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

Date of Decision: 01.08.2024

+ **O.M.P. (COMM) 315/2024** & I.A. 35095/2024, I.A. 35096/2024,
I.A. 35097/2024

IRCON INTERNATIONAL LTD

.....Petitioner

Through: Mr. Siddhant Goel, Ms. Jyotika Jain,
Mr. Shubham S. Saxena, Ms.
Karmanya D. Sharma, Ms. Ashma
Jain, Ms. Kratvi Kawdia, Advs.

versus

AFCONS INFRASTRUCTURE LTD

.....Respondent

Through: Mr. R.V. Prabhat, Adv.
Mr. Abhishek Bithkaray, Mr. Tanmay
Nandi, Mr. Saurabh Suman, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J.(ORAL)**

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the Impugned Interim Award dated 29.04.2024 passed by the majority of the Arbitral Tribunal directing the petitioner to return the performance bank guarantees for Rs. 22,41,17,116/-.
2. The facts are that the petitioner invited bids for the construction of tunnel T – 74 R for a length of 3290 mtr, on the Dhrama – Qazigund section of the Udhampur – Srinagar – Baramulla New BG Railway line project (hereinafter referred to as “Project”).
3. The petitioner and the respondent entered into a Contract Agreement dated 14.03.2014 for the execution of the project.



4. Since certain disputes arose between the parties, the respondent invoked arbitration in accordance with clause 62 SCC – 1, and the Arbitral Tribunal was constituted.

5. During the arbitral proceedings, the respondent filed an application under section 31(6) of the Arbitration and Conciliation Act, 1996 seeking the release of bank guarantee, and the Interim Award came to be passed on 29.04.2024.

6. The majority Arbitral Tribunal passed the following interim Award on 29.04.2024:

“a) Part of Claim No. 1(B) is allowed, and the Respondent is directed to release Performance Bank Guarantee for Rs.22,41,17,116/-;

b) Claim No. 1(C) is deferred and shall be considered at the time of Final Award;

c) Claim No. 2(B) is deferred and shall be considered at the time of Final Award;

d) Claim No. 4(A) and 4(C) are allowed and the Respondent is directed to pay a sum of Rs. 2,08,56,361/- to the Claimant”

7. Aggrieved, the petitioner has filed the present petition, however the petitioner by way of this petition only restricts his claim to the extent whereby the Arbitral Tribunal has awarded release of bank guarantee to the tune of Rs 22,41,17,116/-.

8. Mr. Goel, learned counsel for the petitioner draws my attention to para 8 and 40.2 of the Statement of Claims filed by the Respondent before the learned Arbitral Tribunal, which reads as under:

“8. The Respondent has not issued the Maintenance Certificate despite fulfilment of all required conditions as per the Contract



by the Claimant. The Claimant seeks issuance of the Maintenance Certificate and related reliefs by way of release of bank guarantees, retention amount etc.

....

40.2. The Claimant is entitled to issue of Defect Liability/ Maintenance Certificate in terms of Clause 50(1) of GCC and consequently, release of Bank Guarantees towards Performance Security and Retention Money and to refund Retention Money withheld.”

9. In this regard, he further draws my attention to para 12 of the application filed by the respondent under Section 31(6) of the Arbitration and Conciliation Act, 1996, and states that the respondent itself has asked for a defect liability certificate which is subsequent to the completion certificate. Para 12 of the Application filed under section 31(6) reads as under:

The disputes referred to the Hon'ble Tribunal in the present reference, include the Claim for issuance of Defect Liability Certificate w.e.f. 29 May 2020, and consequent Release of Performance Bank Guarantee (PBG), Retention Money Bank Guarantee (RBG) and Bank Guarantee submitted by the Claimant, in lieu of Liquidated Damages (LD), cash retention money withheld by the Respondent, extension of time and consequent compensation, and other Claims.

