IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 24.07.2017

\+ **W.P.(C) 6699/2016 and CM No. 27651/2016**

AQUA DESIGNS INDIA PRIVATE LIMITED ..... Petitioner

Versus

UNION OF INDIA, MINISTRY OF POWER AND ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner	:	MrAmitesh Chandra Mishra.
For the Respondents	:	Ms Arti Bansal and Ms Madhuri Dhingra for R-1/UOI. Mr Bharat Sangal, Mr Vidushi Garg and Ms S. Spandana Reddy for R-2.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Aqua Designs India Private Limited (hereafter 'Aqua') has filed the present petition under Article 226 of the Constitution of India, *inter alia,* impugning the order dated 02.06.2016 communicating the decision of the Board of Directors of respondent no.2 (hereafter 'NTPC') to reject Aqua's appeal against an order dated 11.09.2015. By an order dated 11.09.2015, NTPC communicated its decision to suspend issuance of bidding documents and not to award any tenders to Aqua for a period of three years from the issuance of the said order.

The orders dated 11.09.2015 and 02.06.2016 are hereafter collectively referred to as 'the impugned orders'.

2. The impugned orders were issued by NTPC pursuant to its policy of Withholding and Banning of Business Dealings in certain cases. The said policy, *inter alia,* provides that NTPC can initiate measures for banning of business dealings against any agency, *inter alia,* on the grounds of corrupt and fraudulent practices. In pursuance of the said policy, NTPC decided to initiate action against Aqua on an allegation that it had filed fraudulent certificate indicating that one of the water treatment plants established by Aqua was in operation for a period of 2.5 years at the time of the bid; whereas, in fact, the said plant was in commercial production only for a period of 1.5 years (approx). According to NTPC, the said certificate is fraudulent and thus fell foul of its Fraud Prevention Policy. Aqua, on the other hand contests the said allegation, and claims that only a typographical error had crept into the certificate in question; there was neither any intention to make any misrepresentation nor any fraud could be stated to have been committed by Aqua. Aqua claims that the typographical error was of little consequence and no benefit could be derived from such error.

3. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

3.1 Aqua is a water management and engineering company, carrying on various activities such as water purification, waste management, etc. It serves various industries operating in diverse fields including steel, textile, tannery, etc.

3.2 In and around July 2014, NTPC invited bids from prospective vendors, through a domestic competitive bidding process, for the purposes of commissioning a water treatment plant package at Darlipali Super Thermal Power Project, Stage I. One of the qualification requirements for the bidders was that the bidder must have designed, supplied, erected and commissioned at least two water/waste water treatment plants with a capacity of not less than 1000 cum/hr and the plants should have been successfully running for at least 1 year prior to the date of techno-commercial bid opening. The relevant clause is quoted below:-

3.0	ITB 8.2(i)(c)	**Qualification Requirement for Bidders**
3.1.0		In addition to the requirements stipulated in Section ITB (Instructions Bidder), the following shall also apply: Bidder should have designed, supplied, erected and commissioned at least two (2) numbers water/waste water treatment plants, each with a capacity of not less than 1000 cum/hr, comprising of clarifiers/tube settlers/thickeners or a combination thereof including civil works. The plants should have been in successful operation for at least one (1) year prior to the date of Techno-Commercial bid opening.”

3.3 Pursuant to the notice inviting tenders, McNally Bharat Engineering Company (hereafter 'McNally') submitted its bid to NTPC. Since McNally did not satisfy the requirement of past experience - that is, commissioning of at least two water / waste water treatment plants each of capacity not less than 1000 cum/hr, which were in successful operation for at least one year - it associated with Aqua for the purposes of bidding. NTPC states that no joint ventures were permitted and the contract if awarded would be in favour of McNally. However, McNally was permitted to associate with other entities and rely on their experience for fulfilling the bidding qualifications. Accordingly, McNally submitted the details of the plants designed, erected and commissioned by Aqua including a water treatment plant designed, erected and commissioned by Aqua for M/s Kesar Enterprises Ltd. Baheri, (hereafter 'the Kesar Plant'). The date of commission of the Kesar Plant was stated to be September 2011 and it was claimed that the Kesar Plant was in operation for over 2.5 years.

3.4 During the post-bid submission technical check, NTPC sought certain additional documents from McNally including the commissioning report of the Kesar Plant. Aqua claims that Kesar Enterprises Ltd initially provided the commissioning report (signed on 25.06.2011) bearing an incorrect date of commissioning of the Kesar Plant, that is, 23.06.2011; however, the error was rectified later and Kesar Enterprises Ltd re-issued a rectified commissioning report (signed on 25.06.2012) indicating the correct date of commissioning of the Kesar Plant (that is, 23.06.2012). Despite the correction, a copy of the said report with the incorrect date of commissioning remained in the records of Aqua. It is alleged that the junior staff of Aqua had inadvertently forwarded the wrong report (that is, the report specifying the date of commissioning as 23.06.2011) to McNally, which was thereafter forwarded to NTPC.

