IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

202 **CWP-21617-2013**

Reserved on:15.02.2023

Pronounced on:03.03.2023

R.B. Gupta **.....Petitioner**

Versus

Haryana Vidhyut Parsaran Nigam Limited and others **.....Respondents**

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

Present: Mr. G.C. Dhuriwala, Advocate with Ms. Alisha Sharda, Advocate, for the petitioner.

Mr. Pardeep Singh Poonia and Mr. Pulkit Dhanda, Advocates, for respondent Nos.1 to 4.

Mr. Vishal Garg Narwana, Advocate, for respondent No.5.

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VINOD S. BHARDWAJ , J.

The present petition was filed for seeking issuance of directions to respondent-The Haryana Vidyut Parasaran Nigam Limited to comply with the decision dated 12.01.2009 (Annexure P-4) and to refund the bank guarantee worth ₹60 lacs along and forfeited amount of ₹9,26,422/- along with the interest.

Briefly summarized the facts of the present case are that the petitioner claims to be the owner/sole proprietor of M/s Techno Engineering

Company as well as R.G. Structures situated at Chandigarh and Dera Bassi, respectively. The sole proprietorship firm was engaged in the business of manufacturing and supply of transmission line towers and sub station structures. The respondent-Haryana Vidyut Parasaran Nigam Limited (here-in-after referred to as “HVPNL”) which is a transmission licencee in the State of Haryana had placed a purchase order (Annexure P-1) on 09.10.2003 to M/s Techno Engineering Company for supply of 1800 MT of transmission lines, towers and sub station structures.

As per terms & conditions, the petitioner was required to furnish a bank guarantee as well as the performance security. It is averred that the respondent-HVPNL however directed the petitioner vide order dated 17.06.2004 to make a time bound supply of 2765 MT for the Turnkey projects first and towers and structures for the departmental works of HVPNL as against the initial supply order of 1800 MT placed on 09.10.2003. It is alleged that the officers of respondent-HVPNL pressurized the petitioner to make supply for the Turnkey projects at different places in Haryana. The petitioner thereafter sought enhancement of the rates for the rest of the supply, however, instead of responding to the aforesaid letter, the firm was ordered to be blacklisted vide letters Annexure P-3 (colly.). It is averred that the aforesaid supply of 2765 MT to Turnkey contractors was not binding on the petitioner and the purchase order was neither time bound nor having any penal consequences for failure to supply the material. Besides, there was no agreement with the petitioner to supply material to the Turnkey Contractors and no letter of execution was ever served to the firm and that the demand of 1800 MT as ordered vide purchase order dated 09.10.2003 ought to be covered under the material already supplied by the petitioner. He thus has not violated any terms & conditions of the contract. However, the respondents not only blacklisted the petitioner but also ordered forfeiture of the bank guarantee as well as the security deposit. He thus prays for withdrawal of the order whereby the bank guarantee and security of the petitioner had been ordered to be forfeited.

Initially, a civil suit for mandatory injunction was filed by the petitioner in the Civil Court, at Panchkula, however, the same was withdrawn on 10.12.2012 to file a writ petition. CWP No.14123 of 2007 was filed by the petitioner challenging the order of blacklisting. The same was disposed of vide order dated 18.09.2008 by passing the following order:-

> *"This petition seeks quashing of order dated 17.8.2007 (Annexure P-9), whereby the petitioner was blacklisted for a period of three years on the ground that it failed to supply material against purchase order. It was mentioned that inspite of opportunity given, the petitioner could not say anything against blacklisting.*
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> *Learned counsel for the petitioner pointed out that it could not cater to the supplies, as per contract, on account of respondents having required the petitioner to divert supplies in the first instance facilitate to Turnkey contractors to facilitate the business of the respondents. He refers to Annexure P-4 filed by the respondents themselves, which is letter dated 23.6.2005 written by the petitioner containing explanation. It is pointed out that in Annexure P-9 stand of the petitioner has not been taken in account.*
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> *In view of the above, without expressing any opinion on merits, at this stage, we direct respondent No.4 to give a hearing to the petitioner and pass an appropriate order dealing with the petitioner's grievance. A copy of the said order be produced on record of this case before the next date of hearing."*

The respondent-HVPNL encashed the bank guarantee worth ₹60 lacs on 16.12.2006 through bank draft No.916542 and forfeited ₹9,26,422/- prior to blacklisting of firm on 17.08.2007.

