

राष्ट्रीय राजमार्ग एवं अवसंरचना विकास निगम लिमिटेड

सड़क परिवहन और राजमार्ग मंत्रालय, भारत सरकार

तीसरी मंजिल, पीटीआई बिल्डिंग, 4-संसद मार्ग, नई दिल्ली-110 001

National Highways & Infrastructure Development Corporation Limited

Ministry of Road Transport & Highways, Govt. of India

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सार्वजनिक क्षेत्र का उपक्रम

A PUBLIC SECTOR UNDERTAKING

NHIDCL/Assam/NH-37/Moran Bypass/Atlanta/2016/Vol-III/ 1138

Date: 23.02.2018

WITHOUT PREJUDICE

To,

M/s Atlanta Limited
101, Shree Amba Shanti Chambers
Opp. Hotel Leela
Andheri-Kurla Road, Andheri (East)
Mumbai 400059

[Kind Attention: Sh. Ulhaas N. Bhole, Authorized Signatory]

Sub: Four laning of End of Moran By pass from (km. 561.700) to Bogibeel junction near Lapetketa (km. 580.778) of NH-37 in the State of Assam under SARDP-NE Phase-'A'; Project:

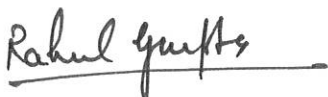
Reg.: 'Termination Notice' in accordance with Clause 23.1.2

Ref:

- 1) GM (P), NHIDCL, Tezpur Letter No. NHIDCL/GHY/2016/Assam/4273 dated 03/10/2016 (Insufficient Mobilization)
- 2) GM (P), NHIDCL, Tezpur Letter No. NHIDCL/GHY/2016/Assam/4409 dated 19/10/2016 (Not submitting the work programme and Non Utilization of the Advance Payment given)
- 3) Authority Engineer Letter No. VSPL/TRB/1365/2016/528 dated 08/11/2016 (Slow Progress of Works)
- 4) GM (P), NHIDCL, Tezpur Letter No. NHIDCL/GHY/2016/Assam/4706 dated 15/11/2016 (Diligence Notice for Slow Progress)
- 5) GM (P), NHIDCL, Tezpur Letter No. NHIDCL/GHY/2016/Assam/4711 dated 17/11/2016 (Cure Period Notice)
- 6) M/s Atlanta Limited Letter No. AL/ASSAM/MB/16/1457 dated 02/12/2016 (reply to Cure Period Notice)
- 7) GM (P), NHIDCL, Tezpur Letter No. NHIDCL/GHY/2016/Assam/5026 dated 16/12/2016 (Comments on reply submitted by Contractor on Cure Period Notice)

Rahul Gupta

- 8) GM (P), NHIDCL, Tezpur Letter No. NHIDCL/GHY/2016/Assam/5101 dated 24/12/2016 (Slow Progress)
- 9) M/s Atlanta Limited, Contractor Letter No. AL/ASSAM/MB/16/789 dated 26/12/2016 (Denying the responsibility regarding Utility Shifting)
- 10) M/s Atlanta Limited, Contractor Letter No. AL/ASSAM/MB/16/796 dated 09/01/2017. (Denying Obligation regarding Utility Shifting)
- 11) GM (P), NHIDCL, Tezpur Letter No. NHIDCL/GHY/2016/Assam/5293 dated 19/01/2017 (denying the contents of Contractor's Obligations regarding Utility Shifting)
- 12) Authority's Engineer Letter No. VSPL/TRB/1365/2016/705 dated 25/01/2017 (Poor Progress of Works)
- 13) M/s Atlanta Limited Letter No. AL/ASSAM/MB/16/267 dated 03/02/2017 (Reply to Cure Notice)
- 14) Authority's Engineer Letter No. VSPL/TRB/1365/2016/723 dated 08/02/2017 (delay during construction)
- 15) Authority's Engineer Letter No. VSPL/TRB/1365/2016/774 dated 02/03/2017 (Slow Progress of Work)
- 16) GM (P), NHIDCL, Tezpur Letter No. NHIDCL/GHY/2017/Assam/5774/111 dated 11/03/2017 (Notice for payment of Damages)
- 17) M/s Atlanta Limited, Contractor Letter No. AL/ASSAM/MB/16/821 dated 23/03/2017 (Hindrances due to not shifting of utilities)
- 18) M/s Atlanta Limited, Contractor Letter No. AL/ASSAM/MB/16/827 dated 27/03/2017 (Reimbursement of Utility Shifting Bill)
- 19) GM (P), NHIDCL, Tezpur Letter No. NHIDCL/GHY/2016/Assam/6032 dated 27/03/2017 (Comments of AE on the reimbursement of Utility Shifting Bill submitted by the Contractor)
- 20) Authority's Engineer Letter No. VSPL/HO/MBP/P01/010 dated 04/05/2017 (EOT determination of the Contractor)
- 21) Authority's Engineer Letter No. VSPL/TRB/1365/2016/902 dated 12/05/2017 (Utility Shifting)
- 22) Authority's Letter NHIDCL/Assam/NH-37/Moran-Bogibeel/Atlanta/2016/839 dated 23.06.2017 (Intention to Terminate)
- 23) Atlanta letter AL/ASSAM/MB/16-17/1617 dated 06.07.2017 (Extension of Time Application 3 pursuant to CI 10.5).
- 24) Order dated 1.8.2017 passed by the Hon'ble High Court at Delhi in OMP(I)(COMM)244/17.
- 25) Authority Letter NHIDCL/GHY/2017/Assam/7416 dated 03.08.2017 (Hon'ble High Court, New Delhi, order OMP(I)(COMM.) 244/2017 dated 01.08.2017)
- 26) Authority's Engineer Letter VSPL/HO/MBP/P01/28 dated 18.08.2017 (Project Status Note)
- 27) Atlanta Letter AL/ASSAM/MB/17/1982 dated 02.09.2017 (Submission of Revised Construction Programme)

