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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 13th December, 2022
 + **W.P.(C) 14526/2021**
SURYA DAY PRIVATE LIMITED Petitioner
 Through: Mr. Ravi Prakash Advocate.
 (M:9818598604)
 versus
NTPC LIMITED Respondent
 Through: Mr. Puneet Taneja, Ms. Laxmi
 Kumari, Advocates. (M:9711091860)
CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition has been filed on behalf of the Petitioner - M/s Surya Day Private Limited challenging the impugned banning order dated 22nd May, 2021 passed by the Respondent – NTPC. The operative portion of the impugned banning order reads as under:

“ The Corporate Standing Committee examined the representation of SURYADAY and concluded with following orders/ instructions:

Banning of all business dealings with M/s Suryaday Pvt. Ltd, Noida (SAP Vendor Code-1171841, PAN#AAUCS7174G) for 03 Years with NTPC, on the grounds as per clause 5.1 (j) and 5.1 (t) of NTPC Policy & Procedure for Withholding and Banning of Business Dealings.

1. The above-mentioned clauses are reproduced as below:

- ❖ *Clause 5.1(J): If it is established that Agency has resorted to corrupt, fraudulent practices including misrepresentation of facts.*

❖ *Clause 5.1(t): If the Agency commits fraud as defined under the fraud prevention policy of NTPC.*

2. Invoking above clauses of NTPC Policy & Procedure for Withholding and Banning of Business Dealings, NTPC Limited has decided for Company wide banning of all business dealings with M/s Suryaday Pvt. Ltd., Noida for a period of 03 (Three) years from 22.05.2021.

Accordingly, no bidding/tender documents shall be issued and / or award shall be made to Ms Suryaday Pvt. Ltd., for any of the Contract Packages tendered from Corporate Centre/ Project Sites / Regional Offices/ Shared Service Centres and JVs/ Subsidiaries of NTPC here after unless this banning is withdrawn or modified earlier than 21.05.2024.

No other orders/instructions were passed by the committee.”

3. In the present case the NTPC had issued tender documents - NIT No.40087652 on 4th October, 2018 and NIT No. 40087677 on 1st February 2019. The Petitioner submitted its bids along with necessary documents for both of these tenders. Pursuant to the same, several emails were exchanged between NTPC and the Petitioner wherein, certain queries were raised by NTPC and clarifications of the same were given by the Petitioner. However, the Petitioner's bids were not successful. Therefore, the Petitioner sought the release of its bank guarantee dated 18th December, 2018 made to the NTPC.

4. The NTPC invoked the bank guarantee on 5th August, 2020 and thereafter issued a show cause notice dated 28th October, 2020. In the said show cause notice, the NTPC alleged that four documents i.e. two client commissioning certificates and two work/purchase orders which were

submitted by the Petitioner were suspect and had several contradictions. The said documents had been issued to the Petitioner by M/s Sri Avantika Contractors (P) Limited, Hyderabad (*hereinafter*, “SACPL”) and were submitted to NTPC to reflect the experience and qualification of the Petitioner for the tenders in question. The Petitioner was asked to explain the contradictions as set out in the show cause notice.

5. The Petitioner submitted its reply on 1st December, 2020 and attached a confirmation letter issued by SACPL dated 30th November, 2020. As per the Petitioner its reply and the confirmation letter issued by SACPL were sufficient to show that the four documents which were found to be suspect by NTPC i.e., the two client commissioning certificates and the two work/purchase orders were duly confirmed by SACPL. However, the NTPC passed the impugned banning order dated 22nd May, 2021, thereby banning all business dealings between the Petitioner and NTPC for a period of three years.

6. Today, it is submitted by Mr. Ravi Prakash, Id. Counsel for the Petitioner that the impugned banning order is contrary to NTPC’s own policy i.e. Policy & Procedure for Withholding and Banning of Business Dealings – Rev dated 29th August, 2020, which in Clause 5.4 requires a speaking order to be passed for banning business dealings. He relies upon the e-mail issued by the SACPL to argue that SACPL had confirmed the issuance of the documents in question and that the impugned banning order does not consider this fact. He further submits that the impugned banning order imposes the maximum permitted period of ban i.e., of three years which is completely disproportionate and has caused immense loss to the Petitioner.

7. Mr. Taneja, Id. Counsel for NTPC submits that the NTPC tenders in question are highly competitive tenders and no party ought to be permitted to indulge in fabrication of documents in their bids. NTPC believes the documents submitted by bidders in good faith and if such documents do not reflect the experience sought by NTPC and are submitted in a casual and malafide manner, NTPC would be entitled to ban such bidders. Id. Counsel relies upon the show cause notice dated 28th October, 2020 which sets out the issues which were arising in the documents submitted by the Petitioner. He refers to paragraphs 3 to 6 of the show cause notice to submit that the two client commission certificates having same reference number with different date of issuance, different date of commissioning, having identical contents and bearing the signatures of same official, rendered the same completely suspicious. Further, the two work/purchase orders submitted by the Petitioner have the same document number, same document title and project name but different date of issue and content. He further refers to the show cause notice to argue that though Sh. Vijay Verma – authorised signatory of SACPL, confirmed the issuance of the completion certificate, however he had only confirmed that the Petitioner had done restoration work and not the installation and commissioning as was claimed by the Petitioner.

