

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 12.10.2021

+ **O.M.P. (COMM) 130/2021**

M/S TOTEM-PREMCO (JV)

..... Petitioner

versus

M/S RAIL VIKAS NIGAM LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Ajay Kumar Thakur, Mr Tarun Ghai
and Mr Sujeet Kumar, Advocates.

For the Respondent : Mr Udit Seth and Mr Prateek, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an Arbitral Award dated 03.06.2020 (hereinafter 'the impugned award') delivered by the Arbitral Tribunal comprising of three Arbitrators, Mr. M. Ravindra, Major General K.T. Gajria (Retired) and Justice (Retired) Jaspal Singh, as the Presiding Arbitrator. Whilst Justice (Retired) Jaspal Singh and Mr. M. Ravindra delivered the impugned award by majority, Major General K.T. Gajria (Retired) entered a dissenting opinion on 03.06.2020.

2. The impugned award has been rendered in the context of disputes that have arisen between the parties in relation to the Contract Agreement dated 13.11.2010.

3. By the impugned award, the Arbitral Tribunal entered an award for a sum of ₹34,43,708. The Arbitral Tribunal further allowed interest at the rate of 10% per annum on the said amount calculated from 31.12.2015 till realisation. The Arbitral Tribunal did not accept the petitioner's claim for refund of the amount recovered by the respondent by invoking the performance bank guarantee submitted by the petitioner.

Factual Context

4. On 30.06.2010, Rail Vikas Nigam Limited (hereinafter 'the respondent') issued Notice Inviting Tenders (NIT) for the "*Construction of New Line between Dankuni-Furfura Sharif via Jangalpara (20 KM) in Howrah Division of Eastern Railway in the State of West Bengal, India*" (hereinafter 'the Project'), on the terms and conditions stipulated therein.

5. The petitioner entered is a Joint Venture (JV) between Totem Infrastructure Limited and M/s Premco Rail Engineers Limited. The petitioner was formed for the purpose of submitting a bid pursuant to the aforesaid NIT.

6. Pursuant to the said NIT, the petitioner submitted its bid for executing the project works on 17.08.2010. The petitioner's bid was

accepted by the respondent and a contract for implementation of the Project for an amount of ₹89,70,13,691.61 was awarded to the petitioner by the Notification of Award dated 20.09.2010 (hereinafter ‘the NoA’)

7. In terms of the said NoA, the petitioner was called upon to furnish a Performance Security in accordance with Clause 41.1 of Instruction to Bidders, for an amount equivalent to 10% of the agreed contract amount (that is, for an amount of ₹8,97,01,369.16) and further, a Bank Guarantee in terms of Clause 35.5 of Instruction to Bidders, for an amount of amount of ₹19,37,779.20. The same were required to be furnished within twenty-eight days of the receipt of the said NoA. And, the petitioner furnished the Bank Guarantees as required.

8. Thereafter, on 13.11.2010, the parties entered into an agreement (hereinafter ‘the Agreement’), whereby the petitioner agreed to complete the Project within a period of twenty-four months from the date of commencement of work. The defect liability period was agreed as six months after the completion of the works

9. By a communication dated 30.11.2010, the petitioner informed the respondent about the various hindrances existing between “*Take off Point to Ch:1391 from CSB of Dankuni-Region*”. The petitioner also requested for a schedule for handing over of land as well as the drawings for minor bridges, major bridges and station buildings. The petitioner also stated in the letter that even after the lapse of thirty days from the

proposed date of commencement of work, no working stretch was made available to it.

10. By several communications dated 20.12.2010, the petitioner informed the respondent about the requisite permissions that were required for completion of the Project.

11. On 07.06.2011, a meeting was conducted between the petitioner and respondent to discuss the progress of the work.

12. By a letter dated 30.06.2011, the petitioner requested the respondent to provide "*hindrance free land along with good for construction drawings*" as more than nine months had elapsed since issuance of the NoA and not a single working stretch had been provided to the petitioner. Further, the petitioner stated that it was incurring huge losses for the same.

13. By a letter dated 12.11.2011, the respondent informed the petitioner that four kilometers of stretch of land that would be made available commencing from the month of December, 2011 from Furfura Sharif end of the new proposed railway line. The respondent also indicated the list of items to be executed for the commencement of work. The respondent requested the petitioner to mobilize equipment and personnel to take up the work and submit its action plan within a week's time.