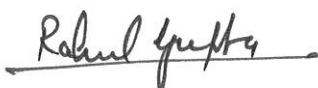


- 28) Authority's Engineer Letter VSPL/HO/MBP/P01/34 dated 14.09.2017 (Comments of AE on Revised Construction Programme)
- 29) Atlanta letter AL/ASSAM/MB/17/942 dated 08.11.2017 (Extension of Time Application 4 pursuant to CI 10.5)
- 30) Authority's Engineer Letter VSPL/HO/MBP/P01/38 dated 11.11.2017 (Review of Project Progress and Construction Programme - Reg)
- 31) Authority's Engineer Letter VSPL/HO/MBP/P01/40 dated 07.12.2017 (Extension of Time Application No 4)
- 32) Atlanta letter AL/ASSAM/MB/17/953 dated 25.12.2017 (Revised Construction Programme)
- 33) Authority Letter NHIDCL/Assam/NH-37/Moran-Bogibeel/Atlanta/2016/Vol-III/1072 dated 02.01.2018 (MOM of Meeting held on 20.12.2017 at NHIDCL-HQ)
- 34) Authority's Engineer Letter VSPL/HO/MBP/P01/46 dated 01.02.2018 (Review of Project Progress - Reg)
- 35) Atlanta letter AL/ASSAM/MB/2018/987 dated 13.02.2018 (Submission on AE Review of Project Progress - Reg)
- 36) Authority's Engineer Letter VSPL/HO/MBP/P01/50 dated 21.02.2018 (Reply to Contractor's submission on Review of Project Progress - Reg)
- 37) Authority's Engineer Letter VSPL/HO/MBP/P01/51 dated 22.02.2018 (Recommendation on Termination of the Contract Due to Contractor's Default)

Dear Sir,

Whereas, LOA for the work of "Four laning of End of Moran By pass from (km. 561.700) to Bogibeel junction near Lapetketa (km. 580.778) of NH-37 in the State of Assam under SARDP-NE Phase- 'A; Project" (hereinafter referred as Project) was issued to M/S Atlanta Limited (hereinafter referred as the Contractor) on 14.01.2016 by the National Highway Infrastructure & Development Corporation limited (hereinafter referred as 'NHIDCL' or 'Authority'); and

2. Whereas, thereafter a Contract Agreement for executing the subject work was signed on 11.02.2016 between Authority and the Contractor; and the Appointment Date for the project was fixed as 10/08/2016; and
3. Whereas, as per the essential Terms and Conditions of the Contract Agreement, the Contractor was obliged to undertake the Survey, Investigation, Design, Engineering, Procurement, Construction and Maintenance of the Project Highway and observe, fulfill and comply with and perform its obligations set out under this Contract Agreement and moreover follow the Contract Agreement and the obligations cast thereon with full adherence, diligence and sincerity; and