8. Id. Counsel for NTPC further submits that the Petitioner was given adequate opportunity by the Appellate Authority to file additional documents in support of its appeal. However, the Petitioner did not avail of that opportunity. Relying on the order dated 29th January 2022 passed by the Appellate Authority, Id. Counsel submits that no one from SACPL was produced before the Appellate Authority to confirm the documents in question. He submits that under these circumstances, the impugned banning

order is completely justified.

9. The Court has heard the Id. Counsels for the parties and considered the matter. The show cause notice dated 28th October, 2020 sets out in detail the contradictions in the documents which have been filed by the Petitioner. The relevant part of the show cause notice is as under:

“3. That in support of meeting Qualification Requirements (QR), M/s Suryaday Private Ltd. had submitted the following documents:

a. Client Certificate ref. No. SACIL/Solar/Suryaday-187/2018-19 dtd. 17.12.2018 (1 page) issued by Mr. Vijay Verma on behalf of M/s Sri Avantika Contractors (P) Limited (SACPL), Hyderabad having commissioning date 15th April 2018 (Annexure-I)

b. Award/Order Copy, document number: SACIL/SOLAR/PO/Elect/001/17-18 dtd. 10.10.2017 received from Sri Avantika Contractors (I) Limited for “Purchase order for Supply of DC & AC equipment 5.35 MW Grid connected PV Plant with single axis tracking”, submitted through mail dtd. 29.08.2019 (Annexure-III).

*4. That further in reference to other NIT no.40087677 dtd. 01.02.2019 for **Grid tied Ground Mounted 500 KWp Solar PV system for NETRA**, wherein bids were opened on 06.03.2019. M/s Suryaday Private Ltd. had submitted the following documents for the same reference work/plant/Project of “5.35 MW Solar PV Power Project Rampura Gaunaha, West Champaran Bihar” in support of meeting Qualifying Requirements (QR).*

a. Client certificate No.: SACIL/SOLAR/Suryaday-187/2018-19 dtd. 3rd February 2019 from Sri Avantika Contractors (I) Limited having commissioning date 17th January 2018 (Annexure-IV).

b. Detailed order copy, vide document No.SACIL/SOLAR/PO/Elect/001/17-18 dtd. 17.06.2017

- (Annexure V) from Sri Avantika Contractors (I) Limited for “Supply erection testing commissioning of 5.35 MW Grid connected PV Plant with single axis tracking at Rampurwaa Bihar....”, along with Scope of supply (Annexure I) -Scope of Electrical Installation & Commissioning document no. SACIL/SOLAR/PO/Elect/002/17-18 (Annexure-VI).
5. That from the above documents submitted by M/s Suryaday Private Limited, it is observed that two client certificates having same reference number with different date of issuance, different date of commissioning, having identical contents and bearing the signatures of same official shows contradiction in the certificates issued by the same authority.
6. That further M/s Suryaday Private Ltd. has submitted two work order copies which are having same document number : SACIL/SOLAR/PO/Elect/001/17-18, same document title & Project name but date of issue is different with slight changes in contents.”
10. A perusal of the aforementioned show cause notice shows that the allegation of NTPC was that the two client commission certificates submitted by the Petitioner had same reference number with different date of issuance, different date of commissioning and identical content and signatures. Further, the two purchase/work orders submitted by the Petitioner had the same document number, same document title and project name but different date of issue with slight change in content. Thus, there was complete suspicion in the mind of NTPC which resulted in the Petitioner’s bid not being accepted and the show cause notice being issued. In reply to the said show cause notice the Petitioner in its reply submitted a confirmation letter issued by SACPL. The genuineness of SACPL letter is not in doubt. The letter of SACPL relied upon by the Petitioner is set out

below:

“a. We had issued two commissioning certificates dated 3rd February 2019 and 17th December 2018 and with respect to the solar project undertaken by Suryaday Pvt. Ltd. at Rampurwa, Gaunaha, West Champaran, Bihar. However, two different dates of commissioning are mentioned in the certificates since the solar plant was brought into operation on 17th January 2018 and the power generation was stabilized on 15th April 2018. This is in line with our certification practice for power plants.

b. With respect to the single work, we had issued two purchase orders bearing same reference no. SACIL/SOLAR/PO/Elct/001/17-18. There were changes made in the PO and commissioning certificate as required by insurance company.”

