IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.02.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.No.523 of 2018

M/s.T.S.Kisan & Company Pvt. Ltd.,
Registered Office at C-420,
Defence Colony, New Delhi – 110 024,
Rep. by its Director Mr.J.K.Thapar. ... Petitioner

Vs

1.Heavy Vehicles Factor,
Avadi, Chennai – 600 054,
Rep. by the Senior General Manager.

2.Hon'ble Mrs.Justice Prabha Sridevan,
Judge (Retd), High Court, Madras,
No.7, Krishnaswami Iyer Avenue, Luz,
Mylapore, Chennai – 600 004
Sole Arbitrator, Chennai. ... Respondents

Prayer: Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the award dated 13.11.2017, allow the claim of the petitioner and thereby dismiss / reject the claim of the 1st respondent.

For Petitioner	:	Mr.S.R.Raghunathan
For Respondent 1	:	Mr.G.Rajagopalan Additional Solicitor General of India Assisted by Mr.Venkataswamy Baby

ORDER

The claimant before the arbitral Tribunal has invoked the Jurisdiction of this Court under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award passed by the sole arbitrator on 13.11.2017. The brief facts that has culminated in the filing of the above petition are as follows:

Claimant's Case:

2. On 14.07.2008, the respondent has issued two tender notices. The first tender was with reference to Heavy Thermo Pressed Plates. The second tender was with reference to the Light Thermo Pressed Plates. The tender purchase committee awarded the bid to the petitioner on 30.09.2008. As per the terms of the tender the

manufacture and supply by the petitioner was determined by the supply of raw-material by the respondent. The petitioner on successfully bidding for the tender had borrowed from the bank and had placed the order for supply of a new hydraulic press of 12,000 ton capacity.

3. The petitioner would submit that the respondent caused a delay in the release of dies. The petitioner therefore sent two letters dated 01.01.2009 and 05.03.2009 requesting permission to examine the dies. Ultimately, the dies were delivered on 29.04.2009 nearly six months after the supply order. The receipt of the dies was also communicated by the petitioner to the respondent vide letter dated 30.04.2009. While so, on 24.06.2009, the respondent informed the petitioner that as per the terms of the Ministry of Defence all the supply orders and related activities had been put on hold for the present, until further orders. This order was challenged before the High Court of Delhi and by order dated 05.03.2010 the order passed by the Ministry of Defence was set aside.

4. The petitioner would submit that on account of the putting on hold order they had suffered a huge loss. Though the High Court of Delhi had set aside of putting on hold the order on 05.03.2010, the hold order was withdrawn only on 09.04.2010.

5. Considering the delay that had been caused by reason of the above procedure, the petitioner requested the respondent to re-fix the delivery period vide their letter dated 22.04.2010 upto the period 30.06.2011. The respondent by their letter dated 08.06.2010 re-fixed the delivery period from 30.04.2010 to 30.03.2011.

6. On the one hand, while the respondent had re-fixed the delivery period, on the other, they had on 07.04.2010 issued a show cause notice to the petitioner asking a response as to why the contract should not be cancelled, why the petitioner should not be black listed and why the petitioner should not be debarred from any contract with the Government and also as to why the loss could not be recovered from them. The said notice came as a bolt from the blue as far as the petitioner was concerned. The petitioner vide their letter dated

10.05.2010 had requested the respondent to give details of the basis on which the show cause notice had been issued as also the copies of the documents that had led to the above show cause notice. Despite receiving the said documents the respondent did not come forward to give necessary information and documents. The respondent would contend that the petitioner had adopted illegal methods to secure the tender.

7. On 13.08.2010, the petitioner had addressed the respondent stating that the Hydraulic press was nearing completion and asking them as to whether raw material was available. This letter was followed by two more show cause notices dated 22.12.2010 from the respondent also on the ground of illegal gratification for securing the contract. The petitioner had sent a detailed reply to the same vide reply dated 27.01.2011. However, the respondent had proceeded to pass an order dated 05.03.2012 cancelling the contract, threatening re-tendering at risk and cost of the petitioner and debarring the petitioner from dealing with the Ordnance Factory, Department of Defence Production, Ministry of Defence, Government of India. The

order had been issued on the basis of the show cause notice alleging illegal gratification by the petitioner.

