

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6373 OF 2021

M/s. Raut Enterprises,
A Sole Partnership firm, through its Partner
Mr. Ankur Yashwant Raut
Having its address at 02, Prerna Building,
Khodaram Baug, Boisar,
Taluka & District Palghar-401 501 ... Petitioner

Versus

- 1 Bhabha Atomic Research Centre,
Nuclear Recycle Board, INPRO Tarapur
Complex, Post Office Ghivali, Boisar (W),
District Palghar-401 502
- 2 M/s. Shree Gajanan Facilities Pvt. Ltd.
(Formerly known as Shree Gajanan Enterprises)
Having its office at House No. 384, Ekta
Enclave, Hotel Sahara Residency Building,
Navpur Naka, Boisar (W),
Taluka and District Palghar-401 501
- 3 Nuclear Power Corporation of India,
A Government of India Enterprise,
Tarapur Atomic Power Section,
P.O. TAPP, Boisar (WR),
District Palghar-401504
- 4 The Department of Atomic Energy,
Through its Chairman,
Anushakti Bhavan, CSM Marg,
Mumbai-400 001 ... Respondents

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Mr. R.D. Suryawanshi alongwith Mr. Vipul Shelar & Mr. Suraj Naik for the Petitioner.
Mr. Y.R. Mishra alongwith Mr. D.P. Singh for Respondent No.1.
Mr. Prabhakar M. Jadhav for Respondent No.2.

Mr. Arsh Misra instructed by M.V.Kini and Co. for Respondent No.3.

Mr. Anil Singh, Addl. Solicitor General alongwith Mr. Aditya Thakkar instructed by Ms. Anusha P. Amin for Respondent No.4.

Mr. Venkatesh Dhond, Senior Advocate as Amicus Curiae.

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**CORAM : S.J. KATHAWALLA &
MILIND N. JADHAV, JJ.**

RESERVED ON : 14th FEBRUARY 2022

PRONOUNCED ON : 17th MARCH 2022

JUDGMENT (Per: S.J. KATHAWALLA & MILIND N. JADHAV, JJ)

1. By this Writ Petition, the Petitioner has impugned the decision of the Bhabha Atomic Bhabha Atomic Research Centre (“**BARC**”) [Respondent No.1 herein] to award the following tenders to Respondent No.2, [Shree Gajanan Facilities Pvt. Ltd].

Sr. No.	Particulars	Date	Scope of Work	Status
1	NIT No. BARC/NRB/GSO(T)/C&M/CMT-111/20/04 (hereinafter the “ 1st tender ”)	2.07.2020	Maintenance of lawns, shrubs, hedges, and other allied horticultural works in BARC Staff Colony, Tarapur for the years 2020-2022	Work Order dated 5.03.2021 issued in favour of Respondent No.2
2	NIT No. BARC(T)/NRB/GSO/C&M/CMT-140/2021	3.02.2021	Maintenance of lawns, shrubs, hedges around plant installations at BARC Plant Site, Tarapur for the year 2021-23	R2 declared as successful bidder, Work Order yet to be issued

3	NIT No. BARC(T)/R&WM/PM/AS/OPA-8100	-	Assistance in mechanical maintenance and operation works of reprocessing facility, Tarapur	Work Order issued in favour of Respondent No.2
4	NIT No. BARC (T)/R&WM/OPN/ DC/2021/OPA-14911	26.03.2021	Assistance in Process Operation, laboratory etc, works of Reprocessing Facility, at BARC, Tarapur	Work Order issued in favour of Respondent No.2

2. The Petitioner has also impugned Respondent No.2's participation in the following tenders, which the Petitioner submits are yet to be opened and awarded.

