

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 03.01.2018

+ **W.P.(C) 7493/2016 & CM No. 30823/2016**

EMAMI POWER LIMITED

..... Petitioner

Versus

NTPC LIMITED & ANR.

..... Respondents

AND

+ **W.P.(C) 9511/2016 & CM No. 38042/2016**

**ORIENTAL SALES AGENCIES (INDIA)
PRIVATE LIMITED**

..... Petitioner

Versus

NTPC LIMITED AND ANR

..... Respondents

Advocates who appeared in these cases:

For the Petitioners : Mr. Parag P. Tripathi, Sr. Advocate with
Mr. Abhimanyu Bhandari, Advocate,
Mr. Cheitanya Madan, Ms. Mishika Bajpai,
Advocates.
Mr. Arjun Pant, Ms. Gauri Rishi, Advocates.
For the Respondents : Ms. Pinky Anand, ASG, Mr. Puneet Taneja,
Ms. Somya Rathore, Advocates.
Mr. Satish Aggarwala, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petitions, *inter alia*, impugning the action of NTPC Ltd. (respondent no.1) in invoking and encashing the

respective bank guarantees submitted by the petitioners alongwith their bids. The petitioners also impugn the order dated 11.08.2016 (hereinafter 'the impugned order') passed by the Ministry of New and Renewable Energy, Government of India (hereinafter 'MNRE') blacklisting the petitioners and debarring them from participating in any of the Schemes/Programmes of the MNRE for a period of three years.

2. The aforesaid punitive measures have been imposed on the petitioners on the allegation that the petitioners had indulged in "malpractices" in submission of their tenders for Solar Power Projects under Phase-II of the National Solar Mission to NTPC. According to NTPC, the petitioners have indulged in 'corrupt or fraudulent practices' and the action taken against them is warranted in terms of the "Fraud Prevention Policy" of NTPC.

3. The aforesaid conclusion has been drawn by NTPC for the principal reason that the bids submitted by both the petitioners were under signatures of one Mr Manoranjan Ghosh, who was named as one of the authorised representatives by both the petitioners. This, according to NTPC and MNRE, established that the petitioners had colluded in submission of their bids, which fell foul of NTPC's Fraud Prevention Policy.

4. The petitioners contest the aforesaid action as arbitrary and unreasonable. They, *inter alia*, contend that (a) the petitioners had withdrawn from the bids much prior to any proceedings being initiated against them and thus there was no possibility of any loss or damage being suffered by NTPC/MNRE; (b) that Mr Manoranjan Ghosh was named as an authorized representative by oversight and there is no other material to indicate that the petitioners had indulged in fraudulent or corrupt practices;

(c) that the action of blacklisting is without any notice and without affording the petitioners an opportunity of being heard and, therefore, the impugned order is unsustainable; and (d) that the action initiated against them is malafide as the petitioners had been asked to extend the validity of their bids and they have been proceeded against only for the reason that they had declined to do so.

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

5.1 NTPC invited bids - Request for Selection (hereafter 'RFS') - for selection of Solar Power Developers (hereafter 'SPDs') for setting up of Grid-Connected Solar PV Power Project of an aggregate capacity of 130 MW (13 projects of approximately 10MW each). The said projects were to be set up in the State of Rajasthan on the land to be identified and arranged by the respective SPDs. The successful SPDs were to be selected by a process that involved a single stage two envelope bid followed by a reverse auction.

5.2 The bidders were required to submit their bids in the first stage and this would determine the number of bidders who qualify for participating in the reverse auction. The bidder who submitted the lowest bid was to be ranked as L-1 and the person who submitted the highest bid was to be ranked as H-1. H-1 and H-2 were to be disqualified and the remaining bidders would be qualified to participate in the reverse auction subject to the maximum of sixty five bidders.

5.3 Initially, the date of submission of the online bid was fixed as 07.09.2015; however, the same was extended number of times and the date

of final submission of the bid was revised to 21.12.2015. Emami Power Limited (hereafter 'Emami'), petitioner in W.P.(C) 7493/2016, submitted an online bid on 17.12.2015 along with Earnest Money Deposit (EMD) of ₹2 crores in the form of bank guarantee(s). Similarly, Oriental Sales Agencies (India) Pvt. Ltd. (hereafter 'OSAPL'), petitioner in W.P.(C) 9511/2016, also submitted its bid on 18.12.2015 alongwith bank guarantee(s) of ₹2 crores as EMD. Certain bid documents were signed by OSAPL through its authorized representative Mr Manoranjan Ghosh, who is stated to have been appointed by OSAPL as its authorized representative on account of his technical expertise in the Power Sector.