4. Whereas, despite repeated notices from Authority/Authority's Engineer, the performance of the EPC Contractor was extremely poor and was not found satisfactory to the requirements of the project and having no other option left, the Authority issued Cure Notice to the Contractor in accordance with the Clause 23.1.2 of the Contract Agreement, vide Authority's Letter No. NHIDCL/GHY/2016/Assam/4711 dated 17/11/2016 and to rectify all the defaults of the Contract Agreement in a time bound manner within 60(sixty) days from the date of notice i.e., before 15/01/2017; and
5. Whereas, the Contractor contested the Cure Period Notice vide Letter No. AL/ASSAM/MB/16/1457 dated 02/12/2016 and made further representations instead of rectifying their defects. This would categorically indicate that the Contractor was at all material times pursuing a different agenda and was not sincere or serious about project completion where huge amount of public money was being wasted by the Contractor; and
6. Whereas, the Authority rejected all the submission made by the Contractor vide Letter No. NHIDCL/GHY/2016/Assam/5026 dated 16/12/2016 & subsequent correspondences, and having determined that the Contractor has miserably failed to cure any of the defaults as specified in the Cure Period Notice thereby causing delay in progress of the project, compromising with the safety and maintenance requirements of the project highway and causing irreparable loss to the Authority, the Authority took further steps; and
7. Whereas, the Contractor, in addition to the failure to cure any of the defaults, was still not showing any interest or genuine intention to execute the works as per the Project Milestone Dates mentioned in Schedule-J; and
8. Whereas, the Contractor has miserably failed to achieve the 10% financial progress for Project Milestone I, within 180 days from Appointed Date i.e., 05/02/2017 nor in accordance with clause 10.3.3, within the next 30 days i.e., 06/03/2017; and
9. Whereas, an Intention to Terminate Notice was issued to the Contractor vide Authority's Letter NHIDCL/Assam/NH-37/Moran-Bogibeel/Atlanta/2016/839 dated 23.06.2017 which highlighted all the defaults and defects of the Contractor and the contents whereof are repeated and reiterated; and
10. Whereas, the Contractor thereafter approached the Hon'ble Delhi High Court at New Delhi on 03.07.2017 and requested to restrain the Authority from acting upon the Authority's Letter NHIDCL/Assam/NH-37/Moran-Bogibeel/Atlanta/2016/839 dated 23.06.2017 and/or invoking the performance/mobilization security of the petitioner to the tune of Rs 46.62 Crs and stay the effect and operation of the Authority's Letter NHIDCL/Assam/NH-37/Moran-Bogibeel/Atlanta/2016/839 dated 23.06.2017 amongst other prayers as mentioned therein;



11. Whereas, both parties appeared before the Hon'ble High Court on 11.07.2017 and agreed to mutually resolve the issue on the merits of the case; and
12. Whereas, a meeting was held on 20.07.2017 between the Authority and the Contractor in the presence of the Authority's Engineer representative and the Minutes of the Meeting (hereinafter referred to as MOM) was finalized and duly signed by all concerned. It is pertinent to mention that the meeting was held by the highest offices of both parties being the Managing Director of NHIDCL and the Chairman of M/s. Atlanta Limited, namely Shri. Rajhoo Bharot; and
13. Whereas, in view of the above MOM of the meeting held on 20.07.2017 between the highest representatives of both parties, the MOM was submitted to the Hon'ble High Court on 01.08.2017 and the case was disposed of on the settlement terms made in the MOM and based on the commitment made by the Contractor. The Hon'ble High Court was pleased to record that there was a meeting held on 20.7.2017 and that the terms reached between the parties as per the MOM was lawful; and
14. Whereas, it is extremely pertinent to mention at this juncture that in another review meeting held on 20.12.2017, pursuant to Hon'ble High Court Order dated 01.08.2017 between Shri. Rikin Bharot, Managing Director of M/s. Atlanta Limited and Executive Director, NHIDCL at NHIDCL-HQ, New Delhi, it was categorically agreed by the MD, M/s Atlanta Limited that the contractor shall achieve progress of 30% by 22.2.2018 as committed in the meeting dated 20.7.2017, the statement of which has been made an order of the Hon'ble Court; and
15. Whereas, as per the MOM and the Hon'ble High Court order dated 1.8.2017, the Contractor agreed "to take up all works in right earnest, including but not limited to the Shifting of Obstructing Utilities, Site Clearances and Project Works at a rate commensurate with the achievement of milestones by deploying the equipments' and resources"; and
16. Whereas, as per the MOM and the Hon'ble High Court order dated 1.8.2017, the Contractor further stated that they will achieve the Milestone-1 which is 10% progress by 10.10.2017 and Milestone-2 which is 30% progress by 22.02.2018; and
17. Whereas, as per the MOM and the Hon'ble High Court order dated 1.8.2017, the Authority agreed to review the progress of the works till 22.02.2018 and not to take any action on the 'Intention to Terminate Notice' issued on 23.06.2017 and agreed to keep the said notice dated 23.6.2017 at abeyance only till 22.2.2018; and
18. Whereas, the Contractor has achieved only a progress of 6.44% as on 22.02.2018, even after a lapse of about 61% of the Project duration and is therefore in total breach



