken by the EIL up to 11.8.2010. It is pertinent to note (a fact we were told in the hearing) that the said legal opinion bears the endorsement of Mr. Grover, Director (Projects) calling upon Mr. R.K. Bhandari, General Manager (Project), EIL to simply comply with the view taken by the legal department. As noticed here in above by us, Mr. R.K. Bhandari was the same gentleman, who on 10.6.2010

had opined that no revision in the award recommendation in favour of RDS was called for. The crucial question which arises, is that, was Mr. R.K. Bhandari given a chance to express his view on the opinion rendered by the legal department. This is a pertinent aspect of matter to our minds since Mr. R.K. Bhandari, followed by Mr. Ravi Saxena, in EIL and Mr. M.B. Gohil in GAIL were people who would have dealt with such like contact on a number of occasions. Being experts in their respective fields, they would know what was intended when terms like "single project" and "single bidder" were put in Clause 8.1.1.1 Therefore, for the legal department of EIL to take contrary, though "absurd" and "harsh" view, required at least a modicum of response from the expert, which was none other than Mr. R.K. Bhandari dealing with the issue till 10.6.2010. Mr. Grover Director (Projects) did not deem it fit to even ask for his comments. Therefore, the integrity of entire process is suspect to say the least. In any event, in our view, the opinion is completely contrary to the plain language of clause 8.1.1.1."

35. The above clearly shows that the High Court has recorded its finding on mala fides on the sole basis that EIL had reviewed its earlier opinion regarding eligibility of RDS. The High Court, in our opinion, was wrong in doing so. While the High Court could find fault with the interpretation which EIL placed on the provisions of clause 8.1.1.1 on the basis of the legal opinion tendered to it, it went too far in dubbing the entire process as mala fide. The High Court appears to have taken the view as though Mr. R.K. Bhandari, Mr. Ravi Saxena and Mr. M.B. Gohil were experts, even in the matter of interpretation of the terms and conditions of the tender document, who could sit in judgment over the legal opinion tendered to them. If on an interpretation of a clause in the tender notice by the legal department concerned the officers review their decision or reverse the recommendations made earlier, the same does not tantamount to malice in law so as to affect the purity of the entire process or render it suspect even assuming that the opinion is on a more thorough and seasoned consideration found to be wrong. In the absence of any other circumstances suggesting that the process was indeed vitiated by consideration of any inadmissible material or non-consideration of material that was admissible or misdirection on issues of vital importance, fresh recommendations made in tune with the legal opinion could not be held to have been vitiated by malice in law. The High Court, it appears, felt that since the officers referred to above were senior officers they ought to have known what was meant by terms like 'single project' and 'single bidder' appearing in clause 8.1.1.1. We need hardly point out that in cases where the decision making process is multi-layered, officers associated with the process are free and indeed expected to take

views on various issues according to their individual perceptions. They may in doing so at time strike discordant notes, but that is but natural and indeed welcome for it is only by independent deliberation, that all possible facets of an issue are unfolded and addressed and a decision that is most appropriate under the circumstances shaped. If every step in the decision making process is viewed with suspicion the integrity of the entire process shall be jeopardized. Officers taking views in the decision making process will feel handicapped in expressing their opinions freely and frankly for fear of being seen to be doing so for mala fides reasons which would in turn affect public interest. Nothing in the instant case was done without a reasonable or probable cause which is the very essence of the doctrine of malice in law vitiating administrative actions. We have, therefore, no hesitation in holding that the findings recorded by the High Court to the effect that the process of annulment of the tender process or the rejection of the tender submitted by RDS was vitiated by mala fides is unsustainable and is hereby set aside. Question no. 2 is accordingly answered in the negative.

