

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3590 OF 2024**

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Karam Chand Thapar & Bros.
(Coal Sales) Ltd. & Anr.

..... Petitioners

Vs.

Maharashtra state Power Generation
Co. Ltd. & Ors.

..... Respondent

**WITH
INTERIM APPLICATION (L) NO.17609 OF 2024
IN
WRIT PETITION NO.3590 OF 2024**

Karam Chand Thapar & Bros.
(Coal Sales) Ltd & Anr.

..... Applicants

Vs.

Maharashtra state Power Generation
Co. Ltd. & Ors.

..... Respondents

Mr. Zal Andhyarujina, Senior Advocate with Ms. Ishani Khanwilkar, Mr. Munaf virjee, Mr. Tirtha Mukherjee i/b. AMR Law for the petitioners

Dr. Birendra Saraf, Senior Advocate with Ms. Amita Chaware for respondent No.1 and 2

Ms. Jyoti Chavan, Additional Government Pleader with Ms. Nazia Sheikh, AGP for respondent No.3 – State

Ms. Saloni Manjrekar i/b. HH Legal for respondent No.4

Ms. Nikita Bhansali a/w. Mr. Tejas Gupta and Ms. Roshni Bhati i/b. Yasmin Bhansali & Co. for respondent No.5

**CORAM: ALOK ARADHE, CJ. &
M. S. KARNIK, J.**

**RESERVED ON : APRIL 7, 2025
PRONOUNCED ON : APRIL 9, 2025**

JUDGMENT (PER : CHIEF JUSTICE)

Rule. Rule is made returnable forthwith. By consent of the learned counsel for the parties, heard finally.

2. The Karam Chand Thapar & Bros. (Coal Sales) Ltd. (**petitioner**) is a company, engaged in the business of liaising, movement, handling and delivery of raw coal from Coalfields to Thermal Power stations by rail as well as rail-sea route. Mr. Sampat Shete is the Director of the petitioner.

(A) CHALLENGE:

3. In this petition, the bid of the petitioner has been rejected by the Chief Engineer (Fuel Management) MAHAGENCO (**Chief Engineer**). The petitioners have also assailed the validity of e-mail dated 17th May 2024 by which the Chief Engineer issued a notice for forfeiture of EMD amount of the petitioner. In order to appreciate the grievance of the petitioners, relevant facts need mention, which are stated infra.

(B) FACTS:

4. The Bokaro Power Supply Company (P) Ltd. (**BPSCPL**), on 22nd October 2022 issued a Notice Inviting Tender for the work of linkage materialisation and shortage minimization for Coal Supply from Central Coalfields Ltd. (CCL) to BPSCPL. The estimated value of the contract was Rs.37,58,841 (excluding GST). On 14th November 2022, petitioner submitted its bid for an amount of Rs.21,00,00,000/- (Twenty-one crores only) and was informed by an email dated 11th May 2023 that the bid submitted by the petitioner is accepted and the reverse auction would be

held on 12th May 2023. The petitioner, on 12th May 2023 logged into the portal to participate in the reverse auction process and learnt that start price of the auction was a meagre sum of INR 21/- for the entire tendered quantity. The petitioner, thereupon immediately submitted a representation to BPSCPL to annul the reverse auction process. However, the BPSCPL continued with the auction process in which no bidder participated.

5. The BPSCPL, on 14th July 2023 debarred the petitioner from participating in any auction of tender for a period of one year. The petitioner, thereupon on 31st July 2023 filed a writ petition No.18476 of 2023 before the Calcutta High court against the order dated 14th July 2023.