5.4 Emami's bid was also submitted through Mr Manoranjan Ghosh, who is stated to be one of the non executive directors of Emami. Emami states that Mr Manoranjan Ghosh's authority to represent Emami was revoked on 28.12.2015. However, there is some controversy in this regard as NTPC claims that it did not receive any such intimation at the material time.

5.5 The petitioners received a letter from NTPC seeking certain details of the shareholding pattern of the companies; namely, M/s Diwakar Viniyog Private Limited, M/s Suntrack Commerce Private Limited and M/s Bhanu Vyapaar Private Limited on the financial strength of which Emami had submitted its bid. Similarly, OSAPL was also asked to provide shareholding pattern of M/s Eamami Agrotech Limited which held 49.99% in the OSAPL.

5.6 The details of shareholding patterns of the companies as sought for by the NTPC were duly provided.

5.7 Thereafter, NTPC sent a letter dated 27.05.2016 requesting Emami and OSAPL to extend the validity of their respective bids - which were valid till 18.06.2016 - for a further period of 45 days - that is, upto and including 01.08.2016 - on the same terms and conditions as stipulated in the RFS.

5.8 This request was not acceded to and both the petitioners sent separate letters expressing their regret to extend the validity of the bid as desired. The only reason indicated in their respective letters for not extending the validity of their bids was the absence of a firm commitment on the part of the Government of Rajasthan to give the requisite Grid-Connectivity within the period as specified under the RFS.

5.9 NTPC responded to the aforesaid letters clarifying that in terms of the Amendment no.6 to the RFS documents, the successful bidders were required to submit CTU/STU regarding Grid-Connectivity only at the time of financial closure, which was to be achieved in seven months after signing of the Power Projects Agreement.

5.10 The petitioners responded to NTPC by separate letters dated 31.05.2016 reiterating their decision not to extend the validity of their bids given the uncertainty regarding Grid-Connectivity and the current solar market.

5.11 Thereafter, NTPC sent an email to Emami informing it that NTPC was receiving positive response from other bidders who had agreed to extend the validity of their bids and once again requesting Emami to reconsider its decision not to extend the validity of its bid upto 01.08.2016.

5.12 Thereafter, on 02.06.2016, the General Manager (Vigilance) of NTPC sent separate emails to both the petitioners seeking clarifications regarding whether Emami & OSAPL had common ownership and/or were group companies and whether submission of bids through common representative amounted to 'collusive practice'.

5.13 The petitioners were also informed that the matter had been reported for investigation under the Fraud Prevention Policy.

5.14 The petitioners responded to the aforesaid letters clarifying that Emami and OSAPL neither had any common ownership nor were group companies as defined in Clause 2 of RFS. Emami also clarified that Mr Manoranjan Ghosh was a non-executive Director of Emami and had been nominated as the authorized signatory as it was the usual practice of Emami to authorise two persons including one being a Director of the company. Emami also informed NTPC that in a subsequent meeting held on 28.12.2015, it had resolved that in the event Emami was selected for reverse auction, Mr Manoranjan Ghosh would not participate in the same on behalf of Emami.

5.15 Thereafter, on 15.06.2016, without any further notice, NTPC invoked and encashed the bank guarantees furnished by the petitioners. The information regarding the same was furnished to the petitioners by their respective banks.

5.16 On 18.06.2016, Emami addressed a letter to NTPC requesting for disclosure of the grounds on which the bank guarantees submitted by it were forfeited.

5.17 OSAPL also sent a letter dated 20.06.2016, protesting against encashment of its bank guarantees without communicating any reasons or affording any opportunity.

5.18 NTPC responded to the letters dated 18.06.2016 and 20.06.2016 sent by Emami and OSAPL, by similarly worded letter dated 04.07.2016, stating that “certain violations in pursuance to the provisions of RFS document were observed” during evaluation of the bids and after examining facts including the explanation provided by the petitioners to the Vigilance Department, their bids had been rejected and their EMD had been forfeited. NTPC also stated that it reserved the right to take further action.

5.19 The petitioners by separate letters requested that the decision to invoke bank guarantees be reviewed. However, the said request was not acceded to.

5.20 Thereafter, on 11.08.2016, MNRE issued the impugned order blacklisting the petitioners. The said order indicates that the petitioners had been blacklisted as it was reported by NTPC that they had “indulged in malpractices in the tenders for Solar Power Projects by NTPC under Phase-II of National Solar Mission”.