10. My attention has also been further drawn to prayers sought by the respondent in the application filed under section 31(6) which reads as under:-

“72. In view of the aforesaid facts and circumstances of the case, the Claimant prays

a) That this Ld. Arbitral Tribunal be pleased to direct the



Respondent to forthwith return the original Bank Guarantees submitted towards Performance Security more particularly described in paragraph 16 hereinabove

b) That this Ld. Arbitral Tribunal be pleased to direct the Respondent to forthwith return the original Bank Guarantees submitted towards Retention Money more particularly described in paragraph 35 hereinabove and return the Cash Retention withheld by the Respondent.

c) That this Hon'ble Tribunal be pleased to direct the Respondent to forthwith provide copy of the verified Final Bill to the Claimant

d) That this Hon'ble tribunal be pleased to direct the Respondent to forthwith release the admitted sums under the Final Bill.

e) That this Ld. Arbitral Tribunal be pleased to direct the Respondent to forthwith return the original Bank Guarantees submitted towards Liquidated Damages and cash retention retained on account of interest on alleged liability of Liquidated Damages more particularly described in paragraph 48 hereinabove and return the amount withheld towards interest on Liquidated Damages.

f) That, this Ld. Arbitral Tribunal be pleased to issue an order restraining the Respondent from invoking or encashing the Bank Guarantees, more particularly described in the paragraphs 16, 35 and 48 hereinabove, pending adjudication of the present application for Interim by the Ld. Arbitral Tribunal.

g) For interim and ad-interim reliefs in terms of prayers clause above

h) Granting such other and further relief as the Ld. Arbitral Tribunal deems just and equitable.”

11. Learned counsel for the petitioner submits that the Arbitral



Tribunal has adjudicated and granted the defect liability certificate to the respondent which was not even sought in the application filed under section 31(6) of the Act.

12. He further states that a perusal of para 35 of the order shows that the arbitral tribunal is yet to adjudicate upon the date of completion and the date when the defect liability period would get over and since the return of bank guarantees were contingent upon these two certificates, the Arbitral Tribunal could not have directed to return these bank guarantees and the same was also specifically pleaded before the Arbitral Tribunal. Paragraph 35 reads as under:-

“35. With respect to part of claim I(B) & I(C) regarding retention money in the form of B.G/Cash, which are linked with finalization of final bill & defect liability certificate, detailed examination of facts & circumstances is required to ascertain the correct date of completion of works and successful completion of defect liability period. Accordingly, the Tribunal will decide these claims in final award after completion of this arbitration proceedings.”

13. Learned counsel for the petitioner also draws my attention to clause 51.1 of the Special Conditions of Contract reads as under:-

“51.1 The whole of the Performance Security shall be liable to be forfeited by the Employer/Engineer at the discretion of the Employer/Engineer, in the event of any breach of contract on the part of the Contractor or if the Contractor fails to perform or observe any of the condition s of the contract. On due and faithful completion of the entire work, the Performance Security shall be returned to the Contractor, subject to the issue of



Completion Certificate by the Engineer. This shall not relieve the Contractor from his obligation and liabilities, to make good any failure, defects, imperfections, shrinkages, or faults that may be detected during the defect liability period specified in the Contract.”

14. *Per contra*, Mr. Bithkaray, learned counsel for the respondent states that a perusal of para 40.2 of the statement of claims filed by the respondent shows that there were three amounts that were retained by the petitioner i.e. a) performance security b) retention money and c) retention money withheld.

15. He further states that the amounts toward performance bank guarantees were about Rs. 22 crores, Rs. 11 crores towards retention bank guarantees, and Rs. 11 crores towards retention money withheld. He states that it is only the amounts towards retention money and refund of retention money which were dependant on the maintenance certificate.

