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

% *Date of decision: 12th December, 2022*

\+ ARB. A. (COMM.) 12/2022 & I.A. 4725/2022

UNION OF INDIA ..... Petitioner
Through: Mr. Jaswinder Singh, Adv.

versus

RCCIVL -LITL (JV) ..... Respondent
Through: Ms. Amrita Panda, Adv.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. This appeal has been filed by the appellant Union of India through Director General, Married Accommodation Project, Integrated HQ of Ministry of Defence (Army) under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 ('Act of 1996', for short) to set aside the order dated January 12, 2022, as modified by order dated February 19, 2022 passed by the learned Arbitrator allowing the application under Section 17 of the Act of 1996 filed by the respondent RCCIVL-LITL (JV), wherein, *inter alia*, a direction has been given to the appellant to release the Bank Guarantee amounting to ₹10,00,00,000/-, while retaining the Bank Guarantee amounting to ₹4,05,56,000/-.

2. At the outset, I may provide a brief background of the instant case, as noted from the appeal. The appellant entered into a contract with the respondent / contractor on November 5, 2014 for

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₹281.11 crore. The scheduled dates of commencement and completion of project were January 1, 2015 and January 31, 2017 respectively. However, the project was completed on June 30, 2018 and the defect liability period expired on June 30, 2020. While securing the contract from the appellant in 2014, the respondent had deposited Performance Bank Guarantees amounting to ₹14,05,56,000/- in terms of the contractual provisions. Further, Bank Guarantee (s) amounting to ₹3,00,00,000/- against retention money was also retained after completion of work. In October, 2018 the respondent submitted pre-final bill worth ₹75,00,00,000/- and final bill worth ₹4,84,01,955/-, which were returned to him by the Project Manager, Bathinda as these were neither complete nor as per the required format. The respondent was asked to submit final bill as per format multiple times but to no avail. Subsequently, the final bill was prepared by a consultant of the appellant in February, 2021 and the respondent was asked to sign the final bill. The respondent signed the final bill under protest and forwarded its claims *vide* order dated April 7, 2021.

3. After completion of work, the respondent invoked arbitration and approached this Court in September 2021 for appointment of an Arbitrator and also for release of its Performance Bank Guarantees. This Court appointed a retired Judge of the Supreme Court as the Sole Arbitrator to adjudicate the disputes *vide* order dated October 3, 2021.

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4. The respondent filed its Statement of Claims amounting to approximately ₹171 crore plus interest along with an application under Section 17 of the Act of 1996 seeking interim relief for release of its Performance Bank Guarantees of ₹14,05,56,000/- and alleged undisputed amount of final bill for ₹4,84,01,955/-. The appellant submitted its reply to the application under Section 17 along with its Statement of Defence and Statement of Counter-Claims.

5. It is stated in the appeal that the retention Bank Guarantee of the respondent amounting to ₹3,00,00,000/- was encashed by the appellant in October, 2021 since these were not extended by the bank. It was stated before the learned Arbitrator that the final bill prepared by the appellant is under scrutiny, and that the amount of the final bill till submission of counter claims by the appellant in December 2021 is ₹5,98,62,665.68/- after adjusting ₹3,00,00,000/- of the Bank Guarantee (s) encashed by the appellant.

6. While the claims and counter claims were under adjudication, the learned Arbitrator passed the order dated January 12, 2022, with the following directions:-

> *"43. In view of the above, the Tribunal directs as under:*
>
> > *(i) In the facts and circumstances of the present case, the Claimant is directed to furnish a Bank Guarantee for a1sum of Rs.3 Crore which should remain valid till the conclusion of the present proceedings. The Claimant is directed to file the necessary records in this*

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> *regard, within 2 weeks from the receipt of the present Order.*
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> *(ii) Subject to the directions contained in paragraph (i), the Respondent is directed to release the Bank Guarantees to the tune of Rs.l4,05,56,000/- within one week thereafter.*
>
> *(iii) The Respondent is also directed to release a sum of Rs. 30,97,784.911- in terms of the findings of the Tribunal in paragraph 32 above within four weeks."*