of the Contractual terms and stipulations and the MOM dated 20.07.2017 and the Hon'ble High Court order dated 1.8.2017. The total progress of the project is extremely dismal and the dates committed before the Hon'ble High Court and as recorded in the order dated 1.8.2017 has been breached by the Contractor and the contractor has fallen foul of its commitments; and

19. Whereas, the Contractor has miserably failed to achieve even 10% progress neither as on 10.10.2017 nor as on 22.02.2018 and thereby is severely in default of the commitments made to Hon'ble High Court, New Delhi and is in breach of the contractual provisions; and

20. Whereas, it has become evident that the Contractor is not a position to execute the Contract within the provisions of the Contract Agreement and continues to be in default of most of the Obligations as brought out in the 'Cure Period Notice' as well as the 'Intention to Terminate', leading to a Major Material Adverse Effect on the Contract and the contents of the said 'Cure Period Notice' and 'Intention to Terminate' notice is repeated and reiterated in addition to the contents in this Termination Notice.

21. Whereas, the Authority has in view of the above decided to revive the 'Intention to Terminate' Notice dated 23.6.2017 which was kept in abeyance as per order of the Hon'ble High Court dated 1.8.2017 for the purpose of watching the progress of the work/project; and

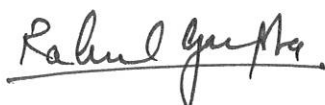
22. Whereas, the Contractor has breached the Contract Agreement, inter-alia, with the following defaults in terms of the Clause 23.1.1 of Article 23 of the Agreement

22.1. Sub clause (c): The Contractor has failed to achieve the first project milestone of 10% and second milestone of 30% progress, even after 61% of the project duration has elapsed.

22.2. Sub clause (q): The Contractor has failed to fulfill obligations, for which failure termination has been specified in the Contract Agreement; and

23. Whereas, the Authority has extended all possible support & efforts to expedite the progress of project but the Contractor has shown no intention to execute the project as per Contract Agreement; and

24. Whereas, the Authority in the interests of the project and since Public Money is involved believe the representations of the Contractor on the last occasion and entered in to the Joint Settlement which was recorded before the Hon'ble High Court by order dated 1.8.2017 however, it is plainly apparent at this stage the Contractor is not at all serious to execute the project and is causing a huge loss to the Government Ex-Chequer; and



25. Whereas, the Authority is left with no other option but to terminate the Contract in accordance with the provisions of clause 23.1.2 for which, in compliance of the terms of the Contract Agreement, Intention to Termination was issued and was simply kept in abeyance till 22.02.2018 in accordance with the order of the Hon'ble High Court dated 1.8.2017; and

26. In the light of aforesaid non-exhaustive fundamental breaches to the Contract, and in view of the Contractor's persistent & sustained gross defaults, the Authority is hereby notifying "Termination of the Contract on account of Contractor's Default" under the provisions of the clause 23.1 with immediate effect; and

26.1. The provisions of Article 23 shall henceforth apply

26.2. Whereas, as a consequence, and in accordance with clause 23.4


- a. All the, material, plant and equipment at the project site is the property of the Authority and the Contractor is strictly advised to maintain status-quo at the project site.
- b. Prepare a detailed list and submit all relevant records, reports, intellectual property and other licenses pertaining to the works, Maintenance other design documents etc.,
- c. Transfer and/or deliver all Applicable Permits to the extent permissible under Applicable Laws
- d. Vacate the site within 15 days; and.

26.3. In accordance with clause 23.5, the Contractor is hereby directed to make a joint measurement of the work executed by them alongwith the Authority's Engineer on a date and time mutually agreed but strictly within 7 days of this 'Termination Notice', failing which, the work will be independently measured by the Authority's Engineer in the presence of Authority and such measurement shall be final and binding upon the Contractor.

26.4. Whereas, the Authority shall intimate the details of Termination Payment in accordance with clause 23.6 within 30 days of the date of 'Termination Notice'.