It is averred that after the order of blacklisting has been passed on 17.08.2007, the respondents took a decision on 12.01.2009(Annexure P-4) whereby they waived off the entire liquidated damages worth ₹60 lacs and also ordered for the release of forfeited amount of ₹9,26,422/- and besides, the work in question was completed by respondent No.5. On coming to know of the same, the civil suit was withdrawn.

The petitioner again approached the respondents for release of the abovesaid amount and sent a legal notice to the respondents on 30.03.2013 but vide response dated 16.05.2013, the respondents refused to return the amount. The subsequent reminders were also responded by refusing to entertain the claim of the petitioner. The petitioner sold the aforesaid firm i.e. M/s Techno Engineering Company to respondent No.5 in the year 2008 for a sum of ₹2,92,51,000/- and a partial amount of ₹1,10,00,000/-was paid by respondent No.5 to the petitioner and the remaining amount had never been paid. It is averred that the bank guarantee/surety, fixed deposit and bank balance etc. of the sold firm had never been alienated/sold in favour of respondent No.5. Reliance is placed on Clause 3 of the aforesaid settlement. The same is extracted as under:-

> *"The buyer will arrange to replace or give counter Bank Guarantees with respect to bank guarantees issued by Punjab National Bank, Industrial Area, Phase-II, Chandigarh on behalf of the firm as per the list attached."*

It is averred that the bank guarantee worth ₹5,42,35,940/- had been deposited by respondent No.5 and that the bank guarantee/performance sureties of the petitioner, thus, could be released. Since the bank guarantees/performance guarantees were to be furnished by respondent No.5, bank guarantees worth ₹4.04 crores approximately were also released in favour of the petitioner.

As the remaining bank guarantees were not submitted, the petitioner filed a civil suit challenging the sale agreement dated 28.02.2008 for various additional grounds as well.

Additionally, respondent No.5 also got the sale-deed registered for 5 acres of land of factory at Dera Bassi, without any agreement, on 19.09.2008 by paying a sum of ₹1 crore only and the balance amount as per settlement-deed was not paid.

The petitioner also filed a civil suit for setting aside of the sale-deed of 5 acres as well as for recovery of ₹93.75 lacs approximately as well. Both the said civil suits are also pending in Courts at Dera Bassi.

At the same time, respondent No.5 entered into a separate settlement with HVPNL as per which the above amount was to be returned on performance of agreement by him. The needful has been done by respondent No.5, hence, the amount needs to be refunded to him.

Written statement on behalf of respondent Nos.1 to 4 had been filed through Yash Pal Niranjan, Executive Engineer, Steel Structure Workshop, HVPNL wherein it has been stated that the sole proprietorship firm namely M/s Techno Engineering Company was blacklisted by respondent- HVPNL on 17.08.2007 (Annexure P-3) and it had been decided to encash the bank guarantee of ₹60 lacs towards liquidated damages and to forfeit the pending amount of ₹9,26,422/- on account of failure of the petitioner to fulfill the obligations arising out of the contract entered into between the parties in connection with purchase order No.HDP-922 dated 09.10.2003 for supply of 1800 MT tower material. The aforesaid sole proprietorship firm was sold by the petitioner in favour of respondent No.5-M/s Arawali Infra Power Limited on 28.02.2008 and consequent upon taking over, the subsequent purchaser i.e. M/s Arawali Infra Power Limited-respondent No.5(herein) entered into a fresh agreement with the respondent-HVPNL on 09.01.2009 (Annexure R-2) for completion of the aforesaid purchase order dated 09.10.2003. However, the said agreement was conditional and respondent No.5 was obligated to perform the contract in a time bound manner after furnishing an additional bank guarantee and that the earlier amounts were to be released only in case the supply as per the purchase order was fulfilled/satisfied within the fresh timeframe. However, even respondent No.5 also failed to supply the material as per the agreement dated 09.01.2009. Hence, the bank guarantee and the forfeited surety amount had not been refunded to any person and stood forfeited in favour of the respondent No.1-HVPNL. It is further averred that as all rights of the sole proprietorship firm stand vested with respondent No.5-M/s Arawali Infra Power Limited, the petitioner has no subsisting claim against any of the rights and obligations of the said respondent.