8. The petitioner would contend that the said order is a non-speaking one and biased one. Much prior to the order dated 05.03.2012, the petitioner had requested for the release of the armoured plates vide their letter dated 15.02.2011. On 25.02.2011 the respondent had deputed two of its officers to inspect the infrastructure put up by the petitioner. However, the respondent did not release the material. The petitioner vide letters dated 18.03.2011 and 30.03.2011 reminded the respondent about releasing the raw materials. The respondent held out that they would be making the supplies shortly, however, no materials were provided.

9. The petitioner by their letter dated 31.05.2011 had called upon the respondent to make good the loss and had sought for the appointment of an arbitrator. Nearly ten months after this letter the black-listing order dated 05.03.2012 was issued by the respondent. While invoking the arbitration clause the petitioner had alleged that

there was no malpractices on their side therefore black-listing was without any basis and that they were ready and awaiting the raw materials being supplied by the respondent. The petitioner claimed a sum of RS.39,46,96,984/- as compensation under various heads.

Defence statement:

10. In the defence statement, the respondent would contend that the tender had been floated since the Indian Army had placed an order for supply of 300 nos. indigenously manufactured T-90 Tanks and the tenders were published. Only two companies had participated in the bidding, one the petitioner herein and the other was L & T. As per the terms of the agreement the installation of the Thermo Pressing facility was to be completed within 12 months from the date of placement of the purchase order, within 3 months the pilot sample was to be made ready and thereafter the entire supply was to be completed by 30.04.2010. As per condition No.10 of the Purchase Order the petitioner was also required to submit quarterly progress reports.

11. In May 2009, in the course of the investigation, the investigating officer would contend that it was found that the petitioner had paid illegal gratification to one Sudipta Ghosh, former Director General and former Chairman of Ordnance Factory Board. The respondent had further contended that the entire Purchase Order files was handed over to the CBI on 30.05.2009. The investigation team which had visited the petitioner's premises submitted a report that on the date of investigation i.e., 05.03.2011 the press was not fully functional. Thereafter, on 10.05.2010 the petitioner had replied to the respondent's show cause notices and on 27.01.2011 a revised show cause notice had been issued.

12. The respondent would further submit that while disposing of the Writ Petitions, the Delhi High Court had quashed the same as one having been passed without hearing the other side. Thereafter, in keeping with the tenor and spirit of the order of the Delhi High Court the respondent had constituted a two member committee to examine the petitioner's response regarding the illegal gratification made. The

committee had summoned the petitioner on 16.05.2011. The petitioner herein failed to appear on the given date and the matter was adjourned by 06.06.2011. The petitioner was once again asked to appear before the Tribunal but however the counsel for the petitioner failed to appear before the Tribunal therefore, the Committee took a view that the petitioner was deliberately keeping away from the proceedings. The report contained a recommendation to the Chairman, Ordnance Factory for taking further action against the petitioner. The Chairman of the Ordnance Factory ultimately passed the following order:

a) Terminating the contract

b) Re-tendering the contract at the risk and cost of the petitioner

c) Debarring the petitioner from further business dealings with the Ordnance Factory.

13. The order of the Chairman was thereafter sent to the Ministry of Defence for approval. On 05.03.2012, the order came to be passed after obtaining due approval of the Ministry for Defence. On 16.03.2012, the respondent asked the petitioner to return the dies and

tools. However, the petitioner had declined to forward the same and had directed the respondent themselves to come and take back the products. On 23.07.2012, the supply order was cancelled invoking clause 24 of the Supply Order and therefore an additional sum of Rs.16,25,729,30/- was claimed for collecting them. The respondent had sought a counter claim for a sum of Rs.168 Crores.

14. The petitioner had filed a re-joinder inter alia contending that the entire delivery schedule of the petitioner was dependent on the supply of the raw-material by the respondent and this being the case the respondent having delayed in the supply of raw-materials, the arbitrator ought to take into notice the terms of the agreement and pass necessary orders.

The Tribunal

15. The learned arbitrator had framed around sixteen issues. Since issues 7 and 8 related to the black-listing which was already subjudice before the Delhi High Court the learned Arbitrator stated that she would not be touching upon the issues at all. Issue Nos.1 to

6 related to the breach of the supply orders as to whether there was a breach and if so who had committed the breach and whether the re-fixation was done correctly. Issue Nos. 9 to 16 was framed to decide which of the parties are entitled to the relief.