In Re: Question No.3

36. The withdrawal of Writ Petition No.8252 of 2010 with permission to petitioner-RDS to file a fresh Writ Petition No.534 of 2011 was followed by the issue of a fresh tender notice in which Clause 8.1.1.1 of the first tender document was modified. Clause 8.1.1.1 as it appeared in the second tender notice was as under:

> "The bidder must have completed in a single contract, as a single bidder or as a leader of a consortium, at least one breakwater (using marine spread-refer Note 1) of minimum length of 400 m located in sea during the last 20 (twenty) years to be reckoned from the last date of submission of bids. The scope of work of the above referred qualifying job should comprise of design, engineering, construction and project management of the breakwater. Land connected breakwater having a minimum length of 400m located in sea is also acceptable provided construction has been carried out using marine spread as mentioned above."

37. Even when RDS claimed to have completed the project of 400 meters length in Mus-Car Nicobar, it was ineligible to compete for the works at Dabhol under the above clause as the work in Car Nicobar was executed under two contracts and not a 'single contract' which was added to the conditions of eligibility under the above clause. The said modification in the BQC was, according to the RDS, meant to

unfairly exclude RDS from competing. The modified clause was, therefore, assailed on the ground that it was tailor made to suit the requirement of other tenderers who had lost out on the "financial bid" front in relation to the first tender. The High Court accepted that contention and declared that the modification in the BQC by which RDS was rendered ineligible was not justified and unfairly eliminated it from competing for the allotment of the works.

38. Assailing the above finding of the High Court Mr. Nariman, learned Solicitor General, argued that if the annulment of the tender process pursuant to the first tender notice was held to be valid and beyond challenge at the instance of RDS, the conditions on which fresh tenders are invited including the conditions of eligibility stipulated in the tender notice was not open to challenge by a prospective tenderer. Relying upon the decision of this Court in Air India Ltd. v. Cochin International Airport Ltd. and Ors. (2000) 2 SCC 617, Mr. Nariman argued that the High Court went wrong in declaring the provisions of Clause 8.1.1.1 of the second tender notice to be legally bad. The following passage from the above decision is apposite:

> "7. ….. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny…."

39. Having said that we must say to the credit of Mr. Nariman that he made a statement on instructions that in order to show its bona fides and to prove that it had no intention to deliberately target or exclude RDS, RGPPL would not apply the modified Clause 8.1.1.1 of the second tender notice to fresh tenders while evaluating them for techno commercial purposes. RGPPL would, according to Mr. Nariman, treat Clause 8.1.1.1. in the first tender notice as the applicable clause and the second tender process shall be carried forward on the Clause 8.1.1.1 as it stood in the first tender document. The statement of Mr. Nariman makes it unnecessary for us to examine whether or not RGPPL was justified in amending the BQC and whether such amendment was meant to exclude RDS or any other similarly situated tenderers from competing for the works. In the light of the statement made by Mr. Nariman we do not consider it necessary to go into the juristic aspect relevant to the validity of the clause extracted above. All that we need say is that Clause 8.1.1.1 of the second tender notice shall not be enforced by RGPPL and that

the corresponding clause as it appeared in the first tender notice shall govern matters stipulated therein. Question No.3 is answered accordingly.

In Re: Question No.4

40. We have while answering Question No.1 held that W.P. No.534 of 2011, out of which this appeal arises, was maintainable only in so far as the same questioned the exclusion of RDS from competing for the work in question. That exclusion could be on account of a change in the conditions of eligibility as was sought to be introduced by Clause 8.1.1.1 of the second tender notice or by reason of RDS being found ineligible even under the unamended/original Clause 8.1.1.1 of the first tender notice. In so far as the amended Clause 8.1.1.1 of the second tender notice is concerned Mr. Nariman's statement which we have noticed while answering question no.3 above, has put an end to the controversy. RDS cannot, therefore, be excluded from competition based on Clause 8.1.1.1 in the second tender notice. But that does not automatically make RDS eligible for allotment of the works even under the first tender notice. The appellant's case is that RDS was techno commercially ineligible for allotment, and in its communication dated 6th October, 2010 it had given the reasons for that view. We shall presently examine the said reasons but before we do so we need to point out that the High Court had quashed the communication and held RDS to be eligible. That finding has not yet attained finality, as the appellant has questioned the judgment of the High Court in the present appeal. Whether or not RDS is eligible, therefore, remains relevant not for the purpose of taking the tender process initiated with the issue of the first tender notice forward but for purposes of finally determining whether RDS will be eligible to participate in any fresh tender notice issued in future, in which Clause 8.1.1.1 remains, the touch stone for determining the eligibility of the tenderers. It is in the above background that we need to examine whether RDS was eligible to compete for the works based on the first tender notice.