An additional affidavit of Y.S. Gulia, XEN, SSW, HVPNL, Panipat was also filed wherein it was clarified that as per the settlement dated 09.01.2009 between respondent No.5 and the HVPNL, the entire supply was to be completed by 30.06.2009 and only in the event of successful completion of the work within the stipulated period, entire LD charges levied on M/s Techno Engineering Company was to be waived off and the bank guarantee worth ₹60 lacs already encashed by the HVPNL and forfeited amount of ₹9.26 lacs was to be returned. But the work was completed by respondent No.5 only on 04.03.2010. Hence, the LD charges levied upon M/s Techno Engineering Company (now M/s Arawali Infra Power Limited)-respondent No.5 cannot be waived off and it cannot be directed to refund the abovesaid amount as the work was never completed within the time schedule.

No separate reply was filed on behalf of respondent No.5.

Learned counsel appearing on behalf of the petitioner has not controvered the issue pertaining to *inter se* dispute between the petitioner and respondent No.5-M/s Arawali Infra Power Limited and has confined his argument to the claim of seeking refund of the bank guarantees/forfeited amount. He has placed reliance on the agreements dated 28.02.2008 and 12.01.2009 to contend that respondent No.5 was required to furnish its own bank guarantee within a period of 15 days from the date of issuance of the aforesaid letter and that since the performance bank guarantee had been furnished by respondent No.5, hence, the bank guarantee furnished by the petitioner ought to be released in his favour. It is argued that since respondent No.5 has not been able to fulfill the terms & conditions of the contract dated 12.01.2009 within the time period, hence, the liability, if any, to make good the forfeited amount was that of respondent No.5 and the petitioner cannot be held liable for the failure of respondent No.5 to perform as per the contracted terms of the order dated 12.01.2009. He has further averred that the agreement for purchase of the firm executed by respondent No.5 dated 28.02.2008 did not assign rights in favour of respondent No.5 to claim the refund of any such bank guarantee/forfeited amount and that in the absence of any such rights having crystalized in favour of respondent No.5, the rights of the petitioner to seek release of the bank guarantee as well as the forfeited amount is not defeated.

Per contra, learned counsel appearing on behalf of respondent Nos.1 to 4 has argued that the petitioner had already sold away the sole proprietorship firm in favour of respondent No.5 on 28.02.2008. The order of forfeiture had been passed prior in point of time and amount was forfeited on 16.12.2006. The order of blacklisting was thereafter passed on 17.08.2007. The petitioner had assailed the order dated 17.08.2007 i.e. only to the extent of blacklisting. Hence, the order of forfeiture as well as encashment of bank guarantee had attained finality. By virtue of the aforesaid agreement for purchase of the firm on 28.02.2008, all the recoverables and all rights stood vested with respondent No.5. The petitioner had no subsisting right in any of the interest of the proprietorship firm i.e. M/s Techno Engineering Company. He further argues that respondent No.5 i.e. the subsequent firm had made an offer to execute the contract dated 09.10.2003 pursuant whereto a settlement-deed was executed on 09.01.2009 as per which the LD charges levied on M/s Techno Engineering Company were to be waived off along with the amount of bank guarantee and they were to be returned only on successful completion of the entire work within the renewed time schedule i.e. upto 30.06.2009. Pursuantly a renewed work order vide dated 28.01.2009 had been issued. He contends that the rights of M/s Techno Engineering Company already stood forfeited and that the revival in terms of the order dated 12.01.2009 has to be read in the light of settlement amongst the parties and cannot be read in isolation or bereft of the settlement between the parties. In any case, as the terms & conditions of the said settlement had also not been satisfied, hence, no right accrued even in favour of respondent No.5 under the renewed settlement to seek waiver of the bank guarantee encashed by respondent-HVPNL as well as the forfeited amount. It is thus averred that the present petition is devoid of any merit and is liable to be dismissed.

Learned counsel for respondent No.5, reiterated the above submissions and denied any liability in favour of the petitioner. It is argued that the petitioner sold off the proprietorship and all rights therein. The claim being amongst "recoverables" vests in it. The rights as claimed by the petitioner are denied. Pendency of *inter se* dispute is not controverted.

I have heard learned counsel for the respective parties and have gone through the documents appended along with the instant petition.