16. I have learned counsel for the parties.

17. It is a well-settled position of law that the scope of interference as mandated under Section 34 of the Arbitration and Conciliation Act, 1996 is very narrow and limited, and in order to adjudicate the matter related to the interpretation of the contract, determination of facts and appreciation and re-appreciation of evidence, the learned Arbitral Tribunal is the best authority for the said purpose. In this regard, reliance is placed on *MMTC VS Vedanta Limited, (2019) 4 SCC 163* wherein the Hon’ble Supreme Court of India *inter alia* held as under:

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the



arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii), i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b) (ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a



possible view based on facts. (See Associate Builders v. DDA, (2015) 3 SCC 49). Also see ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705; Hindustan Zinc Ltd v. Friends Coal Carbonisation, (2006) 4 SCC 445; and McDermott International v. Burn Standard Co. Ltd., (2006) 11 SCC 181).”

18. In the present case, para 40.2 of the statement of claims filed by the respondent categorically states that the respondent shall be entitled to Maintenance Certificate in terms of clause 50(1) of GCC and thereafter will be entitled to release of Bank Guarantees towards Performance Security and Retention Money and to refund Retention Money withheld. Para 40.2 of the statement of claims reads as under:

“40.2. The Claimant is entitled to issue of Defect Liability/ Maintenance Certificate in terms of Clause 50(1) of GCC and consequently, release of Bank Guarantees towards Performance Security and Retention Money and to refund Retention Money withheld.”

19. Additionally, Clause 40.3.3 of the Statement of Claims shows that the respondent sought return of the performance bank guarantees which were to be released after expiry of 120 days of the defect liability maintenance period. Para 40.3.3 of the Statement of claims reads as under:

“40.3.3

As per Clause 51.4 of SCC-I, Bank Guarantees maintained towards Performance Security was to be released after expiry of 120 days after Defect Liability/Maintenance Period i.e., on 25th September 2020.”



20. In this regard, Para 59 of the Statement of Defence of the petitioner is also relevant, wherein the petitioner has categorically stated in clear and unambiguous terms that the work was completed on 12.12.2019 and the defect liability period would have commenced thereafter. Para 59 of the statement of defence filed by the petitioner reads as under:-

“59. The contents of the paragraphs 07 to 09 of the Statement of Claim, to the extent of the same are inconsistent with the record, are denied. It is reiterated that the Respondent has levied liquidated damages in accordance with the Contract and the law. It is denied that the Work was completed on 30 May 2019 as alleged or otherwise or that the Works were put to its intended use on such date as alleged or otherwise. It is submitted that the Work was completed on 12 December 2019 and in accordance with the Contract, the defect liability period commenced thereafter. It is denied that the Claimant suffered additional cost and/or losses suffered during the extended period of the Contract which are attributable to the Claimant’s breaches and even otherwise, the same is inconsistent with the Contract and with law. It is submitted that the Claimant had issued its Final Bill, dated 29 June 2020, which was subsequently verified by the Respondent. After verification of the Final Bill, it was observed that the Claimant’s Final Bill was/is inconsistent with the Contract and the same is wrongfully inflated. It is relevant to state that the measurement of work is an excepted matter and hence, the Claimant is barred from challenging the same. It is denied that the Respondent is not issuing the maintenance certificate as alleged or otherwise. It is submitted that the Claimant till date has not accepted the Final Bill, as verified by the Respondent, and accordingly the Respondent’s subsequent obligation, under the Contract, is not triggered. As the Claimant has failed to submit its final claim in terms of the Contract, the



claims of the Claimant are contractually/legally barred. For the sake of brevity, the Respondent seeks leave of the Hon'ble Arbitral Tribunal to rely on the contents of the present SOD and Section 16 Application filed by the Respondent."

21. Admittedly the defect liability period is for one year after completion of the work.

22. Moreover, Clause 51.4 of the Special Condition of Contract is binding on the parties and categorically states that the performance security shall be released to the contractor after 120 days of the defect liability period. Clause 51.4 of the Special Conditions of Contract reads as under:

"51.4 Performance security shall be released to the contractor only after 120 days beyond the expiry of the Defect Liability Period specified in the contract"

23. The Arbitral Tribunal duly considered that as per the best case of the petitioner, the performance security should have been released latest by 12.04.2021 which is 120 days after the defect liability period (reference to clause 51.4 of the Special Conditions of Contract).