41. In its communication dated 6th October, 2010 the appellant had summed up the reasons for declaring RDS to be techno commercially non- responsive in the following words:

> "From perusal of the various documents, it can be concluded that the qualifying project claimed by you to have been awarded in November 2000 had the maximum length of 290 m and not 400 m required under BQC. The breakwater(s) at Mus (chainage 22 m to 200 m and chainage 200m to

330m/490m) was awarded as two separate projects by the project authority and also executed accordingly by the respective agencies.

Further, award for different phases of the project was made on EHL or M/s Reacon International and you were also not responsible for the execution of total scope of work in any of the two projects.

In the light of the above, it is concluded that RDS does not meet the BQC requirement of having completed at least one project of a breakwater in an offshore location of minimum length of 400, during the last 20 (twenty) years to be reckoned from the last date of submission of bids."

42. A careful reading of the above would show that the rejection of the bid offered by RDS was based on three distinct grounds. These are: (i) RDS had claimed the qualifying project to have been awarded in its favour in November, 2000. The length of the project so allotted was 290 meters only as against 400 meters required under the BQC. (ii) The breakwater at Mus (chainage 22m to 200m and 200 meters to 330/490 meters) were awarded and executed as two separate Projects, whereas Clause 8.1.1.1 required that the single bidder should have executed the required length of Breakwater in a Single Project. (iii) The award of the above project was made on EHL or M/s Reacon International, for different phases and RDS was not responsible for the execution of the total scope of the work in any one of the two projects.

43. RDS has before the High Court and even before us, claimed that the Breakwater at Mus in Car Nichobar was a single project and not two projects as contended by the appellant-RGPPL. It has further claimed that the entire project has been executed by it on behalf of EHL, no matter a part of the work like quarrying of stones/boulders and shipping the same from the quarry site to the place of construction was handled by EHL. These works were performed by the above two agencies for monetary consideration on behalf of RDS who was entitled to associate them with the execution of the project work in terms of the conditions of contract; under which EHL had engaged RDS.

44. The case of the appellant on the other hand is that the only purpose behind stipulating that the tenderer should have executed a breakwater project as a single tenderer with a minimum length of 400 meters was to ensure that only such tenderers are held eligible as have executed a "single project" of that length 'single handedly' without associating any other agency with the execution of the work. It

was important for the appellant to do so because the breakwater length in the present case is more than four times the length stipulated as a condition of eligibility. It is the further case of the appellant that apart from Recon International one Surya Rao was also associated with the execution of the project, which fact is according to the appellant evident from the government files produced by Mr. Gulati appearing for the Central Government.

45. On the question whether the Breakwater constructed at Mus in Car Nicobar comprised one or two projects, also there was some debate which was rendered academic, by Mr. Nariman, making a fair and unqualified concession that for purposes of determining the eligibility of RDS the breakwater at Mus Car Nicobar could be treated as a single project. With that concession, what remains to be determined is whether RDS had limited its claim to eligibility only on the award made in its favour in November, 2000. If so, whether it is debarred or stopped from claiming that it had executed the project from chainage 22 meters to 200 meters also. More importantly, whether RDS had actually executed the Breakwater Project at Mus Car Nicobar with a length of 400 meters.