Sr. No.	Particulars	Date	Scope of Work	Status (according to the Petitioner)
1	NIT No. BARC(T)/NRB/GSO/C&M/CMT-143/2021/09	18.04.2021	Operation and maintenance of ST Plant (2MLD Capacity, working on UASB process) at BARC Colony, Tarapur for 2021-23	On Hold
2	NIT No./BARC(T)/NRB/I NRPO/COL-07/2021/11	26.08.2021	Landscaping Work around Type-E at BARC Staff Colony, Tarapur	On Hold
3	NIT No./NRBT/R&WM/ASFSF/2021/OPA-109444	02.09.2021	Assistance in Operation and Maintenance works at ASFSF, NRB (T)	On Hold

4	NIT No. BARC(T)/NRB/INRP O/UTFF/2021/70	07.09.2021	RTC Operation of compressed air system, ventilation system and other auxiliary system at FF, INRPO, BARC, Tarapur	On Hold
5	NIT No. BARC(T)/INRP(O)/N RB/FF/GEN/07/HPU/ 2021/64	24.09.2021	Providing assistance in checking, counting and estimation of quantity of contaminants, preparation of samples for chemical analysis, process of monitoring cards and other allied works at NRB, BARC, Tarapur	On Hold

3. The Petitioner's grievance is that Respondent No.2 does not meet the eligibility criteria of the aforesaid tenders, as Respondent No.2 has been "banned" by the Nuclear Power Corporation of India ("NPCIL"), [Respondent No.3 herein] for a period of two years.

4. The Petition, therefore, seeks the following reliefs :

“(a) rule be issued, record and proceedings be called for from the Respondent No.1 in respect of tender No.NIT No.:- BARC(T)/NRB/GSO/C&M/CMT-111/2021/20(04) dated 2.7.2020 and tender notice bearing No.NIT No.:-BARC(T)/NRB/GSO/C&M/CMT-140/2021/02 dated 3.2.2021;

(b) this Hon'ble Court be pleased to issue a writ of certiorari or any other appropriate writ, order or directions in that nature and after perusing the legality, validity and propriety, quash and set aside the decision of the Respondent No.1 declaring the Respondent No.2 as a successful bidder in respect of tender No.NIT No.:-BARC(T)/NRB/GSO/C&M/CMT- 111/2021/20(04) dated 2.7.2020 and consequent work order dated 5.3.2021;

(c) this Hon'ble Court be pleased to issue a writ of certiorari or any other appropriate writ, order or direction in that nature and after perusing the legality, validity and propriety, quash and set aside the decision of the Respondent No.1 thereby declaring the Respondent No.2 as a successful bidder in respect of tender notice bearing No. NIT No.:-BARC(T)/NRB/GSO/C&M/CMT-140/2021/02 dated 3.2.2021;

(c-1) this Hon'ble Court be pleased to issue a writ of certiorari or any other appropriate writ, order or directions in that nature and after perusing the legality, validity and propriety thereof, quash and set aside the decision of Respondent No.1, thereby declaring the Respondent No.2 as a successful bidder and awarding him contract in respect of tender No. BARC(T)/RSWM/PM/AS/OPA-8100 (Exhibit-I) and consequent Work Order No. BARC/NRB/RW/PM/2021/OPA150 dated 12.10.2021 and tender No. BARC(T)/RSWM/OPN/DC/2021/OPA-14911 dated 26.3.2021 (Exhibit J to the Petition) and consequent Work Order No. BARC(T)/RSWM/OPN/DC/2021/OPA-51;

(c-2) this Hon'ble Court be pleased to declare and hold that the Respondent No. 2 is ineligible , disqualified and not entitled to participate in respect of tender Nos. (i) NIT NO. BARC(T) / NRB/GSO/CSM/CMT-143/2021/09 dated 18.04.2021 (Exhibit K to the Petition), (ii) NIT NO. BARC(T)/NRB/INRPRO/COL-07/2021/11 dated 26.08.2021 (Exhibit-L to the Petition), (iii) NIT NO. NRB/RSWM/ASFSF/2021/OPA-109444 dated 2.09.2021 (Exhibit M to the Petition) (iv) NIT No. BARC(T)/NRB/INPRO/UTFF/2021/70

dated 7.09.2021 (Exhibit N to the Petition) and (v) NIT No. BARC(T)/INPRO(O)/NRB/GEN/07/HPU/2021/64 dated 24.09.2021 (Exhibit O to the Petition);