3.5 In an inspection of the Kesar Plant conducted by NTPC in relation to another tender in 2013 - Lara-I tender - several documents, which included the commissioning report of the Kesar Plant mentioning the date as 23.06.2012, were handed over by McNally to NTPC. In the Lara-I tender too, McNally had associated with Aqua and had offered the same plant of Kesar Enterprises Ltd. for reference. By a letter dated 05.12.2014, NTPC sought explanation on the discrepancy with respect to the date mentioned in the commissioning report submitted by McNally for the Lara-I tender not being consistent with the date specified in the commissioning report submitted by it (as forwarded by Aqua) for the Darlipali tender. The matter was also reported for investigation for suspected fraud as per NTPC’s policy.

3.6 In response to the same, McNally by a letter dated 19.12.2014 clarified that the Kesar Plant was commissioned on 23.06.2012 and the commissioning report of the same had been checked and verified by NTPC for the Lara-I tender at the Kesar Plant in 2013. And, during the Darlipali tender preparation in 2014, more than a year had passed since commissioning of the Kesar Plant. Along with the said letter, McNally also attached Aqua's response on the issue for NTPC's perusal.

3.7 Thereafter, NTPC issued a show cause notice dated 19.05.2015, calling upon Aqua to explain the reasons for the above discrepancy within 15 days to avoid ban on business dealings with NTPC for three years. By a letter dated 03.06.2015, Aqua replied to the show cause notice and stated that initially the commissioning report issued by Kesar Enterprises Ltd. bore the incorrect date of 23.06.2011; the same was a typographical error, which was later corrected and a rectified report specifying the date of commissioning as 23.06.2012, was issued by Kesar Enterprises Ltd. However, both the reports (the initial incorrect one as well as the rectified one) remained in the files of Aqua. And, the junior staff of Aqua while preparing the documents for the Darlipali tender inadvertently submitted the commissioning report with the incorrect date to NTPC.

3.8 Aqua was afforded an opportunity to be heard on 26.06.2015. During the hearing, Aqua submitted two certificates (both dated 21.03.2015) furnished by Kesar Enterprises Ltd., affirming that the Kesar Plant was commissioned on 23.06.2012. Aqua reiterated the explanation as provided earlier.

3.9 Thereafter NTPC issued the impugned order dated 11.09.2015 holding that Aqua had tampered the commissioning report by changing the dates and submitted it to NTPC. It was observed that Aqua had also submitted multiple documents indicating the commissioning date as September 2011, however, actual commissioning date was September 2012. NTPC concluded that *"it is established as per para 5.1 (j) of the Policy & Procedure for Withholding and Banning of Business Dealings that M/s Aqua Designs India Pvt. Ltd., Chennai had misrepresented the facts while submitting the documents in respect of the work executed at M/s Kesar Enterprises Limited Plant"*.

3.10 In view of the above, by the impugned order dated 11.09.2015, NTPC suspended issuance of bidding documents to Aqua and blacklisted it from all future tenders of NTPC for a period of 3 years from the date of the said order.

3.11 Aggrieved by the aforesaid order, Aqua preferred an appeal before the appellate authority (Board of Directors of NTPC) in terms of paragraph 5.11 of the Policy & Procedure for Withholding and Banning of Business Dealings (hereafter 'the Blacklisting Policy'). The appellate authority upheld the order dated 11.09.2015 and dismissed Aqua's appeal; the same was communicated to Aqua by the impugned order dated 02.06.2016.

4. It is contended on behalf of Aqua that the act of submission of commissioning report with incorrect date did not amount to misrepresentation as the mistake was inadvertent. Even assuming that the date of commissioning was deliberately changed from 2012 to 2011, the same would not confer any advantage on Aqua as it already

fulfilled the qualification requirement for the bid even with the correct date of commissioning.

5. Next, it is argued that the officers passing the impugned orders were not competent to do so and the same have been passed without jurisdiction. In terms of paragraph 3(ii)(a) of the Blacklisting Policy, 'Competent Authority' has been defined as the CMD and the 'Appellate Authority' has been defined to be the Board of Directors (BOD)/ Sub-Committee of the BOD/ Group of Directors of NTPC, nominated for the said purpose. Whereas, the impugned order dated 11.09.2015 was delivered by the AGM (CS-P&S), the order dated 02.06.2016 has been passed by the ED(Law) and Company Secretary of NTPC.

6. Lastly, it has been contended that NTPC failed to consider that the certificates dated 21.03.2015 issued by Kesar Enterprises Ltd. specifying that issue of the commissioning report with the date of commissioning as 23.06.2011 was a typographical error.