24. It is also pertinent to mention that the Arbitral Tribunal while passing the Award has stated that a Performance bank guarantee cannot be retained, once the completion has been duly acknowledged and in the present petition, the petitioner has admitted to the fact that the work was duly completed on 12.12.2019. The operative portion of the Impugned Award reads as under:-

"21. Notwithstanding the controversy as to the actual date of completion of the work, it emerges from the pleadings of the Respondent that the work was admittedly completed at least by 12.12.2019, if not prior, as alleged by the Claimant. Thus, the maintenance/defect liability period shall begin no later than 12.12.2019."



23. *The Respondent relies upon various contractual provisions to deny to the Claimant of the benefit of release of Bank Guarantee even after admitting that the Claimant has completed the work way back in December 2019, The Respondent contention that the Engineer has till date not issued completion certificate, maintenance certificate and defect liability certificate are at the best omissions on the part of the Engineer and the Respondent cannot be allowed to take benefit of such wrong on his part.*

24. *The Tribunal noted that undisputed date of completion of work as per the Respondent is 12.12.2019 and accordingly the date of completion of defect liability period should have been 12.12.2020 as per contract clause- 60.1 and 60.2 of SCC-1. This has also been noted that admittedly no notice for extension of DLP was issued to the Claimant even upto 01.07.2023. Only on 01.07.2023 a notice was issued by the Respondent for some rectification work which is after more than 3 years from the date of completion and during the proceedings of this Arbitration case. There is no specific extension of DLP by the Respondent.*

26. *In our view, after completion of the work and expiry of subsequent period of maintenance/defect liability no employer can be permitted to hold on to two bank guarantees in perpetuity, for want of non-issuance of certificates by the employer or any independent agency appointed by the employer under the Contract. The Hon'ble High Court of Delhi in Bharat Sanchar Nigam Limited versus Teracom Limited, O.M.P. (COMM) 431/2019 and Union of India Versus RCCIVL-LITL (JV), ARB. A. (COMM.) 12/2022 have affirmed the said view and despite similar or identical clauses, held that there is no principle in law whereby an employer could be permitted to retain the performance security after it had acknowledged due performance of Contract. Having found the categorical admission on the part of the Claimant as to the completion of work, we are respectfully bound by the principle laid down by the Hon'ble Court."*



25. It is clear that the petitioner itself has stated that the work was completed on 12.12.2019, and there is no document on record till date showing any defect pointed out by the petitioner to the respondent concerning the work done by the respondent. Once the defect liability period got over on 12.12.2020 and there has been no defect pointed out by the petitioner, there is no reason or basis for the petitioner to withhold the performance Bank Guarantee of the respondent.

26. In my view, the Arbitral Tribunal while passing the Impugned Interim Award dated 29.04.2024 has appreciated the entire dispute and has come to a finding by categorically stating that the work was completed on 12.12.2019 and merely because the petitioner had not issued a completion certificate was no reason for the petitioner not to release the bank guarantees. Non issuance of a completion certificate does not entitle the petitioner to withhold the Performance Bank guarantee under the Contract (Clause 51.4 of the Special conditions of Contract). The finding of the Arbitral Tribunal is based upon factual matrix, documents and pleadings available before the Arbitral Tribunal. The same is beyond the purview of this Court in a Section 34 petition unless the same are perverse. There is no perversity in view of my reasoning above.

27. In view of the above observations, there is no infirmity in the finding of the Arbitral Tribunal and the petition is therefore devoid of merit and is dismissed.

JASMEET SINGH, J

AUGUST 1, 2024/NG/PP

(Corrected and released on 17.08.2024)