(d) this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or directions in that nature, directing the Respondent No.1 to strictly implement the order dated 9.7.2020 (Exhibit A hereto) issued by the Respondent No.1 and thereby debar the Respondent No.2 in participating in any of the tender work in future;"

5. The facts in the matter are briefly set out hereunder :

BANNING ORDER AGAINST RESPONDENT NO.2

6. The subject tenders issued by BARC all contain identical eligibility clauses requiring that:

“3. The bidder should have the following:

(m) **Contractor shall furnish declaration that he has not been debarred from tendering by any authority/agency”**

“7. ..Even though any bidder may satisfy the above requirements, **he should be liable to disqualification, if he has**

- **Made any misleading or false representation** or deliberately suppressed the information in the forms, statements and enclosures required in the eligibility criteria document,
- **Record of poor performance such as abandoning work, not properly completing the contract or financial failures/ weaknesses etc.**

9. The date of opening of Financial bid shall be conveyed to the bidders whose Part-A(Documents related eligibility criteria) is **found satisfactory** to the department and **Part-B(Financial Bid) of such**

bidders only shall be opened.

34. ...The documents related to eligibility criteria will be evaluated and accordingly tenders will be qualified..”

7. The controversy at hand arises from the fact that Respondent No.2 was admittedly ‘banned’ by NPCIL. In this behalf, the relevant facts are that in or about 2019, Respondent No.2 had participated in and was declared as a successful bidder in a tender floated by the NPCIL for hiring of material handling equipment. A Work Order was issued by NPCIL in the name of Respondent No.2. However, Respondent No.2 refused to accept the Work Order, apparently on the ground that it was no longer commercially viable.

8. On 7th October 2019, NPCIL issued a Show Cause Notice to Respondent No.2, asking Respondent No.2 to show cause why it should not be banned from participating in any tender of NPCIL for a period 2 years. Respondent No.2 filed a detailed reply dated 19th October 2019 to the Show Cause Notice issued by NPCIL. Respondent no.2 *inter alia* submitted that that the Work Order which it had refused on the grounds that it was commercially unviable, was being re-tendered for Rs. 94,01,750/-. This was a significant revision upwards from the earlier estimation of Rs. 51,81,436/-. In fact, according to Respondent No.2, this was evidence of un-viability.

9. While the proceedings before NPCIL were still ongoing, on 2nd July, 2020, BARC floated NIT No. BARC(T)/NRB/GSO/C&M/CMT-111/2021/20(04) viz. the **1st tender** under consideration in these proceedings.

10. Soon after the 1st tender was floated, on 9th July, 2020, NPCIL passed an order (“**Banning Order**”) banning Respondent No.2. The Banning Order *inter alia* stated as follows:

‘Now therefore you/ your firm M/s Shree Gajanan Facilities Pvt. Ltd is hereby ‘Ban for making any kinds of business with the Corporation in future for the period of 02 (two) years at Tarapur, Maharashtra Site and all other entire Units-Sites as well as all projects of NPCIL across the country, w.e.f receipt of this order of ‘Banning’

11. One of the enumerated effects of the Banning Order was that Respondent No.2 would not be allowed to submit a bid. Another effect was that Respondent No.2 would not be allowed to participate in any business in its own name or as a sub-vendor or sub-contractor and any bids already submitted would be rejected. The ban imposed under this Order appears to have been limited to NPCIL. However, a copy of this Order was marked, *inter alia* to the BARC.

12. Respondent No.2 submitted its bid in response to the 1st Tender, after the Banning Order was passed. As aforesaid, Clause 3(m) of the Notice inviting the 1st tender required Respondent No.2 to submit a declaration to the effect that it “***not been debarred from tendering by any authority/agency***”. Respondent No.2 submitted a declaration to BARC stating that they have not been debarred by any authority/ agency of BARC-NRB. It however, also stated that:

“However, recently, M/s NPCIL-Tarapur has issued **notice** for banning of business with NPCIL unilaterally. Hence, we have initiated procedure for

revoking the said notice".

13. Two things are therefore immediately apparent: First, Respondent No.2 added the words "*of BARC-NRB*" in its declaration. This, to our mind, is because it was aware that it could not make the declaration as required under the tender. Second, the word "Notice" for banning was clearly incorrect, there was an Order of Banning.