Before preceding further into the matter, it would be essential to refer to some of the terms & conditions of the documents that are in dispute i.e. agreement for purchase of the firm, the settlement-deed as well as the decision/order dated 12.01.2009. The same are extracted as under:-

> *"**AGREEMENT FOR PURCHASE OF FIRM DATED 28.02.2008***
>
> *'The Seller' is the sole proprietor and absolute owner of M/s Techno Engineering Company, hereinafter called "The Firm" having its offices at 182/15, Industrial Area, Phase-I, Chandigarh, and at G-29, 2nd Floor, Vardhman Tower, Near PVR Sonia, Vikas Puri, New Delhi-110018.*
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> ***NOW IT IS AGREED AND DECLARED AS UNDER:***
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> *1. That 'The Seller' will transfer and 'The Buyer' will take over "The Firm" as a going concern with effect from 28th February, 2008 for a total consideration of ₹2,92,51,000/- (Rupees Two Crore Ninety Two Lacs Fifty One Thousand only), which is being paid to 'The Seller' as under:-*

a) DD No.135833 dated 26.02.08 drawn on ICICI Bank Ltd. For ₹1,10,00,000/- (Rupees One Crore Ten Lacs only)

b) 10000 Equity Shares of ₹10/- each of Aravali Infrapower Limited at a premium of ₹290/- each, amounting ₹30,00,000/- (Rupees Thirty Lacs only)

c) Balance amount of ₹1,52,51,000/- (Rupees One Crore Fifty Two Lacs Fifty One Thousand Only) to be paid by demand draft payable at Chandigarh in favour of Mr. R.B. Gupta on or before 15th April 2008.

2. The buyer will liquidate the cash credit account of Punjab National Bank, Industrial Area, Phase-II, Chandigarh within 7 days of this agreement.

3. <u>The buyer will arrange to replace or give counter Bank Guarantees with respect to bank guarantees issued by Punjab National Bank, Industrial Area, Phase-II, Chandigarh on behalf of the firm as per the list attached</u>.

4. <u>That with effect from 28th February 2008 "The Buyer" shall become the sole owner of 'The Firm' and the entire business & undertaking of 'The Firm' along with its goodwill stands vested in 'The Buyer' as a going concern, together with all its movable properties, tangible or intangible, vehicles, work in progress, all current assets, deposits, investments, receivables, plants, machinery, tools, computers, office equipments, all permits, rights, entitlements, approvals, certifications, registration, Trade Name, Licenses, tax credit, all earnest moneys, security deposits, retention moneys, all contracts, deeds, agreements and other instruments of whatever nature together with all duties & obligations, present and future liabilities, including dues to Agencies & Taxation Authorities etc</u>.

5. That with effect from 28th February, 2008, 'The Buyer' shall have full right to carry on the business of 'The Firm' in its sole discretion, under the name and style as under:-

Techno Engineering Company

(A unit of Aravali Infrapower Limited)

Further in future, if necessary 'The Buyer' is fully authorised to change the name & style as 'The Buyer' deems fit."

SETTLEMENT DEED DATED 09.01.2009

A P. O. No.HDP-922 dated 09.10.2003 was placed on M/s Techno Engineering Co., Chandigarh for fabrication, galvanization and supply of 1800 MT (1600 MT MS Steel & 200 MT HT steel) towers and structures at the given rates. On account of inability of the firm to supply material, after following the due procedure fresh NIT was floated, in which again M/s Techno Engineering Co. was L-1. Thus P.O. No.HDP-1199 dated 27.03.2006 was placed on the firm. However again M/s Techno backed out of the commitment and was thus blacklisted for period of three years besides action for encashment of Bank guarantee and forfeiture of pending payment was also taken against the firm. Now M/s Techno Engieering Co. has been taken over by M/s Aravali Infrapower Ltd. On 28.02.2007 with memorandum of Association clause no.7 stating as "To acquire and take over the business of a firm running under the name and style of 'Techno Engineering Co.' as a going concern with all its assets, liabilities and goodwill including its employees, orders in hand, qualification, experience and other beneficial rights attached to it and merge it with the company on such terms and conditions as may be mutually agreed upon". In view of above clause appended in memorandum of association, the pending liabilities of M/s Techno Engineering were to be fulfilled by M/s Aravali Infrapower Ltd. Thus to clear pending liabilities, letter dated 07.10.2008 was written to State Bank of Mysore, New Delhi to encash Bank guarantee of M/s Aravali Infrapower Ltd. Aggrieved by this M/s Aravali Infrapower filed CWP No.7692/2008 before Delhi High Court wherein stay was *granted against letter of revocation dated 07.10.2008. The case now stands adjourned to 11.05.2009. However matter has been resolved between the parties and in terms of compromise, parties witness as follows:-*

1. That necessary steps will be initiated by M/s Aravali Infrapower as per terms and conditions given in PO No.922 dated 09.10.2003 to ensure supply of material w.e.f. 1st Feb. 2009.