Reasoning and Conclusion

7. It is apparent from the facts as stated above that there is no dispute that the certificate submitted by Aqua with regard to the commissioning of the Kesar Plant was erroneous to the extent that it certified that the plant was commissioned on 23.06.2011 instead of 23.06.2012. The plant details submitted by McNally as per the bid data sheet was also erroneous inasmuch as it specified the date of

commissioning of the Kesar Plant as September 2011. Consequently, the bid details also incorrectly stated that the Kesar Plant was in operation for a period of 2.5 years at the time of submission of the bids whereas in fact the Kesar plant would have been in operation for only 1.5 years. Whilst, Aqua contends that the error was an inadvertent typographical error, NTPC claims the same to be fraudulent and falling within the scope of its Blacklisting Policy. Thus, the only question to be examined is whether the submission of certificate issued by Kesar Enterprises Ltd. and other documents by Aqua indicating an incorrect date of commissioning of the Kesar Plant falls within the scope of the Fraud Prevention Policy (hereafter 'the FPP') of NTPC.

8. In order to establish a framework for dealing with other agencies, NTPC has adopted a policy for withholding/banning of business dealings (the Blacklisting Policy) and has also placed the same on its website. NTPC claims that Aqua's case has been considered within the framework of the said policy.

9. Thus it would be relevant to refer to NTPC's Blacklisting Policy. The introduction to the said policy is relevant and reads as under:-

> "**1. <u>Introduction</u>**
>
> 1.1 NTPC Ltd. deals with Agencies, who are expected to adopt ethics of highest standards and a very high degree of integrity, transparency, commitments and sincerity towards the work undertaken. It is not in the interest of NTPC to deal with any Agency who

> commit deception, fraud or other misconduct of whatsoever nature in the tendering process and/or execution. NTPC is committed for timely completion of the projects within the awarded value without compromising on quality."

10. A plain reading of paragraph 1.1 of the Blacklisting Policy, as set out above indicates that the focus of the policy is to maintain high degree of integrity, transparency, commitments and sincerity towards work undertaken. The policy is intended to put an embargo on any future transactions with concerns that commit *deception*, *fraud* or *other misconduct* in the tendering process or in execution of the works. Paragraph 3(vi) defines "Fraud Prevention Policy" to mean the policy related to prevention of fraud, displayed on the NTPC tender website: http://www.ntpctender.com. Paragraph 5.1 of the Blacklisting Policy sets out the grounds on which action for banning of business dealings can be initiated. Paragraph 5.1 (j) which has been invoked in the present case reads as under:-

> "j) If it is established that Agency has resorted to corrupt, fraudulent practices including misrepresentation of facts;"

11. It is apparent from a plain reading of the aforesaid paragraph that it is directed towards concerns that indulge in *corrupt* and *fraudulent* practices. In the present case, there is no allegation of any corrupt practices and the scope of examination before the competent authority of NTPC was limited to determining whether Aqua was guilty of any fraudulent practices. The learned counsel for NTPC had

contended that furnishing of incorrect certificate would be covered under the FPP as referred to in para 3(vi) of the Blacklisting Policy. Thus, the controversy is narrowed down to examine whether Aqua is guilty of fraud within the scope of the FPP.

12. The policy objectives, scope of policy and the definition of fraud under the FPP are set out below:-

> "**POLICY OBJECTIVES:**
>
> The "Fraud Prevention Policy" has been framed to provide a system for detection and prevention of fraud, reporting of any fraud that is detected or suspected and fair dealing of matters pertaining to fraud. The policy will ensure and provide for the following:-
>
> I. To ensure that management is aware of its responsibilities for detection and prevention of fraud and for establishing procedures for preventing fraud and/or detecting fraud when it occurs.
>
> II. To provide a clear guidance to employees and others dealing with NTPC forbidding them from involvement in any fraudulent activity and the action to be taken by them where they suspect any fraudulent activity.
>
> III. To conduct investigations into fraudulent activities.
>
> IV. To provide assurances that any and all suspected fraudulent activity will be fully investigated.
>
> **SCOPE OF POLICY**:
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> The policy applies to any fraud, or suspected fraud involving employees of NTPC (all full time, part time or employees appointed on

adhoc/temporary/contract basis) as well as representatives of vendors, suppliers, contractors, consultants, service providers or any outside agency (ies) doing any type of business with NTPC.

DEFINITION OF FRAUD

"Fraud" is a willful act intentionally committed by an individual(s) – by deception, suppression, cheating or any or any *other fraudulent* or any other *illegal means, thereby, causing wrongful gains) to self or any other* individual(s) and *wrongful loss* to other(s). Many a times such acts are undertaken with a view to deceive/mislead others leading them to do or prohibiting them from doing a bonafide act or take bonafide decision which is not based on material facts."