Submissions

6. Mr Parag Tripathi, learned senior counsel appearing for Emami contended that Mr Manoranjan Ghosh being the signatory for both Emami and OSAPL, at best, indicated the two petitioners had knowledge of each other’s bid; however, that was of no consequence as the purpose of the stage-I bid was only to determine the number of bidders, who would

qualify for reverse auction. He submitted that there was no material to indicate that any loss had been incurred by NTPC and, therefore, the invocation of Emami's bank guarantees was wholly unjustified. He also referred to the Fraud Prevention Policy of NTPC, which defined the term 'Fraud' and submitted that in terms of the said policy it was necessary that the act alleged to be 'fraud' must have resulted in a wrongful gain to the person committing the fraud or to any other individual and consequently a loss to others. He submitted that in absence of any material to indicate that having a common signatory had resulted any gain to Emami or OSAPL or any loss to NTPC, the action of invoking the bank guarantees could not be sustained. He also referred to the decision of the Supreme Court in ***Union of India v. Rampur Distillery & Chemical Co.Ltd.:* (1973) 1 SCC 649** and ***Kailash Nath Associates v. DDA & Anr:* (2015) 4 SCC 136** in support of his contention that NTPC was not entitled to encash the bank guarantees as it had not suffered any loss or damage on account of any breach alleged to have been committed by Emami.

7. Mr Tripathi, assailed the impugned order by contending that MNRE had no jurisdiction in the matter as the tenders had been floated by NTPC. Further, no show cause notice had been served on Emami and thus, the impugned order was in gross violation of principles of natural justice. He referred to the decision of the Supreme Court in ***Gorkha Security Services v. Govt. (NCT of Delhi):* (2014) 9 SCC 105** in support of his contention. He emphasised that neither NTPC nor MNRE had informed the petitioners of the proposed action of blacklisting.

8. Next, Mr Tripathi submitted that naming Mr Manoranjan Ghosh as an authorized signatory was an obvious error. Both the petitioners,

namely, Emami and OSAPL had prepared their bids separately and submitted their bids separately. However, since Mr Manoranjan Ghosh had vast experience in the Power Sector and was also a non-executive Director of Emami, he had been named as one of the two authorized representatives. He submitted that this was neither fraudulent nor a corrupt practice as alleged. He also submitted that since the Emami had declined to extend its bid, therefore, the allegation that Emami and OSAPL were colluding for causing any wrongful gain to themselves or loss to NTPC, was unsustainable.

9. Mr Triparthi also submitted that in the given facts, the punishment imposed on Emami was highly disproportionate and was liable to be set aside on that ground alone. He referred to the decision of the Supreme Court in *Kulja Industries Limited v. Chief General Manager W.T. Proj. BSNL and Ors. : AIR 2014 SC 9* in support of his contention.

10. Lastly, Mr Tripathi referred to various clauses of the RFP and emphasised that it was admitted by NTPC that Emami and OSAPL were not group companies as defined under Clause 2 of RPF and, therefore, there was no prohibition for the two companies to submit their separate bids. He further submitted that Emami had relied on the financial strength of three companies – Diwakar Viniyog Ltd., Suntrack Commerce Ltd. and Bhanu Vuyapar Limited – for meeting the net worth criteria and had provided complete details of the shareholding of the said companies. However, no objection was taken in this regard at the material time. He referred to Clause 3.31, Clause 3.32 and Clause 3.25(a) of the RFS documents and argued that the necessary ingredients of the said clauses were not satisfied and, therefore, none of the said clauses were applicable.

11. Mr Arjun Pant, learned counsel appearing on behalf of OSAPL also advanced contentions similar to those canvassed by Mr Tripathi.

12. Ms Pinky Anand, learned ASG appearing on behalf of the respondents countered the submissions made on behalf of the petitioners. She submitted that although Emami and OSAPL were not group companies as defined in Clause 2 of RFS, the said companies were related. She referred to the shareholding pattern of Emami and OSAPL to indicate that some shares of Emami Agrotech Limited, which held 49.99% in OSAPL, were held by certain shareholders of Emami. She submitted that having a common signatory for submission of the bids itself amounted to fraud and a collusive practice. She submitted that not only the technical details of the bids but as well as the price details of Emami and OSAPL were known to each other as they had a common representative. She submitted that the contention that the first stage was only to determine the number of bidders eligible to participate in the reverse auction was not correct because if a successful bidder refused to participate in the reverse auction, its price bid would be taken as a final bid price.