14. Respondent No.2 challenged the Banning Order by filing a Suit before the Ld. Civil judge, Senior Judge, Palghar. As the following paragraphs will show, the motion filed seeking interim reliefs eventually came to be dismissed.

CREATION OF A FRESH PROFILE ON THE TENDER WIZARD PORTAL

15. Pursuant to the Banning Order, Respondent No.2 was reflected as "blacklisted" on the Tender Wizard portal, a centralised portal through which bids were to be submitted.

16. Ordinarily, the reflection of its status as "blacklisted" would have prevented Respondent No.2 from placing its bid for any tender floated by the BARC through the Tender Wizard Portal. However, Respondent No.2 participated in the 1st Tender by creating a fresh profile on the Tender Wizard Portal. Respondent No.2 created a new User ID, linked to a different email ID, and DSC Serial number etc on the Portal. Respondent No.2 also reflected its status as an "individual" despite being a company.

17. Respondent No.2 does not dispute the fact that it created such a fresh profile. However, Respondent No. 2 has submitted before us that it was justified in creating a fresh profile. Respondent No.2 claims that although the Banning Order applied only to tenders issued by NPCIL, the Tender Wizard Portal incorrectly blocked Respondent No.2 from placing its bid in respect of any and every tender issued through the Portal. It appears that Respondent No.2 wrote to NPCIL on 26th August, 2020, expressing its grievance that the Tender Wizard portal had blacklisted them from all other tenders, apart from those issued by NPCIL. Respondent No.2 sought that their User ID be unblocked in respect of all other agencies. NPCIL addressed letters dated 28th August, 2020 and 15th September 2020 to the Tender Wizard Portal, asking them to introduce the necessary feature for unit-wise banning.

18. Respondent No.2 claims that on 16th September 2020, the DAE Helpdesk/ Support Desk of the Tender Wizard Portal wrote to Respondent No.2, noting that they had created a new ID and stating “*Please note that you can participate in the tender called by other DAE Departments with new credentials, except NPCIL*”. It is in light of the correspondence exchanged that, on or about 15th September 2020, Respondent No.2 created a new profile and submitted its bid.

19. The Petitioner submits that a week later, on or about 22nd September 2020, it found out about the Banning Order against Respondent No.2. The Petitioner accordingly filed a complaint with BARC, claiming that Respondent No.2 had

defrauded BARC.

20. Roughly two months later, on 5th November 2020, Respondent No.2 moved an interim application for injunction before the Ld. Civil Judge, Senior Division, Palghar, seeking an injunction on the Banning Order. By an Order dated 12th November 2020, the Ld. Civil Judge, Senior Division, Palghar directed NPCIL and Respondent No.2 to maintain “*status quo*”.

21. In the meantime, the Tender Evaluation Committee of the BARC examined the bids submitted in response to the 1st tender. A letter of offer was issued to Respondent No.2 on 5th February, 2021 and a Work Order followed on 5th March 2021. Respondent No.2 is now on site and carrying out work.

22. It appears that the BARC took up the Petitioner’s Complaint dated 22nd September 2020 only on 9th March 2021, pursuant to an email from the office of the Secretary of the Department of Atomic Energy. The Complaint was disposed off with the remark “No further Action” on the grounds that the Banning Order is restricted only to NPCIL Tenders.

23. In the meantime, BARC called for the 2nd Tender dated 3rd February, 2021 in respect of work of maintenance of lawns, shrubs, hedges and plant installations at the BARC Plant Site, Tarapur, for the year 2021-2023. The Petitioner and Respondent No.2 participated in the 2nd Tender.

24. The Tender Evaluation Committee, by its Report dated 13th July, 2021

once again found Respondent No.2 to be qualified in respect of the 2nd Tender. Although the Report makes no express reference to the Notice Inviting Tender or the Banning Order, it observes that Respondent No.2 is qualified for participation in opening Financial Bid “*subject to acceptance of debar document by Competent Authority*”.