16. Ultimately, the learned arbitrator had passed the following order with reference to issue nos.1 to 6:

"(1) Whether the "on hold" orders dated 24.6.2009 passed by the Respondent had implications on the Supply Order No.03080013/2008-09/T-90/Casting/Armour Dated 31.10.2008 and Supply Order No.03080014/2008-09/T90/Casting/Armour Dated 31.10.2008? ***The Claimant has been adequately compensated for the time lost, so this is answered in the negative.***

(2) Whether the Claimant was entitled to the grant of extension of delivery period up to 30.6.2011 as stated vide letter dated 22.4.2010? ***No, the time granted by the respondent was in order. This is answered in the negative.***

(3) Whether there was a breach of the Supply Order

No.03080013/2008-O9/T-90/Casting/Armour Dated 31.10.2008 and Supply Order No.03080014/2008-O9/T90/Casting/Armour Dated 31.10.2008? If so, by whom? ***Yes. And the breach was committed by the Claimant. This issue is answered in favour of the respondent.***

(4) Whether the Claimant was entitled for repeat orders from the Respondent on the facilities (Thermo Pressing facility) set up by the Claimant? ***No evidence has been placed before me in this aspect and it is answered in the negative in view of the Claimant's breach.***

(5) Whether the Claimant was duly granted opportunity by issuing show cause notice dated 7.4.2010 and 22.12.2010 before cancellation of the contract by virtue of orders dated 5.3.2012 and 23.7.2012 passed by the respondent? ***Yes. The Claimant failed to avail of the Opportunity.***

(6) Whether the cancellation and termination of the supply orders by the respondent is valid? ***Yes****"*

With reference to issue Nos.9 to 16, the arbitrator as held as follows:

"(1) Whether the Claimant is entitled to a sum of Rs.39,46,96,984/-? ***Since the Claimant has committed the breach, this issue is answered in the negative.***

(2) Whether the claimant is entitled for interest? If so at what rate and for which period? ***This issue is answered in the negative for the same reason as above.***

(3) Whether the counter claim of the Respondent is maintainable? ***The Counter claim is maintainable to the extent as discussed above.***

(4) Whether the Respondent is entitled to risk and costs purchase in View of default committed by the Claimant? ***The Respondent is not entitled to risk and cost purchase, since three out of four is beyond time and one is a purchase of a product not similar to the contracted product.***

(5) Whether the Claimant is liable to compensate the counter claim of the Respondent, viz., a sum of Rs.168,38,97,276/-? ***The Claimant is liable to pay a sum of Rs 21,18,475.00 for transportation and insurance of dies and materials from the Claimant s premises to the respondent's factory.***

(6) Whether the Respondent is entitled for interest on the said sum of Rs.168,38,97,276/-? If so, at what rate and for what period? ***The Respondent is not entitled to interest on the whole sum but is entitled to interest at 18% per annum on Rs 21,18,475/- from date of counter claim(23rd September 2013) till date of payment.***

(7) Whether the Claimant / Respondent is entitled for costs? And (8) Who has to bear the costs of the Arbitration Proceedings? The respondent is entitled to the costs of the arbitration proceedings ,on the dismissal of the claim in full. ***I am not awarding costs on the counter claim since that has been***

allowed only to a fraction of the total."

17. The tribunal had ultimately granted the counter claim with reference to a sum of Rs.21,18,475/- towards transportation and Insurance of dies and materials from the claimant's premises to the respondent's factory and had also held that the respondent was not entitled to interest on the whole sum but entitled to interest at 18% on the above amount from the date of counter claim till date of payment. It is challenging this order that the petitioner / claimant is before this Court.

<u>Submissions:</u>

18. Mr.S.R.Raghunathan, appearing on behalf of the petitioner would argue that the impugned award suffers from patent illegality, non application of mind and deals with disputes not falling within the terms of submission. The learned counsel would contend that the despite the petitioner being ready they could not proceed further with the contract in view of the contract being put on hold pursuant to directions of the Ministry of Defence within a period of 7 months from

the date of the petitioner's bid being accepted and within 2 months from when a portion of the material had been supplied. The respondent had also re-fixed the said period only upto 30.03.2011 and although the petitioner had time and again requested the respondent for supplying of the raw materials the same was not adhered to.