14. Thereafter, on 13.12.2011, a meeting was conducted between the parties to discuss the mobilization of personnel and equipment by the

petitioner. The said Minutes of the Meeting recorded that the petitioner would to take over the available site from the respondent on 15.12.2011.

15. By a letter dated 27.12.2011, the petitioner requested the respondent to handover at least 25% of the total length of the site and indicate the further schedule of handing over of the balance land in order for the petitioner to plan and mobilize and start the work at the desired pace. The respondent responded to the aforesaid letter on 06.01.2011 and requested the petitioner to start the activities at the site immediately.

16. Thereafter, by a letter dated 06.02.2012, the respondent issued a notice to the petitioner under Clause 15.1 of GCC, *inter alia*, stating that a review would be undertaken of the progress made and based on assessment of the same, further action, which included action under Clause 15.2 of the GCC, would be taken.

17. On 21.02.2012, Mr. PK Biswas on behalf of S.N. Bhobde Associates Ltd. (Project Management Consultant) informed the Chief Project Manager of the respondent company that *“the contractor is not willing to take up the work in right earnest and we recommend that suitable course of action may be taken from your end”*

18. Thereafter, on 24.02.2012, the respondent issued a Notice for Termination of the Agreement under Clause 15.2 of GCC to the petitioner.

19. The petitioner responded to the aforesaid notice on 28.02.2012. In the said letter, the petitioner stated that due to non-handing over of the land for complete length of the project and failure to release the due payments, the notice issued by the respondent was improper and not tenable. Further, the petitioner also stated that it had incurred expenditure for the previous year due to non-handing over of the land.

20. Thereafter, on 06.03.2012, a meeting was held between the representatives of the parties during which the parties agreed that the work would be executed in accordance with the joint programme, as agreed. It was also agreed that the respondent would revoke the Termination Notice dated 24.02.2012, subject to certain agreed conditions as recorded in the said Minutes of Meeting, which was jointly signed by the parties.

21. In terms of the agreement between the parties, the respondent issued a letter dated 16.03.2012, revoking the Termination Notice dated 24.02.2012; setting out the joint work programme; and the conditions as agreed by the parties.

22. On 18.04.2012 and 02.06.2012, a meeting was conducted between the officials of the petitioner company, the respondent company and S.N. Bhobde Associates Ltd., to review the progress of the work. The respondent claims that the petitioner had failed to execute the works in accordance with the work programme as agreed.

23. By a communication dated 29.06.2012, the petitioner informed the respondent about the costs aggregating ₹50,596,545 incurred on

account of idle machinery, manpower and equipment due to non-availability of the site and, requested it to release the aforesaid payment.

24. On 03.10.2012 and 16.10.2012, meetings were conducted between the parties regarding the progress of the work.

25. On 22.11.2012, the respondent issued a second Notice to Correct under Clause 15.1 of the GCC to the petitioner. The petitioner responded to the aforesaid notice on 28.11.2012 and stated that the aforesaid notice was not 'justified' as the petitioner did not have the required access to the site and had not received the drawings from the respondent.

26. Thereafter, by a letter dated 12.12.2012, the petitioner informed the respondent that it was willing to foreclose the Agreement and requested the respondent to release all dues and eligible payments.

27. By a letter dated 22.01.2013, the respondent terminated the Agreement in terms of Clause 15.2 of the GCC.

28. Thereafter, on 26.04.2013, the petitioner alleged that the Agreement was illegally terminated; it claimed that the parties had agreed to foreclose the same and release the Bank Guarantees.

29. Thereafter, the petitioner approached this Court under Section 9 of the A&C Act (being OMP COMM 68 of 2013) seeking a stay order on the encashment of Bank Guarantees by the respondent. This Court, by an order dated 28.01.2013, directed the parties to maintain *status-quo* with regard to the Bank Guarantees. However, by an order dated

06.12.2013, this Court disposed of the aforesaid petition as the same had become infructuous in view of the fact that the respondent had encashed the said Bank Guarantees prior to communication of the order.