25. The Committee recommended that a Work Order be issued to Respondent No.2. Such a Work Order is yet to be issued.

26. In these circumstances on 2nd September, 2021, the Petitioner filed this Writ Petition. The matter was heard including on 11th October 2021, when we were informed that the Banning Order was impugned before the Ld. Civil Judge, Senior Division, Palghar, who had by Order dated 12th November, 2020, directed parties to maintain “*status quo*”.

27. We were informed that the Ld. Judge had heard the Interim Application and had listed the matter for orders. Accordingly, the matter was kept on 21st October, 2021 when the Order was forwarded to us in a sealed cover.

28. By an Order dated 20th October 2021, the Ld. Civil Judge, Senior Division, Palghar rejected Respondent No.2’s Application for interim relief against the Banning Order. Respondent No.2 filed an appeal against the aforesaid Order before the Learned Additional District Judge, Palghar, who also dismissed the appeal. Thus, the said Banning Order is effective and in force till today.

29. Respondent Nos. 1, 2 and 4 have filed detailed Affidavits dated 25th October 2021, 16th November 2021 and 22nd November 2021. On our direction, Respondent No.1 also filed an Additional Affidavit dated 22nd November 2021 placing on record the Reports of the Tender Evaluation Committee.

30. On 10th December 2021, Mr. Venkatesh Dhond, Senior Advocate was appointed as Amicus Curiae in the matter. The Ld. Amicus Curiae has submitted a Note to assist this Court in the matter.

31. The Petitioner and Respondent Nos. 3 also filed Written Submissions. The Advocate appearing for Respondent No.2 stated that since he has filed a detailed reply, he is not desirous of filing any written submissions.

32. We have heard the parties and the Amicus Curiae and perused the written submissions.

PETITIONER'S SUBMISSIONS

33. The Petitioner submits that the eligibility criteria in all subject tenders are clear. The subject tenders clearly require the bidder to “*furnish declaration that he has not been debarred from tendering by any authority/agency*”. The criteria is general and not limited to any authority/ agency “*of BARC*”. Petitioner submits that Respondent No.2 having been banned by NPCIL by its Banning Order, could not have submitted such a declaration or participated in the subject tenders.

34. The Petitioner contends that Respondent No.2 participated in the tender by playing a fraud upon Respondent No.1. It attempted to illegally circumvent the criteria by a clever use of words. The declaration submitted by the Respondent No.2 to the effect that NPCIL had issued “*notice for banning business unilaterally*” when, in fact, a Banning Order was passed, is false. By virtue of submitting a false declaration, the Petitioner submits that Respondent No.2 is in violation of the conditions of the NIT.

35. As to the correspondence exchanged by NPCIL with the Tender Portal, the Petitioner points out that as on the date Respondent No.2 submitted its bid, the unit wise banning feature on the Tender Wizard Portal was not in place. It is only after creating a fresh profile to bypass the restrictions on the Tender Wizard Portal, that Respondent No.2 obtained a clarification from the Tender Wizard Portal permitting it to do so. The Petitioner contends this is also a fraud.

RESPONDENTS’ SUBMISSIONS

36. Respondent No.1 initially filed a detailed Affidavit, submitting that :

(a) While the NIT requires that bidders submit a declaration to the effect that s/he has not been debarred by any authority/ Agency, “*there was no specified pre-bid condition or pre-qualification criteria regarding that, Firm-Company black-listed/ debarred/ or banned from any other government establishment or institutions may having*

disqualification from submitting of bid.”

(b) Banning Order of NCPIL is not applicable to BARC.

(c) Respondent No.2 has submitted the “desired declaration” in compliance of the NIT.

37. Respondent No.1 also relied upon an office order issued by the Central Vigilance Commission stating that banning of a business is an administrative matter to be decided by the management of the organisation. Respondent No.1 has produced the Department of Atomic Energy’s own internal procedure to ban/ debar contractors.

38. The Advocate for Respondent No.2 submitted as follows:

(a) That entire Petition suffers from grave delay and laches and therefore, ought not be allowed.

(b) That Banning Order does not prevent Respondent No.2 from doing business with units other than NPCIL. Therefore, he submitted that the Banning Order does not render Respondent No.2 ineligible to participate in the subject tenders.