27. Whereas, the Authorized Signatory of the Contractor is directed to meet the undersigned alongwith all the details pertaining to transfer of rights in accordance with Clause 23.7 within 7 days of this 'Termination Notice'; and

28. The Authority, under Clause 23.6 of the Contract Agreement shall also encash and appropriate the performance security and retention money, for its losses including damage in accordance with CI 10.3.2 & 10.3.3 of Contract Agreement, and recovery of

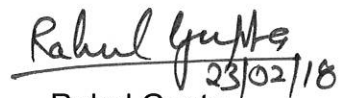


expenditure incurred against maintenance executed at your risk and cost for failure to maintain the project highway in accordance with clause 10.4. The Authority shall also encash and appropriate the bank guarantee for and in respect of the outstanding advance payments and interest thereon. The Contractor is hereby directed to restrain any person claiming through or under Agreement from entering upon the site or in part of the project except for taking possession of materials, stores, implements, construction plants & equipments, which do not vest in the Authority as per the Contract Agreement with the prior permission of the Authority.

29. In conjunction with this Contract Termination, your firm shall perform no further services other than those reasonably necessary to close out this Contract.

30. This Notice is issued without prejudice to any other right or remedy available to the Authority under the Contract Agreement and/or applicable law and is issued with the approval of the competent authority of NHIDCL.

Yours Sincerely,

 23/02/18

Rahul Gupta
Executive Director

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 25th February, 2018

Pronounced on: 01st March, 2018

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O.M.P.(I) (COMM.) 90/2018

ATLANTA LIMITED

..... Petitioner

Through : Ms.Meenakshi Arora, Sr Advocate
with Mr.Chirag M Shroff and
Ms.Neha Sangwan, Advocates.

versus

NATIONAL HIGHWAYS & INFRASTRUCTURE & ANR

..... Respondents

Through : Mr.Rajiv Bansal, Sr Advocate with
Mr.Amit Mishra, Mr.Gaurav
Mahajan, Mr.Kabir Shankar Bose,
Mr.Mohit Singh, Mr.Ritesh Bajaj
and Ms.Vidhi Gupta, Advocates
for respondent No.1.
Mr.Akhil Sibal, Sr Advocate with
Ms.Jahnavi Mitra, Advocate for
respondent No.2.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') has been filed by the petitioner with the following prayers:-

“(a) Pending, hearing and disposal of the present petition, Restrain the Respondent No.1 and their agents, servants, employees, assignees from acting upon the letter of the

Respondent dated 23.02.2018 and/or invoking the Performance/mobilization Security of the Petitioner to the tune of 46.62 crores and restrain Respondent No.3 to 5 from honoring invocation of the said BG of the Petitioner and;

(b) By an order or direction, stay the effect and operation of the letter/communication dated 23.02.2018 issued by Respondent No.1 during the pendency of the present petition;

(c) Direct the Respondent Authority to consider the bids of the Petitioner for further projects as responsive, pending resolution of disputes by the Arbitral Tribunal and this Hon'ble Court;

(d) Restrain the Respondent Authority from taking any other coercive action pending resolution of disputes by the Arbitral Tribunal and this Hon'ble Court;

(e) Grant any other relief as is deemed fit and proper in the facts and circumstances of the instant case."

2. On 11.02.2016 an agreement between the petitioner and respondent No.1 was signed for four lanning of end of Morpan Bypass (KM 561.700) to Bogibeel Junction near Lapetkata (KM 580.778) of NH-37 till the State of Assam under SARDP-NE, Phase A Project - the length of the stretch running up to 19.008 KMS. The grievance of the petitioner is it was to get 90% of total land free from all obstructions by a certain date but the respondent No.1 took long time to handover such land and further had threatened to terminate the contract time and again for which the petitioner had approached this Court twice earlier. It is alleged besides handing over obstruction-free land to the petitioner, there was certain utilities which need to be shifted from both sides of the road

for which too the petitioner was made to make the payments to such utility shifting contractors for removing and/or installing those, though such payments were to be reimbursed by respondent No.1. It is alleged much payments were made to such contractors but the respondent No.1 failed to reimburse such payments in time and it all led to the delay in project for which the petitioner cannot be held solely responsible; hence it is alleged the termination of the contract by the respondent No.1 be held illegal and respondent No.1 be restrained to encash various bank guarantees viz performance and mobilisation advance guarantees given by the petitioner to respondent No.1.

