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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 28.02.2018

+ LPA 610/2017 & CM APPL. 33896/2017

NTPC LIMITED

..... Appellant

Through Mr. Bharat Sangal and Ms. Isha Gupta, Advs.

versus

AQUA DESIGNS INDIA PRIVATE LIMITED & ANR

..... Respondents

Through Mr. P.R. Kovilan, Mr. V. Vasudevan and Ms. Awasthi M.K., Advs. for R-1. Ms. Arti Banal, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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1. The appellant (hereafter called "NTPC") is aggrieved by the order of the Id. Single Judge, who quashed the black-listing of the writ petitioner (hereafter called "Aqua") on 11.9.2015.

2. The brief facts are that Aqua, which is a water management and engineering company, in 2014 had responded to a bid by the appellant (NTPC). The eligibility conditions *inter alia* spelt out that the bidder ought to have designed, supplied, erected and commissioned/supervised at least two water plants/waste water treatment plants with

a defined capacity, within certain technical parameters including civil work and that such plants should have been in successful operation for at least one year prior to the opening of commercial bid. Its associate McNally Bharat Engineering Co. was found not to possess the necessary conditions of having completed the work for atleast one year. The tender conditions permitted McNally Bharat Engineering Co. to associate other company. It accordingly associated Aqua. The Aqua relied upon a certificate issued by Kesar Enterprises Ltd. (dated 25.6.2011) bearing the date of commissioning of its plant as 23.6.2011. It later rectified the error on account of a second/fresh certificate issued by Kesar Enterprises Ltd. dated 25.6.2012 disclosing that the date of commissioning the plant was actually 26.3.2012. NTPC issued show cause notice why action ought not be taken in terms of para 5.5. (clause I) of the Terms and Procedure for withholding and banning of business dealings i.e. the ground of misrepresentation in the submission of the documents. After considering the materials and the explanation of Aqua, the black-listing order was issued.

3. Ld. Single Judge analysed the conditions and concluded that the black-listing in such cases in the facts of the case was unjustified and unwarranted. The relevant discussion in the impugned order is, as follows:

“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."

4. It is urged on behalf of NTPC that Single Judge fell into error in not considering that the blacklisting was pursuant to the Fraud Prevent Policy, as, there was serious misrepresentation which tended to undermine the confidence in the tendering process. It was urged that the writ petitioner's explanation that the tender form was filled by a lower level employee is belied in as much as it was signed by its Vice

President and consequently, the explanation given by McNally Bharat Engineering Co. with respect to the certificate was unsatisfactory, as was the case with Aqua.

5. The material on record which was before the Single Judge is part of the appeal. The single Judge correctly noticed that difference between mistake and inaccuracy on the one hand and fraud on the other hand, is real and serious; as far as the consequences go in the present case, they are grave. The Single Judge also noticed that NTPC is armed with sufficient discretion in determining whom it decides to award a contract. However, if such a public agency falters on the appreciation of the circumstances or even the tender conditions, the Court would be within its right to interfere with an adverse order, particularly, in the case of blacklisting.

6. Material on record shows that the certificate objected to, is indeed the subsequent certificate. The documents also reveal that a show cause notice was issued to Aqua which explained the mistake in filling-up the form and that the wrong certificate was scanned and uploaded, whereas the correct one was later furnished. Significantly, no enquiry or explanation apparently was conducted with respect to Kesar Enterprises Ltd. This aspect is crucial because Kesar Enterprises Ltd. issued both certificates and would have been in the best position to clarify whether indeed the certificate of 2011 was wrongly issued and whether it had issued a later certificate. Even if such enquiry was made, it was never put to the writ petitioner; the show cause notice is bereft of any detail on this aspect. Clearly therefore, the conclusions

that the Single Judge drew on the basis of the materials on record had to be what they were i.e. favouring the writ petitioner. Consequently, the Court is of the opinion that there is no infirmity in the impugned order. The appeal is accordingly dismissed. All the pending application stand disposed of.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

FEBRUARY 28, 2018

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