(c) That the Banning Order is not an order of “debarment”. According to Respondent No.2, the tender criteria required a declaration to the effect that “*he has not been debarred from tendering by any authority/agency*”. An Order of Banning is on a different footing and is not covered by the declaration.

(d) As to the Petitioner’s contention that a false declaration had been

submitted, Respondent No.2 submits that the use of the word “notice” instead of “order” in its aforesaid declaration was inadvertent.

(e) Advocate for Respondent No.2 also placed reliance upon the entire chronology of facts which led to Respondent No.2 creating a fresh profile on the Tender Wizard Portal. The Ld. Advocate drew our attention to the correspondence exchanged between NPCIL and the Tender Wizard Portal. He submitted that the Banning Order applied only to NPCL. However, the Tender Wizard Portal wrongly blocked Respondent No.2 from bidding for any tender whatsoever. Respondent No.2 thus contended that when this was pointed out, NPCIL itself wrote to the Tender Wizard Portal requesting them to introduce a unit-wise banning feature. As such a feature was not yet available, by the email dated 16th September 2020, “DAE Support Desk” permitted it to create a fresh profile in order participate in the subject tenders. According to Respondent No.2, this means that the Department of Atomic Energy (Respondent No.4) and NPCIL have itself permitted Respondent No.2 to participate in the subject tenders.

(f) That Respondent No.2 is challenging the Banning Order, which is even otherwise malafide and bad in law. Respondent No.2 claims that the Banning Order is motivated by independent arbitral proceedings pending between NPCIL and Respondent No.2, where NPCIL has been directed to deposit monies.

39. Apart from the above, Respondent No.2 took issue with the Petitioner's attempt to impugn various tenders that the Petitioner had not even bid for/participated in. He contended that the Petitioner had no "locus" to do so.

40. The Advocate for NPCIL, in response to Respondent No.2's contention that the Banning order is in substance different from an order of debarment, drew our attention to Clause 3.6 of NPCIL's policy, which clearly states that,-

"3.6 Banning of Business Dealing- An Administrative penalty disqualifying a person or an entity from participating in any business process for a given period and shall include suspension, withholding, debarring, delisting, cooling periods, blacklisting of business dealings, holidaying or any other word/attribute inferring to discontinuation of business relation in any form."

41. The Advocate for Respondent No.3 therefore submitted that its Banning Order was in substance an order of debarment. Therefore, Respondent No.3 submitted that by virtue of the Banning Order, Respondent No.2 was "*debarred from tendering by any authority/agency*", and consequently, was disqualified from participating in the subject tenders.

42. The Learned Addl. Solicitor General, who appeared for the Department of Atomic Energy (Respondent No.4, which is also the nodal agency of Respondent No.1) drew our attention to the Affidavit tendered by the Department of Atomic Energy. He clarified that an email from "DAE Support Desk" authorising Respondent

No.2 to create a fresh profile on the Tender Wizard Portal should not be viewed as an authorisation/ permission granted by the Department of Atomic Energy to Respondent No.2 to participate in the subject tenders. “DAE Support Desk” is distinct from the Department of Atomic Energy. It is a helpdesk developed by the Tender Wizard Portal, operated and maintained by Indian Telephone Industries Ltd. “DAE Support Desk” is therefore a third party that monitors tenders issued by the Department of Atomic Energy on the Tender Wizard Portal and is not the same as the Department.

43. At a subsequent hearing dated 24th January 2022, we recorded his fair statement that “*the Brief Note prepared by the learned Senior Advocate Shri Dhond, appears to be fair and therefore, he relies on the same and is submitting to the orders of the Court.*”

SUBMISSIONS OF THE AMICUS CURIAE

44. The Amicus Curiae submitted that the Banning Order, for all intents and purposes was an Order of ‘debarment’ and was required to be disclosed under the Tender. Thus, in light of the Banning Order, Respondent No.2 had been “*debarred from tendering by any authority/agency*” and according to Clause 3(m) of the subject tenders, was ineligible to participate in the subject tenders.