19. The counsel would further argue that right from the inception the respondent was dragging their feet and even after the petitioner had sought for the dispute to be referred to arbitration the respondent had not immediately referred the same and the petitioner was constrained to approach the Court for the appointment of the arbitrator. The counsel would submit that although non-performance had been cited as a reason for cancelling the contract, in the show cause notices that was issued by the respondent under Ex.C.14 and C.17 dated 07.04.2010 and the orders in Ex.C.18A and C.18B dated 05.03.2012 the reason for the cancellation was the allegation of illegal gratification. The issue of non-performance was never raised in the order dated 05.03.2012.

20. The learned counsel would argue that the arbitrator has overlooked the fact that not a scrap of evidence has been let in upon the side of the respondent to say that there was a breach committed by the petitioner. Ex.C.14 to C.16 which are between the periods 07.04.2010 to 22.12.2010 does not speak about non-performance by the petitioner. In fact, even in the counter to the petition seeking appointment of an arbitrator the defence of non – performance has not been raised by the respondent herein. The counsel would argue that the order cancelling the contract had been made only after the period of the contract had ended that is on 30.03.2011 and the petitioner had invoked the Arbitration Clause. The arbitrator has taken into consideration documents that came into existence after the period of the contract to reject the claim of the petitioner.

21. He would further argue that the arbitrator had totally shut her eyes to the fact that the respondent who is bound to supply the raw materials has failed to effect the supply and repeated reminders on the side of the petitioner has not yielded the required results.

Further, the black-listing has come much after the invocation of the arbitration clause by the petitioner and it is this black-listing that has been the case for cancellation and not non-performance as now alleged by the respondent.

22. The counsel would further argue that the arbitrator has held that the claimant had been compensated for the time loss for the put on hold order by extending the period of delivery. However, the extension of time could not be effectively used by the petitioner for the reason that the respondent had not supplied the raw material which was necessary for the petitioner to bring out the finished product. The arbitrator, according to the petitioner, has overlooked the fact that the reasons which were being projected for cancelling the contract were mere after thoughts and was not the actual reason for the cancellation. Since the respondent had committed a breach, the arbitrator ought to have imposed Liquidated damages on the respondent and without doing so the arbitrator mulcted responsibility on the petitioner. In fact, the arbitrator has given totally go by to the terms of the contract and therefore as per Section 28 (3) the award suffers from patent

illegality. He would rely on the Judgements reported in ***2015 (3) SCC 49*** - Associate Builders Vs. Delhi Development Authority, ***2019 SCC OnLine SC 677*** – Ssangyong Engineering & Construction Co. Ltd., Vs. (National Highways Authority of India) NHAI and ***2019 (4) SCC 163*** - MMTC Vs. Vedanta Limited in support of his arguments that the award suffers from a patent illegality and was perversed.

23. Per contra, Mr.G.Rajagopalan, learned Additional Solicitor General of India appearing on behalf of the respondent would argue that the award is a well reasoned award since the petitioner had violated the terms and conditions of the supply order and that there was no delay on the side of the respondent in supplying the dies to the petitioner.

24. He would further argue that the loss of time has been adequately compensated by re-fixing the delivery date upto 30.03.2011. The time had been extended by 11 months and therefore the loss of time had been compensated by the respondent. The Additional Solicitor General would argue that despite being given

adequate time to show cause as to why the cancellation could not be affected the petitioner had not come forward to avail the opportunity and having been failed to participate in the proceedings, the petitioner cannot be now allowed to question the said proceedings. As regards the arguments of the petitioner that non–performance of the contract was not the ground for cancellation, the Additional Solicitor General would submit that even in the committee report Ex.R.18 it has been stated that the petitioner was guilty of non- performance and the same has mentioned in the letter dated 23.07.2012.

25. He further argue that the petitioner cannot raise the plea of non–supply of raw materials when they had not shown the readiness of the press and Bond Room. He would also contend that the Original Petition was not maintainable since the Union of India was not made a party to the proceedings. He would submit that in the case of respondent it is only the Union Of India which was the proper person. He would submit that the respondent had not impleaded the Union of India and therefore the OP was not maintainable.