13. She submitted that both Emami and OSAPL had submitted their bids with unclean hands in order to reduce their chances of elimination in ranking and short listing for reverse auction and to increase their probability of selection and thereby depriving NTPC to establish a bid price at a competitive level by free and open competition. She contended that merely because the petitioners had withdrawn from the reverse auction would not justify the contention that no loss had been occasioned to NTPC as bidders were required to maintain fairness in the entire bidding process. She also referred to the various clauses of RFP. She contended that there

was ample material to establish that Emami and OSAPL had colluded with each other. She also referred to Clauses 3.31 and 3.32 of RFS and contended that the practice followed by Emami and OSAPL fell squarely within the definition of fraud under the Fraud Prevention Policy.

14. She contended that no separate notice was required for blacklisting the petitioners as the same was inbuilt in the provisions of the contract. She contended that clause 3.31(c) of the RFS expressly provided that a firm will be declared ineligible either indefinitely or for a stated period of time if it is found that the said firm is engaged in corrupt or fraudulent practices. She emphasised that the use of the word 'will' left no room for doubt that punitive measures would be taken if the bidders were found to have indulged in fraudulent practice. She submitted that opportunity was given by the Vigilance Department of the NTPC to the petitioners to provide explanation as to their conduct and, therefore, the principles of natural justice were duly followed.

15. Although, in the written submissions filed on behalf of NTPC, it is submitted that encashment of bank guarantees were a natural consequence of rejection of bid on the ground of collusive practice. It is further stated that loss is inbuilt in a case of fraudulent or collusive bidding. It is also stated that various reports and articles available in internet state that fraud, corruption, unethical practices in public procurement enhances the overall cost of procurement by 10% to 30%. It is also stated in the written submissions that had the fraudulent or collusive act of Emami and OSAPL been detected after reverse auction, NTPC would have no option but to annul the tender and the whole process would have taken another four months leading to financial loss to other bidders. Further, the fraud was

detected after signing of the PPA, the contract would have to be terminated and this would have resulted in loss to NTPC of the trading margin of 7 paisa per KWH, which would amount to ₹0.377 crores for 10 MW Solar Power Project and ₹1.5 crores per annum for 40 MW Solar Power Project. No such contentions were advanced during oral arguments.

Reasoning and Conclusion

16. At the outset, it is relevant to observe that both the encashment of the bank guarantees and the impugned order are premised on the basis that the petitioners have indulged in “fraudulent practices”. The said actions - that is, invoking the bank guarantees and debarring the petitioners - have been taken as punitive measures.

17. The first and foremost question to be addressed is whether the procedure followed by NTPC/MNRE for encashment of the bank guarantees and blacklisting the petitioners is in conformity with the principles of natural justice.

18. Undisputedly, blacklisting an entity or debarring the entity from entering in a contract with the State is stigmatic and casts a slur on the entity. In ***Erusian Equipment & Chemicals Ltd v. State of West Bengal & Another*** : AIR 1975 SC 266, the Supreme Court had observed as under:-

“20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an

opportunity to represent his case before he is put on the blacklist.”

19. In ***Gorkha Security Services v. Government (NCT of Delhi) & Ors.*** (*supra*), the Supreme Court had noted that blacklisting was also described as a “civil death” of the person who is imposed with such punitive measure. The relevant extract of the said decision is as under:-

“With blacklisting many civil and/or evil consequences follow. It is described as “civil death” of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in Government Tenders which means precluding him from the award of Government contracts.”

20. In view of the severe adverse consequences that are visited upon an entity, that it is indisputable that it would be necessary to afford the said entity a full opportunity to meet the case as set up against such entity. The learned counsel appearing for the respondents had referred to the decision of the Supreme Court in ***Patel Engineering Limited v. Union of India & Another : (2012) 11 SCC 257*** in support of their contention that the respondents had the executive power to blacklist the petitioners. There can be no dispute to this proposition. In ***Patel Engineering Limited v. Union of India*** (*Supra*), the Supreme Court had explained that:

“The State can decline to enter into a contractual relationship with a person or class of persons for legitimate purpose. The authority of the State of blacklist a person is necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally

without in any way being arbitrary - thereby such a decision can be taken for some legitimate purpose.”

21. It is thus clear that although the State does have the power to blacklist a supplier/contractor, it is necessary that such power be exercised in a fair and rational manner and for a legitimate purpose. It is also necessary that the principles of natural justice as enshrined in Article 14 of the Constitution of India are duly followed to ensure that such decisions are not arbitrary and unreasonable. The Supreme Court in ***Erusian Equipment & Chemicals Ltd v. State of West Bengal & Another*** (*Supra*) had authoritatively held that fundamentals of fair play required that the person against whom a blacklisting order is proposed is given full opportunity to represent his case.

22. In ***Raghunath Thakur v. State of Bihar*** : (1989) 1 SCC 229, the Supreme Court explained the above principle in the following words :-

“4.....It has to be realised that black-listing any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order.”