11. A perusal of NTPC’s Policy & Procedure for Withholding and Banning of Business Dealings – Rev dated 29th August, 2020 shows that there is requirement of a clear speaking order to be passed before banning business dealings with an entity. Clause 5.4 of the said policy reads as under:

“Policy & Procedure for Withholding and Banning of Business Dealings

5.4 Speaking Order

The speaking order for banning the business dealing with the Agency shall be issued (after vetting by legal deptt) by the Competent Authority himself or by a person authorized for the said purpose. In cases where investigation has been carried out by Vigilance Department or CBI etc., the speaking order will also be vetted by Vigilance Department before issuance.”

12. The impugned banning order which has been placed on record gives reference to the bid documents, the policies, the show cause notice and the

Petitioner's replies but does not specifically mention even once the SACPL confirmation letter or the e-mails which have been issued by SACPL. However, this Court is of the opinion that the impugned banning order would have to be read with the show cause notice. In the said show cause notice dated 28th October 2020, a clear reference has been made to all the documents including the e-mails issued by Sh. Vijay Verma – authorised signatory of SACPL.

13. The impugned banning order has banned all business dealings between the Petitioner and NTPC for a period of three years. The allegation is one of corrupt and fraudulent practice including misrepresentation of facts. There may be some suspicion as to the documents relied upon by the Petitioner. However, the said suspicion cannot be, without further inquiry be termed as corrupt or fraudulent practice, especially, in the light of the Petitioner's reply dated 1st December 2021 and confirmation letter given by SACPL. Further, the e-mail relied upon by the Petitioner to argue that SACPL had confirmed the issuance of these letters to the NTPC does not find a mention in the impugned banning order or in the Appellate Authority's order. The said e-mail reads as under:

*"From: sri avantika <sriavantika3@gmail.com>
Date: Mon, Jun 10. 2019, 6:34PM
Subject: Re:Fwd: FW: Confirmation of Enclosed
Execution Certificate for 5 MW A.C. grid connected
project based on PV technology –Regd
To:Om <omnarayansingh@ntpc.co.in>
Cc:<padmasree@sriavantika.com>*

Dear Sir

*With this has reference to your tailing mail regarding
the confirmation of certificate issued to M/s Suryaday*

Pvt Ltd; we do hereby confirm that we have issued the certificate for design, supply, erection & commission of AC works for our 5MW Solar PV Project Grid Connected projected in Billar. The contents shown in certificate is genuine and correct. This is for your kind information.”

14. As per the judgement passed by the Supreme Court in ***Eurasian Equipment & Chemicals Ltd. v. State of West Bengal, 1975 (1) SCC 70***, it is the settled position in law that a banning order can have a deleterious effect on the business of a company. Thus, on a ground of mere suspicion, the banning order for a period of three years cannot be issued. Having said that, the Petitioner also has a duty to satisfy the authorities that the documents which have been submitted are genuine and authentic. In this aspect, there is some suspicion which the documents do raise considering that two client commission certificates having the same reference number with different dates of issuance and commission as also two purchase/work order having same document number but different date of issue have been submitted by the Petitioner. The overall impression which the Court gets is that while the documents do raise suspicion, the NTPC has also overreacted to the situation by imposing a three years’ ban. The documents and the email of SACPL could have been considered or a clarification could have been sought.

15. It is the settled position in law that even if there is some irregularity, the blacklisting or period has to be proportionate. This has been affirmed by the Supreme Court in ***M/S Daffodills Pharmaceuticals Ltd. & Anr V. State Of U. P. & Anr. (Civil Appeal No. 9417 of 2019)***. In the present case, out of the three year banning period, one and a half years have already elapsed.

The Court has also considered the decisions relied upon by the Id. Counsel for the Petitioner including *Aqua Designs India Private limited v. Union of India, Ministry of Power (W.P. (C) 6688/2016)* and *Balram Garg v. SEBI, CA No.7054/2021* wherein it was held that the Court has to consider the reasons for debarment/ blacklisting and the reasons ought not to be arbitrary or unreasonable.

16. In these facts and circumstances, the Court is of the opinion that while the conduct of the Petitioner is not completely above board, the banning of three years would not be justified. Accordingly, the banning order is restricted to the period which has already elapsed. The banning order shall, however, not be construed as a result of fraudulent practice or misrepresentation of facts. It would also not act as an impediment in the Petitioner's future bids for other contracts of PSUs, Govt. Departments, etc.

17. Insofar as bank guarantees are concerned, the Petitioner's remedies, if any, are left open.

18. Petition is disposed of in these terms. All pending applications, if any are disposed of.

PRATHIBA M. SINGH
JUDGE

DECEMBER 13, 2022

Rahul/KJ