26. He would also rely upon the Judgement reported in ***1976 (4) SCC 265 – The State of Kerala Vs. The General Manager, Southern Railway, Madras***, in respect of the arguments regarding maintainability. He would rely upon the Judgements reported in ***2009 (17) SCC 796*** – Fiza Developers Vs. AMCI (India Private Limited), ***O.P.Nos.456 and 457 of 2018*** – The Superintending Engineer, National Highways Salem Vs. M/s.Gowpatt Associates and ***2020 (1) CTC 661*** – Software Technology Parks of India Vs. Consolidated Construction Consortium Limited and another in support of the argument that Section 34 is a summary procedure therefore this Court cannot once again re-appreciate the evidence.

27. He would also rely on the Judgement reported in ***2015 (3) SCC 49 - Associate Builders Vs. Delhi Development Authority***, in support of the arguments regarding the limitation of the powers of the Court for interfering with an award under Section 34 of the Arbitration and Conciliation Act.

28. Heard the counsel and perused the documents.

29. The following dates and events would give a brief history of the events culminating in the arbitral proceedings:

Dates	***Events***
14.07.2008	First tender given by the respondent for supply of Roof Plate Rear, Hull Rear Lower Plate, R.H Pan of case, L.H Pan of case. The second tender notice for supply of Hull Bottom Front Plate, Hull Bottom Middle plate, Bottom Plate Rear and Power Plant Roof Plate.
02.09.2008	The petitioner bids for the light thermo press plate. The petitioner had given certain terms and conditions over letter in which they had clearly stated that since they were setting up the facility by investing a huge sums of money they would expect continued patronage of 400 to 500 sets on an average. The offer was also subject to raw materials being provided by the respondent against the suitable documents for the excise department.
30.09.2008	Tender committee meets and discusses the bids submitted by each bidder and ultimately grants the tender to the petitioner as the tender is technically acceptable and the rates found reasonable compared to the others.
31.10.2008	The respondent places the first supply order for the light as well as the heavy Thermo pressing plates. The letter would read as follows: “Based on your quotation under reference above, this Factory Supply Order No.HVF/LP/03080013/08-09/T-90/CASTING/ARMOUR dt.31.10.2008 and its terms and conditions is hereby placed on you. We believe that this supply order is in line with the agreed terms and conditions. If you have any comments to offer, the same should reach us within ten days from the date of issue of this letter, if the same is not received by us above, it will be deemed that the terms and conditions accompanying this supply order are acceptable to you.” The acceptance of tender by the respondent. The document would indicate that the pilot sample had to be made by 30.04.2010. The acceptance of tender given for both the contracts.

Dates	***Events***
28.11.2008	Covering letter for the Supply Order issued by the respondent.
18.12.2008	The petitioner acknowledges the Supply Order given by the respondent. In the said letter the petitioner had stated that since they were investing over 25 Crores for this project, they should be provided an order for supply of at least 400 to 500 sets. They also informed the respondent that they would be deputing someone to collect information as to why the contract of BHEL had been canceled though they had been supplying to the respondent for years together.
01.01.2009	The petitioner writes to the respondent requesting permission to examine the dies lying at the end of the respondent and to grant them permission to bring these dies to their plant for necessary repairs / alterations as required. They would further submit that they planned to thermo press the plates in the coming months and would therefore request the respondent to keep material in readiness in February – March 2009.
05.03.2009	Same request is reiterated.
14.04.2009	The petitioner would write to the respondent stating that they have entered into contract for transporting tools from the respondent works at Faridabad to Chennai. The details of the Roadlines that the petitioner proposed to use for transportation was also indicated.
30.04.2009	The petitioner had supplied a portion of dies, fixtures, templates etc.
24.06.2009	The supply orders to the contractors including the petitioner was put on hold. The order was challenged by some of the contractors before the High Court at Delhi. The Bench set aside the order putting on hold directing all the petitioners therein. The respondent was directed to proceed in time bound manner and in accordance with law and further directed that the respondent would not take adverse possession without affording an opportunity to the parties to put forward their case.
07.04.2010	The respondent had issued show cause notice in respect of two contracts as to why the contract of the petitioner should not be canceled, why the petitioner should not be debarred from entering into any contract with the Government for a period of 5 years and re-tendering the contract at the risk and cost of the petitioner. The basis on which the show cause notice has been issued was on the allegation that the petitioner had successfully bid in the tender only on account of