30. Since disputes had arisen between the parties, the petitioner, by a letter dated 31.12.2015, invoked the agreement to refer the disputes to arbitration in terms of Clause 20.3 of the Agreement and, requested the respondent to constitute the Arbitral Tribunal within thirty days of the receipt of this notice.

31. On 27.04.2017, the petitioner approached this Court by way of a petition under Section 11 of the A&C Act. By an order dated 20.02.2018, this Court directed the respondent to appoint an arbitrator, and the petitioner to select its nominee arbitrator from the list provided by the respondent. This Court also directed the nominated arbitrators to concur on the appointment of the presiding Arbitrator.

32. Thereafter, on 09.03.2018, M. Ravindra and Major General K.T. Gajria (Retd.) and Justice (Retd.) Jaspal Singh entered reference.

33. The claims made by the petitioner in the Statement of Claims are summarised as under:-

Claim No. 1	₹2,50,00,000- Payment of work done including the Non Scheduled items
Claim No.2	₹20,00,000- Payment of the materials lying at site at the time of termination of contract

Claim No.3	₹1,25,00,000-Damages/ Compensation on account of delay in the payment of bills
Claim No.4	₹25,00,000- Refund of interest recovered on the mobilization advance
Claim No.5	₹75,00,000- Reimbursement of advance paid to the sub- contractors
Claim No.6	₹25,00,000- Reimbursement of expenditure incurred on providing temporary works at site
Claim No.7	₹8,54,49,400- Loss of profit
Claim No.8	₹9,55,40,870- Overhead Expenditure incurred by the Claimant.
Claim No. 9	₹2,69,10,400- Payment of incentive bonus
Claim No. 10	₹5,81,000- Reimbursement of Expenditure incurred on payment made to idle labour and idle machinery
Claim No.11	₹1,00,00,000- Refund of Bidding Security
Claim No. 12	₹14,69,74,900- Claim in relation to the wrongful encashment of Bank Guarantees
Claim No. 13	Interest at the rate of 18% per annum as per Section 31 of the Arbitration and Conciliation Act, 1996

Claim No. 14	Cost of Arbitration
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34. The respondent filed its Statement of Defence on 27.07.2018, however, it did not raise any counter claims.

35. Justice (Retd.) Jaspal Singh and Mr. M. Ravindra rendered the impugned award on 03.06.2020 partly allowing the claims made by the petitioner. Major General K.T. Gajria (Retd.) rendered a separate dissenting opinion on 03.06.2020.

36. The Arbitral Tribunal held that the termination of the Agreement by the respondent in terms of Clause 15.2 of the GCC could not be faulted. The Arbitral Tribunal partly allowed the claims preferred by the petitioner and allowed the refund of ₹49,73,514.00 on account of mobilization advance and interest thereon; and ₹10,00,000 as refund of the amount recovered by encashment of the additional Bank Guarantees. The Tribunal further allowed interest at the rate of 10% per annum from the date of invocation of arbitration, that is, from 31.12.2015

37. Major General K.T. Gajria (Retd.) dissented from the impugned award. In his view, the termination of the Agreement by the respondent was illegal and the petitioner was entitled to ₹25,29,806 towards refund of interest recovered on the mobilization advance; ₹8,54,49,400 on account of claim for loss of profit; ₹9,26,39,148 on account of claim for wrongful encashment of the Performance Bank Guarantee; and ₹24,43,708 towards wrongful encashment of Mobilization Advance

Bank Guarantee. In addition to the above, he allowed interest at the rate of 12% per annum on the awarded amount from 22.01.2013 till the date of pronouncement of the award. He further directed the said payment be made within a period of sixty days failing which a further interest of 12% per annum be paid till the date of payment.

38. On 11.06.2020, the respondent filed a petition under Section 33 of the A&C Act seeking correction of the amount awarded by the Arbitral Tribunal towards the refund of mobilisation advance. The Arbitral Tribunal allowed the aforesaid application and corrected the refund due to the petitioner on account of mobilisation advance to ₹24,43,708. Accordingly, the total awarded amount stood revised to ₹34,43,708.