6. The Maharashtra State Power Generation Company Limited (**MAHAGENCO**) on 10th November 2023 commenced sale of e-tender document for appointment of Supervision, Monitoring & Co-ordination (SMC) agency for the work of supervision of coal rakes movements, coal quantity and quality monitoring, loading of quality coal and movement of sized coal for various TPS of MAHAGENCO from Western Coalfields Ltd. The period of contract was one year with provision for extension of six months, subject to performance. The petitioner, on 22nd November 2023 made payment of Earnest Money Deposit (**EMD**) of Rs.5,00,000/- (Rs. Five lac) in favour of MAHAGENCO and on 22nd December 2023 the petitioner submitted its bid in response to the aforesaid e-tender. However, MAHAGENCO, on 23rd January 2024 rejected the bid of the petitioner and on 31st January 2024 accepted the bids of respondent Sendoz Commercials Private Limited and Godavari Commodities Limited and issued a letter of award in

their favour. In the meantime, the petitioner submitted representation on 30th January 2024. The MAHAGENCO, vide response dated 9th February 2024, informed the petitioner that the petitioner was debarred/blacklisted by BPSCPL for a period of one year from 14th July 2023 and therefore, the bid of the petitioner was rejected. The petitioner, thereupon, submitted another communication dated 10th February 2024 to MAHAGENCO stating that the petitioner has not violated any terms of the tender. The learned Single Judge of the Calcutta High Court, by an ad-interim order dated 19th February 2024 stayed the order dated 14th July 2023 of debarment / blacklisting the petitioner till 31st March 2024 or until further order, whichever is earlier.

7. The MAHAGENCO, on 21st March 2024 issued work order in favour of Sendoz Commercials Private Limited and Godavari Commodities Limited. The learned Single Judge of the Calcutta High Court, by order dated 27th March 2024 passed in the writ petition No.18476 of 2023 filed by the petitioner, made the interim order dated 19th February 2024 absolute till disposal of the writ petition. The Chief Engineer, by email dated 17th May 2024 informed the petitioner that its bid was rejected on the ground of false/misleading information provided on affidavit submitted with the technical bid with regard to its blacklisting/debarment and therefore, three working days' notice for forfeiture of EMD of the petitioner was issued. In the aforesaid factual background, the petitioner has filed this writ petition seeking reliefs stated supra.

(C) SUBMISSIONS ON BEHALF OF THE PETITIONERS:

8. Learned senior counsel for the petitioners has invited attention of this Court to Clause IV of the e-tender and has submitted that the petitioner was under an obligation to disclose an order of blacklisting/banning the petitioner from participation by an independent power producer or Government entity. It is further submitted that the expression 'Government Entity' is not defined in e-tender and therefore, it is vague and has an open ended meaning. It is contended that BPSCPL is a private limited company registered under the Companies Act, 2013 which is substantiated from the official website of Ministry of Corporate Affairs which discloses that in its records the BPSCPL is described as a non-Government Company in the subject category. It is further contended that BPSCPL is neither registered as a Government company nor it is a subsidiary company of such Government Company as defined in Section 2(45) of the Companies Act, 2013.

9. It is urged that the BPSCPL is also not an independent power producer. Therefore, the MAHAGENCO ought to have appreciated that clause IV of the e-tender is not applicable to the facts and circumstances of the case. It is contended that the impugned action of MAHAGENCO, while disqualifying/rejecting the bid of the petitioner, is without any basis, substance and contrary to the terms of e-tender. It is urged that the bid process is illegal, arbitrary, bias and unfair and also against the tender document. It is contended that the conditions of disqualification are contrary to the conditions of disqualification provided in the tender document.

(D) SUBMISSIONS ON BEHALF OF THE RESPONDENTS: :

10. On the other hand, learned senior counsel for the respondents has invited attention of this court to paragraph 2 of the writ petition No.18476 of 2023 filed by the petitioner before the Calcutta High court. It is pointed out that petitioner has described BPSCPL to be a Joint Venture of two Government entities viz. Steel Authority of India Ltd. and Damodar Valley Corporation and it has been stated that the same is a 'State' within the meaning of Article 12 of the Constitution of India. It is pointed out that as per Clause IV of the e-tender, the bidder ought not to have been blacklisted/banned from participation by any independent power producer or Government entities, including Thermal power generators. It is submitted that the petitioners' tender has been rejected on the ground that it was debarred/blacklisted by BPSCPL which is a Government entity. It is pointed out that BPSCPL was established on 18th September 2001 as a Joint Venture between the Steel Authority of India Ltd. **(SAIL)** and the Damodar Vallery Corporation **(DVC)** as a part of SAIL business reconstruction and restructuring plan.