Dates	*Events*
	the illegal gratification to the former DGOF Shri.Sudipta Ghosh.
09.04.2010	Put on hold orders withdrawn by the respondent.
22.04.2010	In view of the order setting aside the put on hold order, the petitioner had addressed a letter to the respondent stating that the Delivery Programme (DP) should be extended till 30.06.2011 without imposition of liquidated damages. The reason for seeking extension till the date 30.06.2011 is also given in the said communication.
10.05.2010	A detailed response is given in which the petitioner would contend that they have been moving products for the defense industry and was also in the know how of the latest defense vehicles, etc. The petitioner would state that there was no compliant / blemish against them till then.
08.06.2010	The period is extended upto 30.03.2011 and not 30.06.2011 as requested by the petitioner herein after withdrawing the put on hold order.
22.12.2010	Yet another show cause notice once again reiterating the case of illegal gratification and in this show cause notice details of the criminal investigation had also been included.
27.01.2011	The petitioner gives a detailed response and they would also contend that the allegations therein was absolutely false. They had also highlighted the fact that out of several orders that has been given to the petitioner no order has ever been awarded to them except on account they being a lowest bidder. The petitioner ultimately denied the allegations contained in the show cause notice dated 22.12.2010. This show cause notice was issued pursuant to the order of the Delhi High Court.
20.04.2011	The respondent intimates the petitioner that the committee had been constituted as directed by Delhi High Court and the said committee asked them to appear on 12.05.2011.
09.05.2011	The petitioner responded by stating that the legal counsel was away on vacation
25.05.2011	Yet another notice indicating the hearing on 06.06.2011 issued by the respondent once again the petitioner does not attend the hearing.

Dates	***Events***
15.02.2011	The petitioner informs the respondent that the press for thermopressing of components had been installed and that the same would be operational within a month. The petitioner request permission to collect material for the following components: i)Rear bottom place 100 nos ii)Middle bottom plates 100 nos. The petitioner would also assure the respondent that the production for 100 numbers could be completed within a single mounting of dies.
25.02.2011	The respondent informs the petitioner that their officials would be inspecting the petitioner's unit on 01.03.2011.
18.03.2011	The petitioner informs the respondent that they were deputing their team for lifting the mater for Rear Bottom Plate and Middle Bottom Plate. They informed the respondent that the team would arrive at the rear side on 21.03.2011.
30.03.2011	Once again request is made for supply of raw materials.
31.05.2011	The petitioner invokes the arbitration clause since there is no response from the respondent and the contract period had ended.
05.03.2012	The contract is canceled and the petitioner is informed that the respondent would be retendering the purchase order at the risk and cost of the petitioner and the petitioner company was debarred for a period of 10 years.
23.07.2012	The supply order is also canceled on the allegation that the supplies have not been effected within the stipulated period.
10.09.2012	The respondent informs the petitioner that since they have been debarred, the order in their favour stood canceled. ***Note:*** *On 23.07.2012 – The respondent herein would contend that since the supply within the delivery period had not been maintained the supply order was being canceled. However, in the letter dated 10.09.2012, the respondent would state that since the firm has been debarred the supply order has been canceled.*
04.03.2016	The arbitrator who had given the award was appointed in place of the

Dates	***Events***
	earlier arbitrator who was terminated on account of the ill health.
15.06.2013	The claim petition is filed.

30. The main grounds on which the Jurisdiction of this Court has been invoked is on the ground that the arbitrator has passed an award on the basis of material which is beyond the scope and terms of reference. Although the arbitrator had herself stated that she would not be considering the black-listing order however the black-listing order appears to be the basis on which the order has been passed. The arbitrator has not applied her mind to the entire evidence and has been very selective in considering the evidence placed before her and therefore the award is sought to be set aside even on the ground that the parties were not given equal treatment.

31. At the outset, a perusal of the dates and events which has been detailed herein above, gives an impression that from the day go, the contract in question has been riddled with obstructions. The tender was accepted pursuant to the recommendation of the tender purchase committee which held its meeting on 30.09.2008. The first and second supply order was given on 31.10.2008. The acceptance of

the tender dated 31.10.2008 would indicate that the respondent had done away with the supply of the pilot sample within a period of three months as indicated in the tender condition. They had also deemed it fit to waive the security deposit since petitioner herein had offered a 1 % discount. The purchase order indicated that the delivery of the total contracted quantity was on 30.04.2010 i.e., within a period of seven months from the date of the acceptance of the tender. The respondent under the terms of the tender was required to create an infrastructure within 12 months from the date of supply order. This is contrary to the subsequent term included in the acceptance of tender which indicated that the supply of the total quantity had to be effected within a period of 7 months from the date of the supply order.