3. The learned senior counsel for the petitioner referred to the history of the case viz the termination of the contract by respondent No.1 vide its termination letter dated 08.06.2016 and approaching this Court by the petitioner on 14.06.2016 vide OMP (I) (COMM) No.266/2016, which was disposed of by this Court on 17.06.2016 wherein the counsel for respondent No.1 submitted, on instructions from Mr.K.G.Bhatt, that *without prejudice to the rights of the respondent No.1 the impugned termination notice shall not be acted upon and recourse to law would be taken as per the EPC Agreement in question.* The said petition was disposed of as infructuous.

4. Later, admittedly, a survey was conducted and vide letter dated 12.08.2016 91.88% land was made available encroachment free under subject package on 09.08.2016 in compliance of the provisions of clause No.4.1.3.(a) and 8.2.1 of the contract agreement for starting of the work. The appointed date for the subject package was fixed as 10.08.2016.

5. Again some disputes arose between the petitioner and the respondents. The petitioner again approached this Court vide OMP (I) (COMM) No.244/2017 wherein this Court vide order dated 01.08.2017, records a settlement between the parties as under:-

“5. For the purposes of completion, the terms and conditions of settlement as recorded in clauses 3(a) to 3 (g) are reproduced hereunder:-

‘3(a) Atlanta Limited will take full responsibility for shifting the obstructing utilities as per Contract Clause 9.2 and National Highways & Infrastructure Development Corporation Limited (NHIDCL) will extend necessary assistance wherever possible for accomplishing the same.

(b) It is stated by Atlanta Limited that Milestone-I shall be achieved by 10.10.2017; Milestone-II shall be achieved by 22.02.2018 and the Project will be completed by 31st May, 2019.

(c) Atlanta Limited has submitted a revised Programme vide Atlanta Letter No.AL/ASSAM/MB/16-17/1673 dated 06th July, 2017 and as per Contractual Provisions. NHIDCL shall seek the recommendations of the Authority’s Engineer M/s Voyants Solution Private Limited on revised programme and the resources to be deployed by Atlanta to achieve the committed dates.

(d) Based on the categorical assurance by the Contractor to take up all works in right earnest, including but not limited to the Shifting of Obstructing Utilities, Site Clearances and the Project Works at a rate commensurate with achievement of the

Milestones by deploying the equipments and resources. NHIDCL will observe the progress of work upto 22nd February, 2018 (2nd Milestone) and the intention to Termination Notice issued by NHIDCL to the Contractor will be kept in abeyance till that date and will not be acted upon.

(e) The Contractor agrees to mobilize necessary equipments and funds for the progress of the project.

(f) Atlanta Limited has submitted for extension of time vide letter dated 03rd July, 2017. It is agreed between the parties that the authority shall consider the same in view of the recommendations of the Authority's Engineer.

(g) Both the parties are agreeable that in view of the above, the captioned petition shall be withdrawn by M/s. Atlanta Limited, by submitting the copy of these minutes before the Hon'ble Court."

6. It is argued though the respondent No.1 had agreed to reimburse the amount spent on shifting of different utilities and also promised to look into the request of the petitioner for extension of time, but did not cooperate with the petitioner on any count. Though the learned senior counsel for the petitioner also referred to a letter dated 13.09.2017 written by the Authority's Engineer to the petitioner asking the petitioner to clear dues of the utility shifting contractors but since the reimbursement was not made in time, such money could not be paid.

7. Alternatively it is argued the mobilisation advance given by respondent No.1 was only ₹ 25.20 Crores out of which an amount of ₹1.50 Crore has already been returned and at best the respondent No.1

can only encash the advance mobilisation guarantees only to an extent of ₹23.70 Crores and anything encashed beyond this amount would tantamount to fraud upon the petitioner.

8. The learned senior counsel for the petitioner referred to page No.8 of the petition (list of dates) wherein the details of five bank guarantees are given. It is alleged the bank guarantees listed at serial numbers 4 & 5 have since been encashed and whereas the remaining bank guarantees at serial numbers 1 to 3 are yet to be encashed.

9. The petitioner in para No.3 of petition asserts:-

“3. The Petitioner states that the act of Respondent to invoke Performance Bank Guarantee to the tune of Rs.18,90,00,000/- and Mobilization advance Bank Guarantees to the tune of Rs.27,72,00,000/- (Rs.Twenty Seven Crores Seventy Two Lacs Only) totaling to Rs.46,62,00,000/- (Rupees Forty Six Crores Sixty Two Lakhs Only) is premised on completely false, frivolous and fraudulent grounds. It is pertinent to state that the 10% mobilization advance for the contract value of Rs.25.2 Crores availed by the Petitioner is only Rs.25,20,00,000/-. Whereas the Bank Guarantee furnished is for an amount of Rs.27,72,00,000/- i.e. 10% extra in terms of clause 19.2.2., 19.2.3 and 19.2.4 of the Agreement, which interalia stipulated for furnishing of Guarantee from a Bank for an amount equivalent to 110% of the advance installments.