23. In ***Gorkha Security Services v. Government of NCT of Delhi & Ors.*** (*Supra*), the Court emphasized the person against whom blacklisting order is proposed must be specifically put to notice of such proposed action. The relevant extract of the said decision is set out below:-

“21. The Central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of

Show Cause Notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.”

24. Although, it is contended on behalf of the respondents that they have the executive power to blacklist the petitioners, the respondents also do not seriously dispute the necessity of a show cause notice; however, they claim that the said requirement is met by the communication dated 02.06.2016 issued by the Vigilance Department.

25. A plain reading of the letter dated 02.06.2016 indicates that NTPC had merely asked the petitioners to clarify the following:-

“1. Whether Emami Power Ltd & Oriental Sales Agencies (India) Pvt. are having common ownership and/or are Group Companies.

2. As both Oriental & Emami had responded to the RfS as separate bidding entitles and thus were competitors in bidding, why both companies resolved to have a common authorised representative. Does it not amount to “collusive practice” by both EMAMI & Oriental.”

26. The said communication does not purport to be a notice calling upon the petitioners to show cause as to why punitive action not be imposed against them. As noticed above, the petitioners were called upon to provide

certain clarifications including whether having a common authorized representative amounts to “collusive practice”.

27. Whilst, there may be some merit in the contention that a finding by the NTPC that the petitioners had indulged in a fraudulent practice would lead to action under Clause 3.25(a) of RFS (that is, forfeiture of EMD) and debarring under clause 3.31(c) of RFS; there was no imputation that the petitioners were guilty of “fraudulent practice” as defined under Clause 3.31 of RFS. There was also no specific allegation that the petitioners had indulged in collusive practice *designed to establish bid prices at artificial noncompetetitive levels and to deprive NTPC of the benefits of free and open competition*. Thus, the letter dated 02.06.2016 did not specifically put the petitioners to notice of the proposed action.

28. As stated above, the punitive action taken against the petitioners is two-fold: first, encashment of bank guarantees by NTPC; and second, the impugned order passed by the MNRE debarring the petitioners. Insofar as the encashment of bank guarantees is concerned, the letters dated 02.06.2016 did not put Emami or OSAPL to notice that their respective bid securities were intended to be forfeited.

29. NTPC claims that the encashment of bank guarantees is pursuant to rejection of bids on account of fraudulent practice. Thus, if NTPC desired to impose a punitive measure of encashment of bid securities, the least that was required was for NTPC to have articulated this in a show cause notice. The petitioners would then have had the opportunity to persuade NTPC not to do so, *inter alia*, for the reason that the petitioners were not extending their offer for bidding. However, since NTPC had not even mentioned any

proposed measure of encashment of bank guarantees, there was no opportunity for the petitioners to deal with the same.

30. Insofar as the punitive measure of blacklisting the petitioners is concerned, the petitioners had no notice whatsoever that MNRE was intending to impose such punitive action on the petitioners. The letter dated 02.06.2016 issued by NTPC seeking clarifications cannot be read as a substitute for a show cause notice by MNRE. It is submitted on behalf of the respondents that a blacklisting order by MNRE would necessarily have to follow once NTPC determines that the petitioners had indulged in fraudulent practice. The same is not persuasive as the RFS documents do not contemplate any action by MNRE and there was no occasion for the petitioners to presume so.

31. In view of the above, this Court is not persuaded to accept that the punitive measures imposed on the petitioners - that is, encashment of their bid securities and debarring them from participating in tenders, schemes /programmes of MNRE for a period of three years - were imposed after providing the petitioners full opportunity to meet the case set up against them and after following the principles of natural justice.

32. Although, in view of the conclusion above, it is not necessary to address the other issues raised in this petition. However, for the purpose of completeness, it would be apposite to do so.

33. The impugned order does not indicate any reason apart from stating that the petitioners had indulged in “malpractices”. However, the respondents contend that NTPC’s letter of 02.06.2016 seeking clarifications did indicate the allegations against the petitioners. One of the

clarifications sought was whether the petitioners are group companies and have common ownership. The counter affidavits filed on behalf of MNRE also indicate that the petitioners are treated as group companies and, therefore, their bids affirming that neither their parent company/affiliate/ or group company has submitted a response to RFS is false. According to the respondents, the same also violated the conditions of the “integrity pact” and thus constituted a fraudulent practice within the definition of Clause 3.32 of RFS. The petitioners had contended that they are not group companies or affiliates as defined under RFS.