46. We looked in vain for a finding on the above questions in the impugned judgment leave alone one that satisfactorily dealt with the material placed by the parties on record in support of their respective cases. What we found was a concession attributed to Ms. Indra Jai Singh, learned Additional Solicitor General to which the High Court referred in Para 30.2 of its order, and which by far is the only reason given by the High Court for holding that RDS had executed the Breakwater Project at Mus in Car Nicobar. The High Court observed:

> "30.2
>
> We may note at this stage that we had had pointedly put to the ASG Ms. Indra Jai Singh during the course of hearing, as to whether there was any doubt or dispute that RDS had not executed the qualifying work at Mus Car Nicobar Island equivalent to the contracted length of 500 meters. Ms. Indra Jai Singh, on instructions, categorically informed us that this aspect of the matter was not in issue. She, however, submitted that what was in issue, was the fact, that since it had not emerged that RDS had completed the project in two (2) phases; according to EIL, it was not eligible. With EIL having taken this stand, which was not contradicted by GAIL at the hearing; it quite surprised us when Mr. Chandiok appearing on behalf of RGPPL took the

stand that RDS had not even constructed the required minimum 400 meters length of qualifying work."

47. Ms. Indra Jai Singh appearing for the Central Government argued that the High Court had misconstrued her statement, in as much as no concession as attributed to her was made or could be made when the relevant record did not bear any evidence of RDS having been associated with the project in question. Mr. Nariman contended that the concession even if made did not bind the appellant RGPPL, who as a separate legal entity was entitled to argue, as it indeed argued, before the High Court that RDS had not been associated with or executed the entire project, at Mus Car Nicobar, hence was not eligible to compete.

48. There is considerable merit in the submission made by the learned counsel for the appellants and Ms. Jai Singh. A concession even if made by one of the parties could not prevent the other parties from arguing that it did not bind them or that the same was contrary to the facts. The High Court ought to have examined the issue on merits, rather than taking a short cut. The High Court has incidentally taken support from the certificate dated 5th April, 2008 and clarification issued on 5th June, 2010 to hold that the RDS had indeed executed the qualifying project at Car Nicobar. We had in the course of the hearing asked Mr. Gulati, learned counsel for the Central Government, to disclose to us the basis on which the certificate and the clarification had been issued by the officers concerned. We got no satisfactory answer to the query. We even asked the parties to produce the relevant record including the government files, so that we could ourselves answer the question regarding eligibility of RDS but in the absence of any conclusive evidence, and in the absence of a specific finding from the High Court, on the question, we remained handicapped. A remand to the High Court, therefore, became inevitable which part we must say in fairness to learned counsel for both sides, was conceded even by them.

49. In the result we allow these appeals, set aside the judgment and order passed by the High Court and remand the matter back to the High Court with the following directions:

(1) The High Court shall examine and decide afresh the limited issue whether RDS was eligible to compete for the works in question in terms of the first tender notice based on the works which it claims to have executed at Mus in Car Nicobar.

(2) If the High Court comes to the conclusion that RDS is not eligible in terms of Clause 8.1.1.1 of the first tender notice as it had not executed a breakwater of the requisite length, Writ Petition No. 534 of 2011 filed by the respondent-RDS shall stand dismissed in toto. Resultantly, the appellant-RGPPL shall be free to carry forward and finalize the process of allotment of works started by it in terms of the second tender notice.

(3) In case, however, the High Court comes to the conclusion that RDS was eligible to compete for the works in question on the basis of the first tender notice, subject to that finding attaining finality in any further appeal filed by the aggrieved party, the appellant-RGPPL shall be free to issue a fresh tender notice without altering the conditions of eligibility as stipulated in Clause 8.1.1.1 and finalise the said process on such other terms and conditions as it may deem fit and proper to incorporate in the tender notice.

(4) Keeping in view that the tender process relates to a project of national importance, the High Court is requested to dispose of the matter at an early date and as far as possible within a period of four months from the date a copy of this order is received by it.

50. Parties are left to bear their own costs.