2. M/s Aravali Infrapower Ltd. will supply material to the tune of 250 MT per month starting from 1st Feb 2009 and the entire supply will be completed latest by 30th June 2009. The firm however can supply more than above mentioned quantity which shall be accepted by HVPNL. Non supply of material or less supply of material will entail invoking of penalty clause besides other legal action in terms of contract.

3. Additional performance bank guarantee of ₹60 lacs will be furnished by M/s Aravali Infrapower within 15 days of issuance of letter from HVPNL to start the work.

4. The entire LD charges levied on M/s Techno Engineering will be waived off and the amount of bank guarantee of ₹60 lacs encashed by HVPNL and forfeited amount of ₹9.26 lacs shall be returned on the successful completion of the entire work within the stipulated period.

5. The terms and conditions and rates etc. of the present work shall be as per old purchase order which was originally placed on M/s Techno Engineering Co.

6. The matter regarding removal of blacklisting of M/s Techno Engineering Company (now AIPL) will be reviewed in March 2009 depending upon the performance of AIPL. The CWP No.14123 of 2007 pending before Hon'ble Pb. & Haryana High Court shall be withdrawn by M/s Aravali Infrapower Ltd.

As a consequence of above comprise/settlement letter dated 07.10.2008 written to State Bank of Mysore by CE/MM *for encashment of BG only to the tune of ₹98 lacs shall be withdrawn by HVPNL authorities on the receipt of BG of ₹60 lacs as per clause No.3 above."*

"Memo NO. Ch-26/HDP-922/Request /XEN (Projects/TL) Dated 12.1.2009

Subject: 1. Purchase Order No. HDP-922 dated 9.10.2003 for supply of towers by M/s Techno Engineering Company. (A unit of M/s Aravali Infrapower Ltd.)
2. Construction of 132 KV transmission lines against contract. NO. HDP-1389 & HDP 1390 dated 13.7.2007.

Please refer to your letter Nos. TEC/AIPL/08/09/858 dated 24.10.2008, TEC/A1PL/08/08/859 dated 25.10.2008, TEC/AIPL/08/09/883 dated 5.11.2008, TEC/AIPL/08/09/905 dated 13.11.2008 pertaining to various issues such as blacklisting of M/s Techno Engineering Co. by HVPNL, Liabilities of M/s Techno Engineering Co. which is now owned by M/s AIPL, approval of your newly built plaint at Sitarganj for supply of towers and approval of Parekh Electra Wire for supply of Zebra/Panther conductor and completion of transmission lines under the scope of contract No.HDP-1389 & HDP 1390 dated 13.7.2007.

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3. Allowed AIPL to supply 1665 MT tower material against pending PO No. HDP-922 dated 9.10.2003 placed on M/s Techno (now taken over by AIPL) 250 KT per month, The supply will commence from 1st February, 2009 and the entire supply of material be completed latest by 30 June 2009.

It was further decided that AIPL would furnish additional performance Bank Guarantee of ₹60 Lacs within 15 days from the issue of this letter by HVPNL & commence the work.

4. The entire liquidated damages levied on M/s Techno Engineering Company (now AIPL) would be waived off and the amount of Bank Guarantee of ₹60 Lacs encashed by HVPNL and the forfeited amount of ₹9,26,422 by the Nigam shall be *returned on successful completion of the entire work within stipulated period. The other terms and conditions rates etc. would be as per old purchase order originally placed on M/s Techno Engineering Company (now AIPL) i.e. P.0. No. HDP 922 dated 9.10.2003.*

5. The matter regarding removal of blacklisting of M/s Techno Engineering Co. (now AIPL) be reviewed in March 2009 on satisfactory performance of the AIPL."

xx xx xx xx

In view of above and consent upon your signing of the settlement deed in the office of Chief Engineer (MM) on dated 9.1.2009, the above are conveyed to you. You are further requested to submit a bank guarantee amounting to ₹60 Lacs latest by 27.1.2009 and withdraw CWP No. 14123 of 2007 which is pending before Hon'ble Pb. & Haryana High Court & CWP No.7692 of 2008 pending before Delhi High Court as agreed by you."