13. A plain reading of the objectives of the FPP indicates that the object is not to penalize any party for a *bonafide* or an inadvertent error but is intended to provide a framework for prevention of fraud. As is apparent from the plain reading of the definition of "fraud", it involves a willful act of *deception*, *suppression*, *cheating* or any *other fraudulent* or any other *illegal means,* which causes *wrongful gain(s) to self or any other individual(s) and wrongful loss to others*. Therefore, for an act or conduct to be considered as fraudulent within the FPP, it must have been committed intentionally for causing wrongful gains (to self or others) or wrongful loss to NTPC. In the present case, there is no allegation that any wrongful gain accrued to and/or could have accrued to Aqua, McNally or any other person. There is also no allegation that any loss has resulted and/or could have

resulted to NTPC by the incorrect representation. The certificate furnished by Aqua incorrectly representing that the Kesar Plant was commissioned on 23.06.2011 instead of 23.06.2012 and, was thus, functioning for 2.5 years instead of 1.5 years, resulted in no additional advantage whatsoever to McNally or Aqua. The qualification criteria that two water treatment plants of the specified capacity, successfully functioning for one year would have been met even if the correct statement was made.

14. It is also a conceded position that the specified criteria - that is, commissioning of at least two water/ waste water treatment plants each of capacity not less than 1000 cum/hr, which were in successful operation for at least one year - was only a qualification criteria for determining the qualification and was not relevant for further evaluation. Thus, there is no possible reason or incentive for Aqua to have furnished an incorrect certificate. Admittedly, no advantage of any kind would be available or was secured to Aqua by stating the incorrect date of commissioning of the water treatment plant in question. In the aforesaid view, the ingredients of fraud as defined under the FPP are plainly, not established. Consequently, the incorrect certificate would not fall within the scope of *fraudulent practices* under the Blacklisting Policy.

15. Blacklisting of an entity by NTPC has serious consequences inasmuch as it not only disables such entity to secure contracts from NTPC but such blacklisting is also usually taken into account by other companies while awarding contracts; resultantly, an entity which has

been blacklisted by NTPC would also be disqualified from participating in tenders floated by other public sector enterprises and Government agencies. Given the serious adverse effect of blacklisting, it was also necessary for the concerned authorities of NTPC to consider the gravity of the offending act while considering the question of blacklisting Aqua. A bare perusal of the order dated 11.09.2015 indicates that the competent authority had concluded that Aqua had tampered with documents on the basis that there were two certificates issued by Kesar Enterprises Ltd. which indicated the commissioning date of the Kesar Plant as September 2011, that is, the date mentioned in its bid. Aqua's explanation that the errors in the bid documents had crept in inadvertently was not accepted. Although, the concerned authority did not accept the said explanation, they failed to address the question whether there could possibly have been any ulterior motive for furnishing an inaccurate certificate. Concededly, no benefit could have been obtained or was obtained by Aqua and this issue was not addressed by the concerned authorities. Having come to the conclusion that inaccurate certificate (tampered certificate) was furnished; the concerned authority proceeded to hold that the ground as stated in paragraph 5.1(j) of the Blacklisting Policy was established. This as indicated above, is *ex facie* erroneous as the focus of the Blacklisting Policy is not to inflict punitive measures for inaccurate information but to exclude parties indulging in any deceptive and fraudulent practices from any transactions with NTPC. This aspect was also not addressed by the appellate authority. In this view, the impugned orders cannot be sustained.

16. This Court is conscious that NTPC (or for that matter any other entity falling within the scope of State within the meaning of Article 12 of the Constitution of India) has sufficient discretion in determining the persons it intends to deal with and the persons with whom it does not want to engage; but this discretion cannot be exercised arbitrarily. If NTPC decides to exclude any party from entering into transactions with it for good reasons, the merits of NTPC's decision to do so, cannot be subjected to judicial review. The scope of interference with such decisions is extremely narrow and unless the court comes to a conclusion that the decision making process was flawed or the decision is so arbitrary and unreasonable that no sensible person could have reached such decision (*wednesbury* principle), the decision will not be interfered with.

17. However, in this case, NTPC has set out objective standards for determining whether a party requires to be blacklisted. Therefore the question whether its decision is arbitrary or unreasonable would have to be tested on the basis of the policy sought to be implemented.

18. It is also seen that almost two years have elapsed since Aqua was blacklisted and only about one year of the embargo imposed remains. Thus, notwithstanding that this Court finds that the impugned orders were unwarranted; Aqua has already suffered a large part of the punitive measure inflicted by NTPC.

19. In the aforesaid circumstances, the impugned orders are set aside and NTPC is directed to ensure that Aqua is not excluded or

penalized in any manner on account of the incorrect documents/information that were submitted along with the bid in question.

20. The petition and the pending applications are disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

JULY 24, 2017
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