34. Article 2 of the RFS defines the terms “affiliate” and “group company” as under:-

““**Affiliate**” shall mean a Company that, directly or indirectly, Controls, or is controlled by, or is under common control with, a Company developing a Project or a Member in a Consortium developing the Project and control means ownership by one Company of at least 26% (twenty six percent) of the paid up share capital of the other Company.

“**Group Company**” of a Company shall mean:

- (i) a Company which, directly or indirectly, holds 10% (ten percent) or more of the paid up share capital of the Company or;
- (ii) a Company in which the Company, directly or indirectly, holds 10% (ten percent) or more of the paid up share capital of such Company or,
- (iii) a Company in which the Company, directly or indirectly, has the power to direct or cause to be directed the management and policies of such Company whether through the ownership of securities or agreement or any other arrangement or otherwise or;

- (iv) a Company which, directly or indirectly, has the power to direct or cause to be directed the management and policies of the Company whether through the ownership of securities or agreement or any other arrangement or otherwise or;
- (v) a Company which is under common control with the Company, and control means ownership by one Company of at least 10% (ten percent) of the paid up share capital of the other Company or power to direct or cause to be directed the management and policies of such Company whether through the ownership of securities or agreement or any other arrangement or otherwise.

Provided that a financial institution, scheduled bank, foreign institutional investor, non-banking financial Company, and any mutual fund shall not be deemed to be Group Company, and its shareholding and the power to direct or cause to be directed the management and policies of a Company shall not be considered for the purposes of this definition unless it is the Project Company or a Member of the Consortium developing the Project.”

35. The respondents also seek to support the encashment of bank guarantees and the impugned order on the basis that petitioners are affiliates/group companies. However, during the course of arguments it was conceded by Ms Pinki Anand, the learned ASG that the petitioners are neither affiliates nor group companies as defined in Article 2 of RFS.

36. In the counter affidavit filed on behalf of NTPC in W.P. (C) 7493/2016, it has also been unequivocally affirmed that “*action of forfeiture and rejection of bid and other consequent actions have been taken under clause 3.31, 3.32 and 3.25 (a) of RFS and not on account of petitioner and OSAPL being a group company*”.

37. In view of the conceded position that the petitioners are not group companies, the impugned order - which is supposedly based on the presumption that petitioners are group companies - cannot be sustained.

38. It is also relevant to mention that the respondents have in their written submissions indicated the shareholding pattern of certain related companies. However, once it is accepted that the petitioners are neither affiliates nor group companies as defined under Article 2 of the RFS, it would serve little purpose to indicate that certain shareholders had economic interest in Emami and OSAPL. The same also does not establish the two petitioners to be alter egos of one another.

39. The next question to be addressed is whether the petitioners have indulged in fraudulent practices. Clause 3.31(a) of RFS expressly provides that NTPC requires the bidders to observe highest standard of ethics during development and operation of Solar Power Projects. Clause (a) of Article 3.31 defines the expression 'corrupt practices' and 'fraudulent practices'. Clause (b) of Article 3.31 expressly provides that if it is determined that the bidder recommended for the award has indulged in corrupt or fraudulent practices, its proposal of award would be rejected. Further, clause (c) provides that the NTPC would declare the firm ineligible either indefinitely or for a stated period of time, it is found that the firm had indulged in any corrupt or fraudulent practices in competing for or in executing the development and operation of Solar Power Projects.

40. Article 3.32 of RFS requires the bidder to strictly adhere to the Fraudulent Prevention Policy of NTPC. Further, Article 3.34 requires bidder to unconditionally accept the "integrity pact" as per the format specified in the RFS document.

41. Articles 3.31 and 3.32 are set out below:-

“3.31 Corrupt or Fraudulent Practices:

NTPC requires that Bidders, Solar Power Developers, etc. observe the highest standard of ethics during the development and operation of Solar Power Projects(s). In pursuant of this policy, NTPC:

- (a) defines, for the purpose of this provision, the terms set forth below as follows:
 - (i) “corrupt practice” means the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the bidding process or in the development and operation of Solar Power Project(s); and
 - (ii) “fraudulent practice” means a misrepresentation of facts in order to influence the bidding process or in the development and operation of Solar Power Project(s) to the detriment of NTPC, and includes collusive practice among Bidders (prior to or after bid submission) designed to establish bid prices at artificial noncompetitive levels and to deprive NTPC of the benefits of free and open competition:
- (b) will reject a proposal for award if it determines that the Bidder recommended for award has engaged in corrupt or fraudulent practices in competing for the tender in question;
- (c) will declare a firm ineligible, either indefinitely or for a stated period of time, to be awarded a contract, if it at any time determines that the firm has engaged in corrupt or fraudulent practices in competing for or in executing the development and operation of Solar Power Project(s).