It is also undisputed that the purchase order dated 09.10.2003 was placed on M/s Techno Engineering Company by respondent-HVPNL for fabrication, galvanising and supply of 1800 MT (i.e. 1600 MT MS Steel and 200 MT HT) Steel Towers and Structures against tender enquiry No.HDP-922/QDP-508. The petitioner has not disputed that supply in terms of the aforesaid purchase order had not been made. He has given an explanation that the HVPNL had, in the meanwhile, directed the petitioner to supply the material against the Turnkey projects and the same is noticed in the communication dated 17.06.2004. The petitioner wishes to read the aforesaid letter to construe that he was not at fault and he had already supplied the material against other demands raised by the respondents, however, such argument of the petitioner cannot be given much weight and is noticed to be rejected. The petitioner had agreed to supply to the Turnkey projects as per the work orders and the payment with respect to the aforesaid supplies are not disputed. The only benefit which the petitioner could have claimed on account of the interim directions issued by the HVPNL is for seeking extension of time for complying with the purchase order dated 09.10.2003. The memo dated 17.06.2004 (Annexure P-2) in fact notices the orders for supply of towers and structures pending with the petitioner in March 2004 including the work order of 1800 MT as above. The total supply to be made was 4565 MT. The respondent-HVPNL actually extended the delivery period against the purchase orders and allowed the petitioner to supply of fabricated structures to respondent- HVPNL at the rate of 400 MT per month from April 2004 onwards out of the pending purchase orders of various Turnkey projects as well as the purchase order No.HDP-922 dated 09.10.2003 (Annexure P-1) as per priority to be fixed by the Chief Engineer. In the event of failure of supply of 400 MT towers and structures to respondent-HVPNL against the pending purchase orders including the Turnkey contracts from April 2004 till completion of supplies. He was directed to pay penalty for the short quantity supplied for the delayed portion at the rate of half per cent per week subject to a maximum of 5% of the contract value of purchase order No.HDP-922. The supplies against the order of Turnkey projects was to be completed by September 2004 and supplies against the purchase order in question was to be completed by February 2005. The abovesaid extension had in fact been granted on the request dated 01.03.2004 submitted by the petitioner. Hence, the petitioner stands compensated by way of extension in time to make supplies upto February 2005 for the supply order dated 09.10.2003. It is thus an incorrect portrayal as if the petitioner was prejudiced in placing orders and directing other supplies and yet not granting any time extension.

Hence, contention of the petitioner that the supplies made against the Turnkey projects should be taken into consideration for waiver of the liquidated damages/punishment of forfeiture cannot be accepted. The petitioner has chosen not to append the purchase order of the Turnkey projects to point out the terms & conditions thereof and/or the consequences of default. The *inter se* rights or obligations in the said projects can be ascertained only from a reading of the said documents and there can be no presumption qua the terms & conditions incorporated therein. Failure of the petitioner to place the relevant documents on record cannot be read to his advantage and an adverse inference has to be drawn against him. The supply against the Turnkey projects cannot thus be construed as a compliance of the supply requirement as per order No.HDP-922(Annexure P-1).

Perusal of the memo dated 17.06.2004 also shows that the petitioner was deficient in delivery of towers and structures required by the respondent- HVPNL not only against the aforesaid purchase order but also against the Turnkey projects. Hence, discussions were held with the petitioner on 27.02.2004 followed by his letter dated 01.03.2004 as well as dated 12.04.2004. A revised supply order was thereafter issued to the petitioner on 17.06.2004. There was no challenge raised by the petitioner to the aforesaid revised memo laying down the renewed terms & conditions and the timelines for supply. Hence, the petitioner agreed to the terms & conditions raised therein and accepted the same without challenge. It is also not disputed that the petitioner could not make the supplies even in accordance with the revised memo dated 17.06.2004. The letter dated 01.03.2004 referred to in Annexure P-2 and sent by the petitioner shows that the petitioner claimed to have a capacity of 500 MT towers and sub station structures per month and he had himself undertaken to supply about 400 MT of towers/structures to transmission licencee-HVPNL in relation to the pending orders, in order of preference of requirements, as given by the respondent-HVPNL. The abovesaid quantity as per purchase order No.HDP-922 was specifically mentioned by the petitioner himself in the aforesaid communication dated 01.03.2004. The relevant part of the undertaking is extracted as under:-

> *"We can supply about 400 MT of tower/structures of HVPNL of about pending orders in preference of requirements by HVPNL provided the following assistance is made available to us.*
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> *In case HVPNL want early supply of materials for evacuation of power from thermal plant the delivery is required to be amended as per our offer i.e. the entire quantity of 1800 MT will be supplied within 12 months from the date of receipt of P.0. The entire quantity of tower/structure will be supplied in 2 lots i.e. 600 MT from April to June 04 and balance 1200 MT from July to October 04".*

It is thus evident that the petitioner sought time to supply the quantity mentioned in the aforesaid letter till October 2004 whereas the memo dated 17.06.2004 allowed the petitioner to make the supplies up untill February 2005 i.e. beyond the period requested for by the petitioner in his abovesaid communication which he failed to meet.