45. He submitted that Respondent No.2 in its declaration only stated that

there was a “**notice for banning of business with NPCIL**”, when, in fact, it was aware that there was an “Order of” Banning. Further, Respondent No.2 had carefully avoided making a declaration to the effect that it had “***not been debarred from tendering by any authority/agency***”. Instead, Respondent No.2 added words of qualification and stated that it had not been debarred by “**any authority/ agency of BARC-NRB**”. These words are absent in the tender. Thus, he submitted that not only was Respondent No.2’s bid in violation of the eligibility criteria under Clause 3(m) of the tender, but the declaration submitted by Respondent No.2 was also misleading.

46. He, therefore, submitted that Clause 7 of the eligibility criteria, which stated that a bidder was liable for disqualification if he submitted a false declaration, was also attracted.

47. He further submitted that Respondent No.2’s submission that it was authorised to create a fresh profile on the Tender Wizard Portal, even if correct, would have no real bearing at all on the issue at hand, which is whether or not Respondent No.2 is eligible to participate in the subject tenders. The issue has to be determined solely with reference to Respondent No.1’s own eligibility criteria and whether they allowed a bidder who was banned/debarred by another agency to participate in the subject tenders. Thus Mr. Dhond submitted that (i) the fact the terms of the Banning Order restricted the ban on Respondent No.2 solely to NPCIL tenders and (ii) that

NPCIL accordingly requested the Tender Wizard Portal not to impose a blanket ban on Respondent No.2 from participating in government tenders, have no bearing on the issue at hand.

REASONS AND FINDINGS:

48. The requirements in a tender notice can be classified into two categories —those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it may be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.

49. First and foremost, Clause 3(m) of the subject tender requires Respondent No.2 to submit a declaration to the effect that it has “*not been debarred from tendering by any authority/agency*”. Clause 3(m) is one amongst a list of ‘Initial Eligibility Criteria’ which open with the phrase “*the bidder should have the following*”. Clause 9 of the tender states the documents relating to the eligibility criteria will be evaluated, and the financial bid of only those bidders whose documents relating to the eligibility criteria are found to be satisfactory will be opened. Clause 34 reiterates that “*documents related to the eligibility criteria will be evaluated and accordingly tenderers will be qualified*”.

50. From a reading of the subject tenders therefore, we find that Clause 3(m) of the tender is an essential condition of the tender which goes to root of the eligibility of persons who make offers under the tender.

51. It is well settled in law that an essential condition of a tender has to be strictly complied with. We find that the natural and obvious corollary of Clause 3(m) of the tender is that a bidder who has been “*debarred from tendering by any authority/agency*” is liable to be rejected straightaway.

52. The only question that arises, therefore, is whether Respondent No.2 is in violation of Clause 3(m) of the subject tenders.

53. We reject the contention taken by Respondent No.1 in its Reply Affidavit that the tender condition merely required a *declaration* to be submitted, and so long as the “desired declaration” was submitted, whether or not a bidder was actually debarred is irrelevant. That would render the eligibility criteria of the tender completely redundant. It would tantamount to placing a premium on dishonesty. Indeed, no purpose whatsoever will be served by asking bidders to disclose whether or not they are debarred, if the consequence is that even those making false declarations are eligible to participate in the tender.

54. Similarly, we are unable to accept the contention that the Banning Order has no effect on the eligibility of Respondent No.2, as it is not an order of debarment. We find that the Banning Order was nothing but an order of debarment. This is

apparent from the words of the Banning Order itself, which states that “*the committee [of NPCIL] has taken unanimous decision for ‘debaring you/your firm’ from dealing any kinds of business with the ‘Corporation’ for the period of two years in public interest.*” It is also evident from the policy of NPCIL to which the Advocate for Respondent No. 3 drew our attention, which treats debarment and “*or any other word/attribute inferring to discontinuation of business relation in any form*” as one and the same.

55. Turning next, to the contention that the Banning Order applies only to NPCIL, we are of the considered view that what is really relevant is the requirements of the subject tender. What is of importance is that the subject tenders themselves require that Respondent No.2 “*has not been debarred from tendering by any authority/agency*”. It is not in dispute that by virtue of the Banning Order, Respondent No.2 has been so debarred. Once the factum of debarring is established, the fact of debarring would operate to make Respondent No.2 ineligible to participate in the subject tender on the basis of the tender terms. In such circumstances, the inevitable conclusion that follows is that Respondent No.2’s bids are in violation of Clause 3(m) of the tender and are liable to be rejected as ineligible.