39. Aggrieved by the impugned award, the petitioner has filed the present petition.

Submissions

40. Mr Thakur, learned counsel appearing for the petitioner focused his submissions on assailing the impugned award to the extent, that the Arbitral Tribunal had upheld the respondent's action of enforcing the Performance Bank Guarantee of a sum of ₹9,16,39,148/-. He pointed out that the Arbitral Tribunal had found that the respondent had not provided complete access to the site as the same required land acquisition, which was not done. He submitted that the respondent was, thus, in breach of its obligation of providing complete access within ninety days of the commencement of the Agreement. The Arbitral

Tribunal found that even in respect of the stretch of land available from the Dankuni Station end, no work could be smoothly executed on account of changes contemplated in the layout of Dankuni Station. Notwithstanding the aforesaid findings, the Arbitral Tribunal rejected the claim of the petitioner for refund of the Performance Bank Guarantee. He earnestly contended that to this extent, the impugned award was vitiated on the ground of patent illegality.

41. Next, he submitted that the Arbitral Tribunal had grossly erred in proceeding on the basis that the Agreement was novated. He stated that neither of the parties had urged that there was any novation of the Agreement and thus, the finding to the aforesaid effect, is patently erroneous.

42. Lastly, he submitted that the finding of the Arbitral Tribunal that the petitioner had abandoned the work, is also, *ex facie*, erroneous as this was not the ground as mentioned in the Termination Notice dated 24.02.2012.

43. Mr Seth, learned counsel appearing for the respondent countered the aforesaid submissions. He submitted that the respondent had terminated the Agreement on account of failure on the part of the petitioner to take preparatory steps for execution of the works. The said termination was revoked as the petitioner had approached the respondent and expressed its willingness to execute the works in terms of an agreed programme and this was recorded in the letter dated 16.03.2012. He submitted that the respondent had specifically pleaded

that the parties had modified the Agreement in terms of the aforesaid agreement as recorded in the Minutes of Meeting dated 06.03.2012. He also referred to the written submissions filed on behalf of the respondent before the Arbitral Tribunal to counter the submission that no such case was canvassed by the respondent before the Arbitral Tribunal.

44. Lastly, Mr Seth submitted that the respondent had led evidence to establish that the petitioner had abandoned the works and therefore, the contention that the Arbitral Tribunal's finding to the aforesaid effect is without any basis, is erroneous.

Reasons and Conclusion

45. The controversy in the present case falls within a narrow compass. The principal issue to be addressed is whether the decision of the Arbitral Tribunal in rejecting the petitioner's claim for refund of the Bank Guarantees is patently erroneous as being inconsistent with its findings.

46. The works to be executed in terms of the Agreement involved construction of twenty kilometers of a new railway line between Dankuni-Furfura Sharif via Jangalpara for a total consideration of ₹89,70,30,639.16/-. In terms of Clause 2.1 of the General Conditions of the Contract (GCC), the respondent had agreed to provide the petitioner *“right of access to, and possession of, all part of the site within the time (or times) stated in the Contract Data”*.

47. Part A of Section VII of the Special Conditions of Contract (SCC) specified the time within which access to the site would be provided. In terms of the SCC, the site was agreed to be progressively handed over in ninety days. Admittedly, the respondent did not handover the entire site, as agreed. The Arbitral Tribunal held that the date of commencement was fixed as 01.11.2020 and therefore, the complete site was required to be handed over by 29.01.2011. The Tribunal found that *“this could not be achieved due to land acquisition involved for construction of the railway line”*. It further noted that the new railway line to be constructed, in terms of the Agreement, ran parallel to the existing railway lines for about 1400 meters taking off from the Dankuni Railway Station. Thus, this stretch of land did not involve any issue regarding access to the site. The petitioner was to commence work at the above stretch of 1400 meters. However, the Arbitral Tribunal found that the same *“could not materialise as the layout Dankuni Station was undergoing a change by Eastern Railway due to which the exact location from where to start the work for the new railway line was not known”*.

48. The Arbitral Tribunal noted that in the given circumstances, the respondent had sent a letter dated 12.11.2011 indicating that four kilometers of stretch of land would be made available commencing from the month of December, 2011 from Furfura Sharif end of the new proposed railway line. Thus, access to this site was made available thirteen months after the date of commencement.

