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

% *Decided on: 12.05.2023*

+ LPA 96/2018

NTPC LTD

..... Appellant

versus

EMAMI POWER LTD & ANR

..... Respondents

+ LPA 100/2018

NTPC LTD

..... Appellant

versus

ORIENTAL SALES AGENCIES (INDIA) & ANR.

Respondents

Through: Mr. Puneet Taneja, Mr. Manmohan Singh Narula and Mr. Amit Yadav, Advocates for Appellant.

Mr. Abhimanyu Bhandari and Mr. Harshit Khanduja, Advocates for Respondent/Emami Power Ltd. in Item No. 4.

Mr. Avishkar Singhvi, Ms. Gauri Rishi, Ms. Srishti Juneja, Ms. Garima Sehgal and Mr. Vivek Kumar, Advocates in Item No. 5.

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CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

HON'BLE MR. JUSTICE SUDHIR KUMAR JAIN

NAJMI WAZIRI, J (ORAL)

The hearing has been conducted through hybrid mode (physical and virtual hearing).

1. The appeals are received on transfer. At joint request, they are taken up for disposal.
2. This appeal impugns the order dated 03.01.2018 passed by the learned Single Judge in W.P.(C) No. 7493/2016 on the ground that it has erred in not holding that the two bidders: i) Emami Power Ltd and Oriental Sales Agencies (India) Private Limited ('OSAPL') as group companies and ii) that they had colluded in the bid. The learned counsel for the appellant submits that there was collusion between Emami and OSAPL. Referring to page 836 of the paper-book, he states that there is cross holding between Emami and OSAPL. However, the said chart only shows five sets of shareholdings in each Emami Power Ltd. and OSAPL with some common shareholding. This shareholding pattern by itself does not establish or mean that they are group companies or one and the same company.
3. The learned counsel for the respondent states that the appeals are without basis; pursuit of the same is causing much prejudice and harassment to the respondents, both of whom had withdrawn their applications for bids, before the bid took place.
4. The impugned order has rightly held, indeed it was conceded by

the appellant, that Emami and OSAPL were not group companies; there was nothing on the record to establish that the two companies which are otherwise independent and separate entities, could be said to have colluded or otherwise conspired to cause any monetary loss or injury or impediment in the affairs of the appellant. The impugned order has reasoned as under:

“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).

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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.”

5. As has been discussed in the impugned judgment the respondents had applied for bidding in an auction; they deposited the EMD but much before the bid could take place they withdrew their application. Yet, for the reasons best known to the appellant, the latter declined to return the EMD and went on to blacklist both Emami and OSAPL. The reason for blacklisting of the said companies cannot be on the basis of an afterthought or on speculative loss. No collusion was established between them and no loss has been caused to the appellant. In the circumstances, withholding the monies is unjustified and the blacklisting too is arbitrary and without reason. The Ministry of New and Renewable Energy (‘MNRE’) too had blacklisted Emami and OSAPL. The impugned judgment has set aside the blacklisting done by the MNRE. Half a decade has passed, the MNRE has not filed an appeal against the said order. It can be assumed that MNRE has accepted the setting aside of the blacklisting and that the

blacklisting should be treated as *non-est*.

6. Article 2 of the RFS which defines the terms “Affiliate” and “Group Company” have been examined in the impugned order as under:

“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 directly, 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.”

7. The impugned order has rightly held that Emami and OSAPL are not group companies. That being the position, there cannot be any cause for presuming that they were alter egos of each other or one and the same company or that they had colluded in the bid, let alone caused any harm to the appellant. One individual being named as a common signatory for both the companies has been held to be a mistake. In any case, the said person had resigned from Emami by the time the financial bids could be made. The said companies had already communicated that they were not interested in making the bids. Yet the appellant, which was aware of the cross-holding as noted hereinabove, represented to the said companies to make financial bids. The financial bids were never made.
8. In view of the above, the appellant's contention that Emami and OSAPL were group companies and had colluded to cause loss to the appellant is baseless and rejected. No loss was proven to have been caused to the appellant. Their alleged 'collusion practice' was never established. The applications for bids were withdrawn and no financial bids were made either by Emami or the OSAPL. The period for validity of the bids had expired by the time NTPC rejected their application for bids. Therefore, the said rejection was of no consequence. Consequently, there would be no occasion for forfeiture of the EMD.

9. The appeals are without merit. Accordingly, they are dismissed.
Let the monies deposited be released to Emami and OSAPL
along with the interests accrued thereon.

NAJMI WAZIRI, J

SUDHIR KUMAR JAIN, J

MAY 12, 2023

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