56. We find that the Tender Evaluation Committee of the BARC, in its Report dated 28th December, 2020 in respect of the 1st Tender, has not considered these aspects before concluding that Respondent No.2 is a “qualified” bidder. In so far as the 2nd tender is concerned, the Tender Evaluation Committee of the BARC

recommended that Respondent No.2 is qualified for participation in opening Financial Bids “*subject to acceptance of debar document by Competent Authority*”. Thus, even according to Respondent No.1, the Banning Order was extremely relevant. However, in spite of these observations, Respondent No.1 eventually decided to award the 2nd tender to the Respondent No.2.

57. The next submission raised was that the Writ is delayed. Respondent No.2 submits that although the Work Order in respect of the 1st tender was awarded on 5th March 2021, the Writ Petition was filed on 2nd September 2021. We do not find any undue delay in the present case, especially in light of the circumstances including the second wave of COVID-19 prevailing in early 2021. Moreover, in light of our categorical findings that the work orders that have been awarded to Respondent No.2 are *ex-facie* in violation of the tender conditions, even if there is a slight delay, we find that it is not fatal to the Petition being entertained.

58. We also reject the submission that we must not interfere with those tenders where the Petitioner is not a competing bidder. At any rate, in light of our finding that the tenders have been awarded/ work orders been issued in contravention of essential conditions in the tender, we cannot allow such illegalities to stand on the basis of a mere technicality.

59. The next question that we must consider is how Respondent No.2 came to create a new Profile on the Tender Wizard Platform. We find that this need not

detain us at all. The question before us is whether Respondent No.2's bid was eligible in light of the tender conditions. We have already noted that in light of the plain language of the subject tenders, we cannot but conclude that the bid was ineligible. In the circumstances, how and in what manner Respondent No.2 submitted the bid and whether it did so with the blessings of NPCIL has no bearing on the *lis* before us.

60. Similarly, Respondent No.1's reliance on its own internal procedure on when a bidder may be banned is not germane to the issue at hand. The issue at hand is not whether Respondent No.1 has banned Respondent No.2, but whether Respondent No.2 is eligible to participate in the subject tenders, despite having been banned by another agency, in the context of the specific terms of the BARC tender itself.

61. In light of our findings above, we come to the question of what reliefs the Petitioner is entitled to. The subject tenders before us are of two varieties. The first group, enlisted in Para 1 of our Order and prayer clauses (b), (c) and (c-1), are those where the decision to award the tender to Respondent No.2 has already been made. As far as the first group is concerned, we have already found that Respondent No.2's bid was in violation of the tender condition. In the circumstances, we quash and set aside the decision of the Respondent No.1 to award the aforesaid tenders to Respondent No.2. This Writ Petition is allowed in terms of prayer clauses (b), (c) and (c-1) above. However, we clarify that Respondent No.2 is at liberty to award the tenders to any other bidder and/or to issue a fresh notice inviting tender.

62. As far as the second group of tenders at Para 2 of our Order and prayer clause (c-2) is concerned, it is an admitted position that these tenders are yet to be opened and awarded. We find it entirely premature at this stage to pass any Orders in respect of the tenders. We find no reason to presume that Respondent No.1 will not evaluate the bids in accordance with law and the tender conditions themselves. Thus, we find no reason to grant any reliefs in terms of prayer clause (c-2). We clarify that the Petitioner is at liberty to file appropriate proceedings as and when the tenders are opened and the bids are awarded, if the need arises.

63. No order as to costs.

(MILIND N. JADHAV, J.)

(S.J. KATHAWALLA, J.)

In view of the request made by the Learned Advocate appearing for the Respondent No.2, the direction/order in paragraph 61 above will not be implemented for a period of two weeks from today.

(MILIND N. JADHAV, J.)

(S.J. KATHAWALLA, J.)