The respondent-HVPNL thereafter served various notices to the petitioner and finally passed the order of blacklisting on 17.08.2007 after forfeiture of security and encashment of bank guarantee. It was clearly mentioned in the aforesaid order of blacklisting as well the purchase order No.HDP-922 dated 09.10.2003 had not been complied with by the petitioner.

The petitioner initially filed a civil suit which was withdrawn to enable the petitioner to file a writ petition. CWP No.14123 of 2007 seeking quashing of the order dated 17.08.2007 was only in relation to blacklisting of the petitioner and not qua the penalty of forfeiture and encashment.

The petitioner also did not raise a challenge to the levy of liquidated damages and/or the encashment of the security and confined his prayer to the extent of challenging only the order of blacklisting in the writ petition which was disposed of by this Court vide order dated 18.09.2008 directing the respondent-HVPNL to grant an opportunity of hearing to the petitioner and to pass an appropriate order thereupon. Even in the said order dated 18.09.2008, it was specifically noticed that the petitioner had failed to effect the supplies within the time stipulated. The petitioner never challenged any consequent order or claimed non-compliance of the order dated 18.09.2008. He was thus no longer aggrieved.

The petitioner had however at the same time entered into an agreement for purchase of firm M/s Techno Engineering Company with respondent No.5. It was mentioned in the aforesaid agreement that the buyer i.e. respondent No.5(herein) will arrange to replace or give counter bank guarantee. The statement of bank guarantees appended along with the aforesaid agreement do not include the bank guarantee issued in favour of respondent-HVPNL. In fact, there is only one bank guarantee of ₹60 lacs mentioned therein which relates to have been issued in favour of the Oriental Bank of Commerce, Mohali. Hence, Clause No.3 of the aforesaid agreement for purchase mandating the respondent No.5 to substitute the bank guarantees did not seemingly include the bank guarantee that had been furnished by the petitioner qua the work order No.HDP-922 dated 09.10.2003 as renewed on 17.06.2004. Apparently, the details of the bank guarantee furnished in compliance to the purchase order dated 09.10.2003 have not been mentioned in the aforesaid schedule since the order of forfeiture of the bank guarantee and encashment thereof had already been issued and there was no subsisting bank guarantee which required any substitution or renewal. The above clause is thus required to be read along with the schedule for its scope.

Further, the perusal of the aforesaid agreement also shows that condition No.4 entitled the buyer i.e. respondent No.5(herein) to be the sole owner of M/s Techno Engineering Company along with all its movable properties/tangible/intangibles/vehicles, work in progress, all current assets, deposits, investments, **receivables**, plant, machinery, tools etc. Thus, all rights qua the **receivables** against the sole proprietorship firm namely M/s Techno Engineering Company thus stood transferred by virtue of the aforesaid agreement and a deed of assignment. A separate settlement-deed was thereafter executed between the respondent-HVPNL as well as respondent No.5. It is significant to point out that the firm namely M/s Techno Engineering Company was also in default of various other contracts. Resultantly, the respondent- HVPNL had submitted a letter dated 07.10.2008 to the State Bank of Mysore for encashment of bank guarantee to the tune of ₹98 lacs. CWP No.7692 of 2008 was filed by respondent No.5 before the High Court of Delhi raising a challenge to the aforesaid order for encashment of bank guarantees. During the pendency of the aforesaid writ petition, the above settlement-deed was executed between respondent-

HVPNL and respondent No.5 on 09.01.2009 whereby the respondent agreed to grant a renewed timeline to respondent No.5 to commence the supplies in terms of the purchase order dated 09.10.2003 w.e.f. 01.02.2009 and to conclude the supply by 30.06.2009. An additional performance bank guarantee of ₹60 lacs was to be furnished by respondent No.5 within 15 days of issuance of letter from respondent No.1 to respondent No.5. It was also agreed that the liquidated charges levied on M/s Techno Engineering Company would be waived off and the amount of bank guarantee of ₹60 lacs encahsed by HVPNL along with the forfeited amount of ₹9,26,422/- would be returned on successful completion of the entire work within the stipulated period. Thus, the assurance to waive off the LD charges levied on M/s Techno Engineering Company and the return of the bank guarantee of ₹60 lacs as well as the forfeited amount of ₹9,26,422/- was subject to successful completion of the entire work. All the terms & conditions of the aforesaid purchase order dated 09.10.2003 were retained. A renewed memo/purchase order dated 14.01.2009 (Annexure P-4) was consequently issued wherein the abovesaid conditions were duly incorporated. The petitioner is claiming bank guarantees on account of a renewed cause of action by execution of a separate settlement-deed between respondent No.1 and respondent No.5. The claim, in my opinion lacks merit for the following reasons**:-**