The said Bank Guarantees are annexed hereto and marked as ANNEXURE Pl-(colly).

The present dispute pertains to work on a stretch of a highway in Assam, i.e. Four

Laning of End of Moran Bypass (km.561.700) to Bogibeel Junction near Lapatkata (km580.778) of NH-37 in the State of Assam under SARDP-NE, Phase A Project - the length of the stretch running up to 19.008 kms.

The Petitioner further respectfully submits that it has invested substantial efforts, money, machineries and resources in the said project so far and there has been significant delay on part of the Respondent in complying with its obligations of the terms of the agreement i.e. clauses 4.1.3 (a), 4.1.4, 4.2, 8.1, 8.2, 8.4, 9.2 and 10.5 of the EPC Agreement dated 11.02.2016, which has consequently delayed the construction work.”

10. Hence, it is argued considering the conduct of respondent No.1 in terminating the contract twice and not releasing the encroachment free land in time despite settlement; coercing petitioner to pay for shifting of utilities to different utilities shifting contractors without extending the time for completion of contract shows the equities are in favour of the petitioner and against the respondents and hence the petition be allowed.

11. It is also argued per termination notice dated 23.02.2018, the respondent No.1 had though alleged only 6.44% of the work has been completed, but the petitioner has given bills for 16% of the work till 21.02.2018 hence not only the termination is illegal, but also per decision in *M/s Nangia Construction (India) Limited vs International Airport Authority of India and Ors* DRJ 1992 (22) 379, the respondent No.1 can only encash the mobilisation advance guarantees to the extent of its

outstanding viz. ₹23.70 Crores till date and not the entire amount of the mobilization advance bank guarantees of approx ₹27.72 Crores.

12. Heard arguments of both the learned senior counsels. Admittedly, the mobilisation advance has been given by respondent No.1 to petitioner for executing the contract but since the petitioner had failed to perform its work within the stipulated timeframe the respondent No.1 was well within its rights to terminate the contract and to encash the bank guarantees. Though the petitioner avers an amount of ₹1.50 Crore towards mobilisation advance stood repaid as also the interest till April, 2018 but qua performance guarantee the dues of more than ₹8.00 Crores are allegedly to be recovered from the petitioner.

13. Moreso clause No.(d) (*supra*) of the settlement per order dated 01.08.2017 records *the categorical assurance by the contractor to take up all works in right earnest including but not limited to the shifting of obstructing utilities, site clearance and the project work at a rate commensurate with the achievement of the milestones by deploying the equipments and resources. The respondent No.1 to observe the progress of work upto 22nd February 2018 (2nd milestone) and the intention to termination notice issued by the respondent No.1 to the contractor will be kept in abeyance till that date and will not be acted upon.*

14. Now, the Authority Engineer surveyed the work and found only 6.64% could be complete as against 30% of the work till 22.02.2018, hence termination notice which was kept in abeyance was again sent and it gave the right to respondent No.1 to encash the bank guarantees, being *unconditional* ones where the respondent No.1 was not even liable to

plead *the petitioner being in default*. Thus, in view of the nature of guarantees, the petitioner had no case. Admittedly, it was the primary duty of the petitioner to make payments to Utility Shifting Contractors and then to submit the bills and only upon certification by the Authority Engineer, such bills could be reimbursed. Though the request for extension of time was submitted by the petitioner vide its letter dated 03.07.2017, but admittedly it was to be considered only in view of the recommendations of the Authority's Engineer.

15. However, the letters dated 11.11.2017 and 22.02.2018 written by the Authority's Engineer show the petitioner had miserably failed to uphold the commitments made to achieve milestone-I (10% Progress) by 10.10.2018 and milestone-II (30% Progress) by 22.02.2018. It was also noted by the Authority's Engineer that status of progress as on 22.02.2018 was 6.64% instead of 30%. It was only on the basis of such letters dated 11.11.2017 and 22.02.2018 the contract was terminated and the bank guarantees were sought to be encashed.