49. The Arbitral Tribunal held that the petitioner accepted “*change in the sequence of executing the work and partial access to site being made available after about 13 months without demur; no precondition was laid down by it.*”

50. The respondent terminated the Agreement by a Termination Notice issued on 24.02.2012 as according to the respondent, the petitioner was not taking the requisite steps to execute the Project. Thereafter, on 06.03.2012, a meeting was held between the representatives of the parties during which the parties agreed that the work would be executed in accordance with the joint programme. It was also agreed that the Termination Notice dated 24.02.2012 would be revoked subject to certain agreed conditions as recorded in the Minutes of Meeting held on 06.03.2012, which was jointly signed by the parties.

51. Admittedly, in terms of the agreement as arrived between the parties on 06.03.2012, the respondent issued a letter dated 16.03.2012 setting out the joint programme to be executed for the initial 800 meters and revoking the Termination Notice dated 24.02.2012, subject to the conditions as recorded therein. The said conditions are at the centre of the controversy in this case. The relevant extract of the said letter dated 16.03.2012, setting out the conditions as agreed between the parties, is reproduced below:

“Total value of work = Rs.94,87,182/- say one crore approx. The value of the Additional BG to be submitted @ 10% = 10 lakhs in five equal instalments of 2 lakhs each as surety for achieving each months

programme. The Bank Guarantee shall be submitted by 9th March 2012.

M/s TOTEM PROMCO JV has also agreed for the following conditions:

- i) The Bank Guarantee shall be valid up to DDC of the contract.
- ii) In case of failure of achievement of any month programme, one of the above additional bank guarantee shall be encashed as penalty.
- iii) The above programme is only for the initial 800m of site from Furfura end handed over to the contractor till date. Additional work should be done for the additional site which will be handed over progressively. For this RVNL reserves the right to ask for similar time bound programme.
- iv) RVNL reserves the right for issuing the termination notice again after completion of the above period for poor performance in the above programme.
- v) Penalty imposed as defined above shall be reviewed only on completion of the contract.
- vi) The bank guarantee against mobilization advance which may become due for extension/encashment should be extended/deposited by the agency along with the interest as per the contractual provision in next 7 days time otherwise due bank guarantee shall be encashed by RVNL.
- vii) In case of the shortfall of the progress in concerned month is made up in any of the following months, such encashment shall be reversed by RVNL in full.

Therefore, the Termination Notice of the contract is hereby revoked with the approval of Competent Authority.

S/d

(Anuj Mittal)

Chief Project Manager(Barrackpur)”

52. The Arbitral Tribunal found that in view of the agreement arrived at between the parties and as recorded in the Minutes of the Meeting dated 06.03.2012 and the letter dated 16.03.2012, the Termination Notice dated 24.02.2012 was withdrawn and the Agreement between the parties underwent an ‘alteration’ or ‘novation’.

53. The Arbitral Tribunal found that the petitioner did not adhere to the joint work programme and ceased all activities at Furfura Sharif. The Arbitral Tribunal accepted the respondent’s contention that the petitioner had abandoned the site and the same entitled the respondent to terminate the Agreement. The relevant extract of the impugned award setting out the reasoning and the conclusion of the Arbitral Tribunal, in this regard, is reproduced below:

“The Tribunal notes that on termination of the Contract, it was the Claimant who desired for its revival with willingness to execute the work as per an agreed program. Details of the commitments made by the Claimant have been given in paragraph [29] above. The terminated Contract was revived with effect from 16/03/2012. As would be evident, the Contract underwent a ‘Noyation’ or ‘Alteration’ with regard to certain stipulations, namely:

- 1) Commitment to execute work as per the program detailed, failing which the additional bank guarantee for Rs. 10 lakhs given would be forfeited. The Performance Guarantee prescribed in the Contract and submitted by the Claimant was for performance of the Contract in its entirety, including the work at Furfura Shraif. Submission of an additional bank guarantee specifically for the work at Furfura Sharif, which work was already covered by the Performance Guarantee given for the Contract as a whole, is an Amendment.
- 2) Obligation to make available access to site progressively within 90 days of 'Date of Commencement' as provided in Clause 2.1 of the General Conditions of the Contract was done away with.
- 3) Right of the Respondent to issue termination notice once again if the Claimant failed to adhere to the agreed program laid down.