1) The encashment of bank guarantees; levy of liquidated charges and forfeiture of the security amount of ₹9,26,422/- was already imposed against the petitioner much prior to the settlement dated 09.01.2009. Even though the petitioner had a remedy to challenge the order of encashment and forfeiture, however, he chose to confine his challenge only to the extent of blacklisting at the time of filing CWP No.14123 of

2007. Hence, by necessary implication, the order of levy of liquidated damages as well as the forfeiture of security and encashment of bank guarantee thus attained finality.

2) Secondly, the writ petition bearing CWP No.14123 of 2007 was disposed of with liberty to the petitioner to approach the authorities concerned who were to thereafter pass an order after granting an opportunity of hearing to the petitioner. The petitioner never preferred to raise any subsequent grievance with the respondent-HVPNL against the order of blacklisting. A civil suit Case No.405 dated 15.12.2006 was instituted by the petitioner for seeking injunction against the respondent-HVPNL for encashing the bank guarantees and for seeking issuance of directions to respondent No.1(herein) to exercise the arbitration clause of the purchase order before invoking the bank guarantee. The said civil suit was withdrawn on the statement of the plaintiff that he does not wish to proceed further with the suit and liberty was granted to file a fresh civil suit, if so advised. However, no separate civil suit was also filed by the petitioner for seeking recovery of the aforesaid money. The present writ petition was filed in the year 2013 for seeking refund but no challenge was raised to the order of forfeiture and encashment passed by the respondent-HVPNL.

3) Thirdly, the petitioner is not claiming refund of the aforesaid money in terms of the agreement for purchase dated 28.02.2008 and is rather claiming the refund on the strength of the memo dated 14.01.2009. Hence, the petitioner has himself chosen not to claim any right on the strength of the aforesaid agreement for purchase. The memo dated 14.01.2009 however has to be read along with the settlement-deed dated 09.01.2009 between respondent No.1 and respondent No.5 whereby the

right of refund was created. The said settlement agreed for refund the amount in favour of respondent No.5. The petitioner is not a signatory to the aforesaid settlement-deed and as such, he cannot claim a right on the strength of the said settlement-deed or the consequential purchase order/memo dated 14.01.2009 issued in compliance to the said settlement.

Assuming for the sake of arguments that the agreement between the parties to direct refund in favour of respondent No.5 was not a valid agreement qua the rights of the petitioner, the same does not create any right in favour of the petitioner to claim refund. The petitioner being a third-party cannot claim revival of his right on the basis of the said agreement where such agreement does not recognize the petitioner to claim the abovesaid refund.

4) Fourthly, even otherwise the respondent No.5 failed to perform the agreement as per the revised memo dated 14.01.2009 and hence, no refund ever took place. It remains undisputed that neither the petitioner nor the successor-in-interest could fulfill the obligations under the purchase order despite repeated opportunities having been granted by respondent No.1. The occasion for refund/return of the amount thus never arose. The question of *inter se* rights between the petitioner and respondent No.5 could have arisen only in the event of occurrence of a refund.

5) Fifthly, the remaining part of the dispute regarding the status of *inter se* rights between the petitioner and respondent No.5 qua the agreement for purchase dated 28.02.2008 and as to whether the respondent No.5 was obligated to furnish a substituted bank guarantee in terms of the purchase order dated 09.10.2003 or not, is a private dispute amongst the petitioner and respondent No.5 which is not amenable to writ jurisdiction

and the petitioner had a right to agitate such an issue before a competent civil court.

Having examined the issue from all the aforesaid perspectives, I find no merit in the claim raised by the petitioner.

The present writ petition is accordingly dismissed.

March 03, 2023 **(VINOD S. BHARDWAJ)**
seema **JUDGE**

Whether speaking/reasoned: Yes/No
Whether Reportable: Yes/No