16. Admittedly respondent No.2 was appointed to oversee the implementation of this contract. The two communications dated 01.02.2018 and 22.02.2018 written by the respondent No.2 to the petitioner points to the failure of the rate of progress to commensurate with the achievement of the milestone as agreed in the settlement arrived at and recorded in the order dated 01.08.2017 of this Court (*supra*). Admittedly 91.88% of the land was handed over to the petitioner on 10.08.2016 but by the end of the February 2018 - 61% of the time of the contract had elapsed but only 6.64% of the financial progress was made.

17. Though in its letter dated 13.02.2018 the petitioner still talks of delay of project due to reasons stated above and poaching of skilled manpower to be a reason for extension of time but in its letter No.714 had also admitted *the financial progress is more than 10% in SPS 5 with SPS 6 to be submitted on certification of SPS 5 and their progress shall be more than 18% by end of February 2018 - milestone-II*. Thus, though the petitioner disputes the progress is 6.64% by February 2018, but in its letter dated 13.02.2018 had admitted its progress shall be more than 18% by 22.02.2018, thus admittedly it could not achieve the target of 30% as settled between the parties. The respondent No.2 vide its letter dated 21.02.2018 had responded to the letter dated 13.02.2018 of the petitioner and denied all the assertions and reiterated the petitioner had miserably failed to achieve the target in time.

18. Moreso the termination clauses No.23.1 and 23.6.1 of the agreement in question notes as under:-

“23.1 Termination for Contract default.

23.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Contractor fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Contractor shall be deemed to be in default of this Agreement (the "Contractor Default"), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:- xxxxxx

23.6. Termination Payment

23.6.1 Upon Termination on account of Contractor's Default under Clause 23.1, the Authority shall:

(a) encash and appropriate the Performance Security and Retention Money, or in the event the Contractor has failed to replenish or extend the Performance Security, claim the amount stipulated in Clause 7.1.1, as agreed pre-determined compensation to the Authority for any losses, delays and cost of completing the Works and Maintenance, if any;

(b) encash and appropriate the bank guarantee, if any, for and in respect of the outstanding Advance Payment and interest thereon; and

(c) pay to the Contractor, by way of Termination Payment, an amount equivalent to the Valuation of Unpaid Works after adjusting any other sums payable or recoverable, as the case may be in accordance with the provisions of this Agreement.”

19. The termination clause makes it clear upon termination on account of contractors' default the respondent no.1 shall have the right to encash the bank guarantees.

20. Undisputedly, the bank guarantees are unconditional as is noted in clause No.1 of the documents viz.:-

“The Bank hereby unconditionally and irrevocably guarantees the due and faithful performance of the Contractor's obligations during and under and in accordance with

the Agreement, and agrees and undertakes to pay to the Authority, upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, and without any reference to the Contractor such sum of sums up to an aggregate sum of the guarantee amount as the Authority shall claim, without the Authority being required to prove or to show grounds or reasons for its demand and/or for the sum specified therein.”

21. Thus, considering the correspondence relied upon by both the parties prima facie put the petitioner at default and considering the terms of settlement as noted in order dated 01.08.2017 whereunder the performance of the petitioner was admittedly to be reviewed by respondent no.1 as on 22.02.2018 and also its request for extension of time was only to be considered at the advice of the Authority's Engineers and further considering the nature of bank guarantees and dues of respondent No.1 qua the petitioner allegedly being more than the amount of the guarantees, the prayer sought for by the petitioner cannot be granted.

22. Even otherwise, the law on the issue of bank guarantees is well settled and is reiterated in *Himadri Chemicals Industries Limited vs Coal Tar Refining Company* (2007) 8 SCC 110 :-

“14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the

encashment of a Bank Guarantee or a Letter of Credit :-

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.”

23. Also in *Sabarkantha Annuity Pvt. Ltd. vs. NHAI* 2017 SCC Online Del 11666 the Court held:

“10. Moreso, the law qua encashment of bank guarantee is well settled. It being an independent contract and lest any fraud or irretrievable loss to the petitioner is alleged no stay can be granted by the Court. The merits and the terms of contract are irrelevant for invoking of the bank guarantees. At this stage one can only go through the terms of the bank guarantee to find if any fraud was committed while entering into such contract and nothing beyond.”

24. Thus, in view of the facts and circumstances no case is made out for allowing the prayers of petitioner. The petition is dismissed.

25. Consequently, the interim order dated 25.02.2018 stands vacated and the respondents No.3 to 5 are at liberty to proceed as per rules.

26. No order as to costs.

YOGESH KHANNA, J

MARCH 01, 2018

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