11. It is further pointed out that the shares of BPSCPL are held equally by DVC which is the statutory corporation formed under the Damodar Valley Corporation Act and SAIL which is a Government Company in which 65% shares are held by the President of India. It is also pointed out that the Chairman of BPSCPL is nominated by DVC and the Board of Directors are nominated by SAIL and DVC. It is contended that the clauses in the contract do not merely contemplate blacklisting/banning by

the Government entity but also by the independent power producer. It is argued that even assuming that the BPSCPL is not a Government entity, it is still an independent power producer. In this connection, reference has been made to the provisions of Maharashtra Electricity Act and the regulations framed thereunder.

12. Lastly it is urged that the author of the tender document is the best person to understand and appreciate the requirement of tender with regard to the eligibility of a tenderer. In support of the aforesaid submissions, reliance has been placed on ***AFCONS INFRASTRUCTURE LTD. VS. NAGPUR METRO RAIL CORPORATION LTD. & ANR.***¹ and ***AGMATEL INDIA PRIVATE LTD. VS. RESOURSYS TELECOM & ORS.***²

(E) REASONS:

13. We have considered the rival submissions made on behalf of both the sides and have perused the records. The solitary issue which arises for our consideration in the instant writ petition is whether the BPSCPL is either a Government entity or an independent power producer.

14. At this stage, it is apposite to take note of 'Clause IV of Section-1-Instructions to the Bidder' of the e-tender document, which deals with Bidders Past Record, which is extracted below for the facility of reference:

IV) BIDDERS PAST RECORD:

"On the due date of submission of bid,

¹ ***(2016) 16 SCC 818***

² ***(2022) 5 SCC 362***

(a) The bidder/consortium/JV members including any of their affiliate should not have been blacklisted/banned for participation by any IPP or Govt. entities including Thermal power Generators, CIL subsidiaries/SCCL.

(b) Penal action such as termination/foreclosure of contract(s) on account of non performance of contractual obligations should not have been taken against the bidder or any of the consortium/JV partner/bidder by any IPP or Govt. entities including Thermal power Generators, CIL subsidiaries/SCCL during past 3 years.

If the documents submitted against "Bidders Past Records" are found misleading during scrutiny/at any stage of contract, the bidder will not be considered for qualification/contract will be immediately stopped and any explanation will not be accepted."

15. Thus, it is evident that on the date of submission of the bid, the bidder/consortium or Joint Venture members including any of their affiant should not have been blacklisted/banned from participation by any independent power producer or Government entity including the Thermal Power Generation, Coal India Ltd. subsidiaries viz. Singareni Collieries Company Limited. The petitioner filed an affidavit in the form of Annexure-IV appended to the tender, wherein in paragraph 3, the following statement was made:

"3. That no order for blacklisting/Banning of the bidder has been passed against the bidder or any of the consortium partner/bidder for participation in tenders by Govt. entities in Thermal power generation, CIL subsidiaries by any of the Government entities, which is still in force as on due date of submission of bids."

16. The explanation put-forth by the petitioner to the aforesaid statement made in paragraph 3 of the affidavit is that, the BPSCPL is neither a Government entity nor an independent power producer. The term 'Government entity' is not defined in the e-tender. Therefore, its meaning in ordinary parlance has to be taken into account. In "Advanced Law Lexicon" (3rd Edition), the expression 'entity' is defined as a real being or existence, particularly one with separate existence for tax purposes, encompassing individuals, trusts, and governmental units.