32. On 18.12.2008, the petitioner had acknowledged receipt of the supply order and they had pointed out that the dies would require modification and they had also informed the respondent that they had initiated the process of procuring the 12,000 ton Hydraulic press. By their letter dated 01.01.2009 it is seen that the petitioner had requested the permission of the respondents to bring the dies lying at

their end for repairs / alterations. They had also requested certain details from the respondent with reference to the thermal cycle to be followed with reference to the process sheet. On 05.03.2009, once again there is a letter from the petitioner calling upon the respondent to provide the Thermo Pressing dies so that they would start the work.

33. Therefore, from the above communication it is clear that though the supply order had been placed in October 2008, the raw materials which the respondent was bound to provide had not reached the petitioner even after four months. Immediately thereafter by letter dated 24.06.2009 the respondents had put the entire contract on hold on allegations that the tenderer had obtained the order by illegal gratification. This order continued till 09.04.2010 when the put on hold orders were withdrawn by the respondent. Two months later on 08.06.2010 the period was extended till 30.03.2011.

34. The records would indicate that it was only on 05.03.2011 that the respondent's officials have inspected the premises of the petitioner. The inspection report marked as Ex.R.18 has been relied

upon heavily by the arbitrator to come to the conclusion that the Thermo Press was not ready and that it would take a month to get ready. The inspection report contains just an opinion of the team that completion of certain works may take a month. The learned Arbitrator has overlooked the fact that even on the date of inspection, which was nearly a year and half after the Acceptance of the Tender and the Supply Order, raw materials had not been supplied to the petitioner.

35. The learned Arbitrator has overlooked the fact that the cancellation dated 05.03.2012 was only on the basis of the Show cause notice that had been issued alleging that the petitioner has procured the contract by illegal methods and not on the ground on non-supply. The learned arbitrator has also ignored the fact that four months after cancelling the contract on 05.03.2012 the respondent has once again cancelled an already cancelled contract on the ground of non-supply. The respondent admittedly had not effected supply of the raw material as undertaken by them till the date of the inspection by the respondent's team on 05.03.2011 and the invocation of the Arbitration clause on 31.05.2012. The witness on the side of the

respondent RW2 would also admit that the respondent have not produce a shred of evidence to show that they were ready with the raw material and the petitioner was not in a position to take them. On the contrary it is the categoric stand the respondent in their counter in O.P.No.510 of 2011 dated 29.09.2011 stated as follows:

> *"With regard to para 11, it is most respectfully submitted that further, the delivery period was not extended and raw material for thermopressing operation was not issued to the petitioner, since the process to black list the petitioner is on."*

36. Therefore even as late as in September 2011 the respondent had admitted non-supply of raw materials by them and the reason for it. Therefore the inspection of the premises of the petitioner by the officials of the respondent was nothing but an empty formality. Further the respondent has admitted that the non-supply was on account of the fact that the process to black list was on. Therefore the cancellation on 05.03.2012 was on the ground of illegal gratification and not non-supply. The learned Arbitrator has therefore clearly erred in coming to the conclusion that the claimant is not entitled to the

relief as they had not supplied the plates as tendered by them.

37. The award therefore suffers from a patent illegality since the learned arbitrator has failed to appreciate that the cancellation of the contract was not on the ground of non-supply and further the respondent till 05.03.2011 had not supplied raw materials when the inspection was undertaken. Therefore, the cancellation on the ground of non-supply when the raw materials admittedly was not supplied on time was not correct. Consequently the award awarding the counter claim is also flawed as it was the respondent by their conduct who had not allowed the petitioner to execute the works which depended entirely on the supply of raw materials by the respondent.

38. The award dated 13.11.2017 is therefore set aside and the Original Petition is allowed. No costs.

28.02.2020

kan
Index : Yes/No
Speaking order/non-speaking order

P.T.ASHA, J.,

kan

O.P.No.523 of 2018

28.02.2020

OP.No.523 of 2018
and
A.No.273 of 2020

P.T.ASHA, J.

The learned counsel for the petitioner after pronouncement of the order would submit that the he has deposited a sum of Rs.21,48,093/- by way of fixed deposit.

2. Considering the fact that this Court is also setting aside the award with reference to the counter claim, the said amount shall be refunded to the petitioner.

28.02.2020

mrn