3.32 Fraud Prevention Policy:

The Bidder along with its Affiliate/Group Company/associate/collaborators/sub-contractors/sub-vendors/consultants/service providers shall strictly adhere to the Fraud Prevention Policy of NTPC displayed on its tender website <http://www.ntpctender.com> and shall immediately apprise NTPC about any fraud or suspected fraud as soon as it comes to their notice. A certificate to this effect shall be furnished by the bidder along with his bid as per Format 6.14 enclosed with the RFS document. If in terms of above policy, it is established that the bidder/his representatives have committed any fraud while competing for this tender then the bid security of the bidder shall be forfeited.”

42. The Fraud Prevention Policy has been placed by NTPC on its website. The objectives of Fraud Prevention Policy, the scope of Policy and the definition of fraud under the Fraud Prevention Policy 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:

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.”

43. A plain reading of the definition of fraud under the “Fraud Prevention Policy” indicates that for any action to be characterized as ‘fraud’, it is necessary that it fulfills the following conditions:

- (a) The action ought to be a willful act intentionally committed;
- (b) That the act must have been committed by deception, suppression, cheating or any other fraudulent or illegal means;
- (c) The act must have caused wrongful gains to self or any other individual and wrongful loss to others;

44. It is also explained in the Fraud Prevention Policy that many a times such acts are done with a view to deceive/mislead the others.

45. In the present case, the only allegation against the petitioners is that their bids were submitted under a common signatory. In the circumstances, it is reasonable to believe that both Emami and OSAPL had knowledge of each other's bids. The petitioners maintain that their bids were independent and it was an obvious mistake in naming a common signatory. Even if the said explanation is rejected, it does not necessarily follow that the petitioners have practiced any deception. NTPC in its reply has also not been able to establish as to how this had caused any wrongful gain to the petitioners or any wrongful loss to NTPC or any other competitor. In the written submission, which was filed after conclusion of the hearing, it is contended on behalf of NTPC, that submission of such bids had reduced the chances of the elimination. This argument is plainly an afterthought as it does not form a part of any contemporaneous documents. Further, this contention also assumes that the petitioners are one and the same entity. However, during the course of arguments it was conceded that the petitioners are not group companies. Although, some common shareholding had been established, there is no material to conclude that petitioners are the one and the same entity. More importantly, this is also not a conclusion which was drawn by NTPC or MNRE for taking actions, which are impugned herein.

46. Since, the petitioners are not 'affiliates' or 'group companies' as defined under Article 2 of the RFS, there was no prohibition for both the petitioners submitting their separate bids. The only allegation against them is that their bids were known to each other. This plainly cannot by itself lead to the conclusion that there was any wrongful gain resulting to the petitioners or any wrongful loss caused to any other person. There is also no material to indicate that the bids were submitted to mislead or deceive

any person or persons leading them to do or prohibiting them from doing any *bonafide* act or taking any *bonafide* decision.

47. It is important to note that the communication dated 02.06.2016, which according to the respondents was a show cause notice, sought clarification on two points: (i) whether the petitioners had common ownership and were group companies; and (ii) whether submission of their bids through common authorized representative amounted to “collusive practice”. Insofar as the petitioners being under common ownership and/or group companies is concerned, it was conceded during the course of arguments that Emami and OSAPL are not group companies even though some of the shareholders of Emami are also shareholders of Emami Agrotech Private Ltd, which owns less than 50% shares of OSAPL. Thus, the only allegation against the petitioners is that they had indulged in collusive practice, which constitutes a fraudulent practice in terms of clause 3.31 (a)(ii).

48. A plain reading of clause 3.31 (a)(ii) of RFS indicates that a collusive practice as referred therein means a practice designed to establish bid prices at artificial non-competitive levels and to deprive NTPC of the benefits of free and open competition.

49. In the facts of the present case, there is no material to establish that submission of bids through common representative was designed to establish bid prices at artificial non-competitive levels. No allegation to this effect was made at the relevant time. Further, merely because two out of several bidders are aware of each other’s bids at the qualifying stage does not lead to the conclusion that there would not be free and open competition amongst competitors. The expression “collusive practice”

necessarily has a negative connotation; it is a practice, which would tend to subvert the process of free competitive bidding in general. In the present case, the competitive bidding (reverse action) was yet to take place. The petitioners being aware of each other's bids in the first stage could have little impact on the bidding process. There is also no material to establish that such knowledge was with the object of depriving NTPC of free competition.