[38] The Tribunal notes that while reviving the terminated Contract with Amendments, the Claimant did not make or put forward any claim for the delay that had occurred in making available the site, that is, non-adherence by the Respondent to the time limit of 90 days prescribed.

[39] As brought out above, even after revival of the Contract, work at Furfura Sharif did not progress as planned. While the Claimant's contention is that hinderances continued to exist coming in the way of execution, the Respondent argues that the cause lay squarely with the Claimant. A perusal of the evidence on record supports the Respondent on this rival contention. Monthly Reports of the Engineer covering the relevant period establish slowing down of execution by the Claimant and abandonment of the site in great detail.

One of the conditions accepted by the Claimant while reviving the Contract was the right of the Respondent to terminate the Contract if the Claimant failed to adhere to the agreed program of execution of work at Furfura Sharif. In other words, nonperformance at Furfura Sharif was in itself a sufficient cause for termination of the Contract. Any assertion that the Respondent had not provided access to site for the entire stretch of the Project and thus had no right to termination the Contract, being in itself in default, would be incorrect (emphasis added).

[40] xxxx xxxx

[41] The Tribunal concludes that the termination of the Contract by the Respondent due to cessation of all activities by the Claimant at Furfura Sharif and then abandoning the site was in order, the Claimant, while reviving the Contract, having unequivocally entitled the Respondent to do so. The right to terminate was thus independent and not circumscribed by any consideration of access to site being not made available by the Respondent elsewhere; performance at Furfura Sharif alone was the criterion. And this has been mentioned by the Respondent in the correspondence that followed after termination.

54. The question as to the interpretation of a contract falls squarely within the jurisdiction of the Arbitral Tribunal. It is also settled law that a commercial contract is required to be interpreted in the context of the commercial understanding between the parties.

55. In the present case, the Arbitral Tribunal has interpreted the scope of the Minutes of the Meeting dated 06.03.2012 and the letter dated 16.03.2012, in terms of which the Termination Notice dated 24.02.2012

was revoked and the Agreement was reinstated. Undisputedly, the contract was required to be understood in accordance with the joint work programme as agreed between the parties on 06.03.2012 and, also recorded in the letter dated 16.03.2012. In view of the above, the conclusion of the Arbitral Tribunal that the original terms of the Agreement stood altered at least to the extent regarding the manner in which the site was to be made available and the work to be executed, cannot be faulted.

56. This Court also finds no ground to interfere with the conclusion of the Arbitral Tribunal that in terms of the agreement as arrived at between the parties on 06.03.2012 and as recorded in the letter dated 16.03.2012, it was no longer necessary for the respondent to immediately make available the entire site to the petitioner. However, that does not mean that the petitioner was absolved from performing its obligations under the agreement. The conditions, as agreed under the letter dated 16.03.2012, clearly provided that the joint work programme was for the initial 800 meters of the site, from Furfura end, which was handed over to the petitioner prior to that date. It was further specified that further work would be done thereafter and, the site for the same would be handed over progressively. The Arbitral Tribunal found that the petitioner had failed to perform the work in terms of the joint work programme as specifically agreed and set out in the letter dated 16.03.2012. Thus, the question of providing access to additional areas of the site did not arise.

57. The question of the respondent defaulting in its obligations to provide access to further site would arise once the petitioner had executed the works in accordance with the joint work programme.

58. In view of the above, this Court is unable to accept that the impugned award is vitiated on account of any patent illegality or falls foul of the public policy of India.

59. The decision of the Arbitral Tribunal to reject the petitioner's claim for a refund of the amount of ₹9,16,39,148/-, recovered from encashment of its Performance Bank Guarantee, cannot be interfered with in these proceedings. It was contended on behalf of the petitioner that since the performance of the joint work programme was secured by Bank Guarantees aggregating to a sum of ₹10,00,000/-, the failure to perform the said works could result in encashment of the said Bank Guarantees of ₹10,00,000/- and the respondent could not invoke the Performance Bank Guarantee furnished initially.