17. BPSCPL was established on 18th September 2001 as a Joint Venture between the Steel Authority of India Ltd. (**SAIL**) and the Damodar Vallery Corporation (**DVC**) and the shares of BPSCPL are held equally by DVC and the SAIL is a Government Company of which 65% shares are held by the President of India. The Chairman as well as Board of Directors are nominated by the SAIL and DVC. The accounts of BPSCPL are also audited by the Comptroller and Auditor General of India. It is also pertinent to note that the petitioner had filed a writ petition against the order of blacklisting/debarment dated 14th July 2024 before the Calcutta High Court viz. writ petition No.18476 of 2023. In the aforesaid writ petition, in paragraph 2, 31, 34 and 36 the following averments have been made:

"2. *"The respondent number one is Bokaro Power Supply Company Limited in short BPCL, which is a joint venture of two government entities, namely Steel Authority of India Ltd. and Damodar Valley Corporation. In fact, the chairman of respondent number 1 is nominated by DVC and the directors of the respondent number 1 are nominated by SAIL and DVC in equal number. Does the control of the respondent number one rest with the two forming entities*

that is SAIL and the DVC, the respondent number 2, 3 and 4 are officers and or instrumentalities working under the respondent number 1. The respondent number 5 is the auctioning agent of the respondent number one. Does the respondent number 1 to 5 fall under the scope and ambit of "State" as understood under the article 12 of the Constitution of India, the acts and actions of the respondents hearing, are all amenable under the jurisdiction of this honourable court.

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31 *"that it is a trite law that the state does not stand on the same footing as a private person that the state in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution of India which excludes arbitrariness in state action and requires the state to act fairly and reasonably and that the action in the matter of award of contract has to satisfy this criteria".*

34. *"that the petitioner humbly states and submits that in the matter of judicial review, the basic test is to see whether there is an infirmity in the decision making process and not in the decision itself. The petitioner further submits that the principle of judicial review cannot be denied even in contractual matters in which the government exercises, its contractual powers, and as such judicial review is intended to prevent the arbitrariness and it must be exercised in larger public interest".*

36 *"Your petitioner states that vide a number of landmark judgments delivered by the honourable Apex Court as well as this honourable court, it has become a well settled and trite law that once a public authority falling under the ambit of state under Article 12 of the Constitution of India enters into a business contract with a private entity, any decision as to the banning in the business transactions with the private entity must be proceeded by a proper opportunity of hearing and also must be fortified with the cogent reasons behind, taking such decision, otherwise, the said decision will suffer from the arbitrariness and consequently will be in contravention of Article 14, 19 and 21 of the Constitution of India."*

18. Thus, from the stand taken by the petitioner in the aforesaid writ petition, it is evident that the petitioner itself understood the BPSCPL to be a Government entity. The petitioner is now estopped from contending that BPSCPL is not a Government entity. It is also relevant to mention here that Clause IV of Section-1 of the tender document contemplates the blacklisting/banning even by an independent power producer. Section 2(I) of the Maharashtra Electricity Duty Act, 2016 defines the expression 'independent power producer' to mean a producer of electrical energy which is not a public utility but which makes electrical energy available for sale to utilities or end users, therefore, is the power producer as well.

(F) CONCLUSION:

19. For the aforementioned reasons, clause IV of Section-1 of the e-tender is attracted to the facts and circumstances of the case. The petitioner was admittedly debarred/disqualified on 14th July 2023 by BPSCPL and therefore, on the date of submission of the bid i.e. 22nd December 2023, in pursuance of the e-tender dated 10th November 2023, the petitioner was debarred/banned from participating in the tender. The issue whether BPSCPL is a Government entity or independent power producer is answered in the affirmative. Therefore, the action of MAHAGENCO in rejecting the technical bid of the petitioner and forfeiting the amount of security cannot be found fault with.

20. However, we cannot lose site of the fact that the order of debarment dated 14th July 2023 has been stayed by learned Single Judge of Calcutta High Court on 19th February 2024 and

the aforesaid ad-interim order has been made absolute on 21st March 2024 during pendency of the writ petition No.18476 of 2023. Therefore, it is observed that it will be open to the petitioner to disclose the grant of interim order granted by the Calcutta High Court, if it still subsists, in future tenders.

21. Accordingly, the writ petition is disposed of.

22. Interim application(s), if any, stands disposed of.

(M. S. KARNIK, J.)

(CHIEF JUSTICE)