50. Although, the respondents also claim that there was an agreement/arrangement between the petitioners to cartelize, however merely because the initial bids made by the petitioners were known to each other does not establish that they had entered into an anticompetitive agreement or arrangement to establish prices at anticompetitive levels. There is no material to establish any agreement to rig the bids or make collusive bids that fall foul of section 3 of the Competition Act 2002. In the facts of the case it is difficult to accept that having a common representative established that the petitioners had indulged in any fraudulent practice.

51. The next question to be considered is whether NTPC had suffered any loss which would justify encashment of bank guarantees. Plainly, NTPC has been unable to establish that it has incurred any loss on account of the bids submitted by the petitioners. The offers made by the petitioners were not accepted by NTPC during the term of their validity, and thus, the question of NTPC suffering any loss on account of the bids submitted by the petitioners does not arise. Further, no arguments were advanced on behalf of the respondents to counter the submission that NTPC had neither suffered nor could have suffered any loss on account of the bids submitted

by the petitioners. However, in the written submissions filed on behalf of NTPC after the conclusion of the arguments, it has been contended that various research reports/articles on the internet suggest that fraud/corruption/unethical practices in public procurement enhances the cost of procurement by 10 to 30 percent. According to NTPC, it would have suffered a loss of 21.20 crores if the petitioners had been successful in the technical evaluation stage and their fraud had not been detected. It is further contended that if the fraud had been detected after issuance of the letter of intent, the respondents would have suffered a loss of approximately 1.50 crores computed as loss of trading margin of 7 Paisa Per Kwh.

52. The said contentions cannot be accepted for several reasons. First of all, there are no pleadings to support the above contentions. Further, no such contentions were in fact advanced during the course of arguments and have been slipped in the written submissions filed after conclusion of the hearing. Lastly and more importantly, these contentions are wholly bereft of any merit. The loss as claimed is plainly illusory. Indisputably, the respondents have not suffered any loss. It is also relevant to state that no communication rejecting the bids was issued to the petitioners prior to the expiry of the validity of the bids. The first communication indicating that NTPC had rejected the bids was issued on 04.07.2016 much after the validity of the bids had expired. The NTPC had made their efforts to persuade the petitioners to extend their validity of the bids which the petitioners had declined. Since, the offer was neither rejected nor accepted during the term of its validity, the question of forfeiture of EMD does not arise.

53. Admittedly, the respondents were not in a position to complete the bidding process during the period of validity of the bids. Although, NTPC had attempted to persuade the petitioners to extend the validity of their offer, the petitioners had declined to do so. Thus, there is no question of NTPC suffering any loss on account of the bids submitted by the petitioners. The bank guarantees have been invoked as a punitive measure, which this Court finds is not warranted.

54. In *Kulja (supra)*, the Supreme Court had laid down the guidelines for any action of blacklisting. The factors that are necessary to be considered by the authority imposing the punitive measure were summarised as follows:-

“21. The guidelines also stipulate the factors that may influence the debarring official’s decision which include the following:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing.

(d) Whether contractor has been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or

administrative costs incurred by the government, and have made or agreed to make full restitution.

(h) Whether contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.”

55. It is apparent that the above factors were neither considered by NTPC nor MNRE.

56. Before concluding, it is necessary to observe that there is no order that has been passed by either NTPC or MNRE specifically dealing with the contentions advanced by the petitioners. This is perhaps for the reason that no specific show cause notice had been issued to the petitioners by NTPC or MNRE. Even if it is accepted - which this Court does not - that the letter dated 02.06.2016 seeking certain clarifications was a show cause notice as contended by NTPC, the same did not culminate in a reasoned order. Admittedly, the petitioners had responded to the said notices. It was thus incumbent on NTPC to specifically deal with the same and pass an appropriate order. However, no such order was communicated to the petitioners which specifically dealt with the contentions raised by the petitioners in their defence.

57. As noticed above, the impugned order merely states that the petitioners have indulged in malpractices. The said order is bereft of any reasons and thus cannot be sustained. The counter affidavits filed on behalf of the NTPC and MNRE seek to set up a case and provide explanations that are otherwise not available in the contemporaneous documents. Further, the written submissions filed after the hearing was concluded seek to further improve the case, which was set up in the counter affidavits or argued before this Court. Plainly, this cannot be countenanced. Blacklisting an entity is a serious matter and it is incumbent upon the authority blacklisting any entity to not only provide sufficient opportunity to the concerned party but pass a speaking and reasoned order clearly dealing with the contentions advanced.

58. In view of the above, the impugned order is set aside. The respondents are directed to refund the amount recovered from the petitioners by encashment of their bank guarantees within a period of two weeks from today.

59. The petitions are allowed. All the pending applications are disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

JANUARY 03, 2018
MK/pkv