60. The Arbitral Tribunal did not find any merit in the aforesaid contention. The Arbitral Tribunal noted that in terms of Clause 4.2 of the General Conditions of the Contract (GCC), the Performance Guarantee was required to be encashed if the Agreement was terminated under Clause 15.2 of the General Conditions of the Contract. Thus, in terms of Clause 4.2 of the GCC, the Performance Guarantee was required to be encashed in full. The letter dated 16.03.2012 also expressly recorded that additional Bank Guarantees of ₹10,00,000/- would be submitted. The word 'additional' indicates that the bank

guarantees to be furnished in terms of the letter dated 16.03.2012 were in addition to the existing Performance Bank Guarantee.

61. The question whether the initial Performance Bank Guarantee could be encashed, is a contentious one, which depends on the interpretation of the agreed conditions as recorded in the letter dated 16.03.2012. The respondent had not invoked the Performance Bank Guarantee after the Termination Notice dated 24.02.2012. The Arbitral Tribunal had interpreted the agreed conditions as recorded in the Minutes of the Meeting dated 06.03.2012 as well as the letter dated 16.03.2012 and concluded that after revival of the terminated Agreement, the value or amount of the Performance Security increased from ₹9,16,39,148/- to ₹9,26,39,148/-. The Arbitral Tribunal also noted that one of the agreed conditions stipulated by the respondent was that it reserved its right for issuing a termination notice after completion of the period covered under the joint work programme for its poor performance. Since the Agreement was terminated on that ground, the encashment of the Performance Bank Guarantee was in terms of the Agreement. However, the Arbitral Tribunal directed the release of the additional Bank Guarantees since the Performance Security (Performance Bank Guarantee) covered the Agreement in full. The relevant extract of the impugned award setting out the reasoning and the conclusion of the Arbitral Tribunal, in this regard, is reproduced below:

“(c) As brought out above, the Contract was terminated under Clause 15.2 on 24.02.2012 for the first time for the reason the Claimant failed to start the work at Furfura Sharif for which site had been handed over in December, 2011, as also all the

data and drawings made available. The 'Termination Letter' also brought out above full mobilization advance having been paid to the Claimant and several meetings held to commence work.

(d) If the above termination order was not revoked, and the Contract revived, in terms of Clause 4.2 of the General Conditions of Contract reproduced above, the Performance Guarantee in full (that is, Rs. 9,16,39,148/00) could have been encashed as the Claimant was not commencing work at Furfura Sharif though it was a part of the overall work covered by the Contract and covered by the Performance Security (emphasis added).

(e) However, there was no action by the Respondent to encash the Performance Guarantee after the above termination order due to the Claimant expressing its willingness to execute work as per an agreed programme and terminated Contract was revived on 16/03/2012. The agreed programme was for work involved at Furfura Sharif for the 800 m of site made available and covered the period March, 2012 to June, 2012. The value of the work was assessed at Rs. 94,87,182/00.

The Claimant provided five additional Bank Guarantees, each of Rs. 2 lakhs in value and totalling Rs. 10 lakhs, as surety for execution and valid up to the date of completion of the Contract. Thus, after revival of the terminated Contract, value or amount of Performance Security got increased from Rs. 9,16,39,148/00 to Rs. 9,26,39,148/00. Work described in the agreed programme for which the additional Bank Guarantees of Rs. 10,00,000/00 in value was given, got covered by two Performance Securities, one for Rs. 9,16,39,148/00 and another for Rs. 10,00,000/00 (emphasis added).

To reiterate, as mentioned above, work mentioned in the agreed programme was a part of the Contract and was thus covered by the Performance Guarantee given for the Contract

as a whole earlier while executing the Contract. (emphasis added).”

62. The view expressed by the Arbitral Tribunal is certainly a plausible one and therefore, cannot be interfered with in these proceedings.

63. The contention that the impugned award is required to be set aside on the ground that the Arbitral Tribunal had erred in concluding that the petitioner had abandoned the works, is also unpersuasive. The finding that the petitioner had abandoned the works is a finding of fact. The Arbitral Tribunal has returned the said finding after appreciation of various communications and material on record. The said finding, thus, warrants no interference in these proceedings.

64. In view of the above, the impugned award cannot be set aside under Section 34(2A) or Section 34(2)(b)(ii) of the A&C Act. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

**OCTOBER 12, 2021
RK**