7. Consequent thereto, the respondent sent a letter dated January 18, 2022 seeking modification of the interim award to the extent that the Bank Guarantee amounting to ₹10,00,00,000/- be released in its favour and the appellant be allowed to retain the Bank Guarantee to the extent of ₹4,05,56,000/- in lieu of furnishing a fresh Bank Guarantee for a sum of ₹3,00,00,000/- as directed by the learned Arbitrator *vide* order dated January 12, 2022. The said modification was allowed by the learned Arbitrator and the directions contained in the order dated January 12, 2022 were modified *vide* order dated February 19, 2022 with the following operative directions:-

> *"In the circumstances, the application is allowed with the direction to the respondent to retain the Bank Guarantee of Rs.4,05,56,000/-. The claimant is directed to ensure that the Bank Guarantee is valid during the pendency of his case. The Respondent is directed to forthwith release the Bank Guarantee in the sum of Rs.10,00,00,000/- within two days from the receipt of this order."*

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8. It is the case of Mr. Jaswinder Singh, learned counsel for the appellant that the orders dated January 12, 2022 and February 19, 2022 passed by the learned Arbitrator proceeds on a misconception of the contractual provisions and has rendered observations on merits of the controversy infructuous. It is his submission that the principles underlying the grant of interim relief under Section 17 of the Act of 1996 have not been applied correctly and as such the award is unsustainable.

9. He stated that the learned Arbitrator has pre-judged the entire issue inasmuch as the counter claim preferred by the appellant for a sum of approximately ₹14 crore is still pending adjudication. According to him, the possibility of recovery of any counter claim, if so awarded, is remote if the Bank Guarantees are released as directed by the learned Arbitrator. In the application under Section 17 of the Act of 1996, the respondent has admitted to severe financial distress aggravated by the COVID-19 pandemic. It is his contention that to ensure that equities are maintained between the parties, the learned Arbitrator should not have directed release of the Bank Guarantee. In other words, his submission is that if the counter claims of the appellant are allowed, it would not be able to recover the same from the respondent in the absence of the Bank Guarantee.

10. That apart, he submitted that the learned Arbitrator wrongly applied the principles of Order XXXVIII Rule 5 CPC in directing the release of the Bank Guarantee of ₹10,00,00,000/-, as

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it is not a case where the appellant has sought intervention of the Court or the Arbitrator regarding furnishing Bank Guarantee to secure the claims preferred by the appellant.

11. Mr. Singh has further submitted that the learned Arbitrator has failed to appreciate that as per the final bill submitted to the respondent, no amount was due to the respondent in terms of the contract. This aspect was brought out in the Statement of Defence of the appellant wherein it was clearly averred that as per the final bill submitted by the respondent the undisputed amount works out to (-) ₹27.98 crore, which implies that the said amount is recoverable from the respondent. On the other hand, in the Statement of Claim of the respondent the first claim pertains to non-payment of the final bill. Even in the application filed by the respondent under Section 17, a similar averment is made. The learned Arbitrator has erroneously proceeded on the assumption that the final bill is beyond the pale of controversy. It is contended by Mr. Singh that the claims and counter claims preferred by the parties were to be adjudicated by the learned Arbitrator, and this adjudication would fructify only when the learned Arbitrator renders a final award. The release of the Performance Bank Guarantee could only have been granted as part of the final award in the event of the appellant being unsuccessful in the arbitration proceedings.

12. He also stated that the learned Arbitrator erred in refusing to accept the correctness of letter dated October 20, 2021 observing

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inter alia that it had been authored after the institution of the arbitral proceedings. The said letter which clarified certain discrepancies in the Board proceedings could not have been simply rejected without the recording of evidence and in the absence of any other material suggesting to the contrary. The letter clearly pointed out the exact quantity of steel, i.e., 1775.509 MT, that was required to be procured by the respondent for completion of the work, but which it failed to do. The same is liable to be recovered from the respondent and has to be imposed on it either as part of the final bill or as part of a separate claim. However, without examining all these aspects the learned Arbitrator has rejected outright the said letter.

13. He has further submitted that the learned Arbitrator also failed to appreciate Clauses 19.4 and Clause 58 of the GCC in the proper perspective. The said clauses are reproduced as under:-

Clause 19.4

> *"19.4 All compensation or other sums of money payable by the contractor to the government under the terms of this contract or under any other contract with Government may be deducted from, or paid by the sale of a sufficient part of the Performance Security or from the interest arising there from or from any sums which may be due or may become due to the contractor by the government on any account whatsoever and in the event of his Performance Security being reduced by reason or any such deduction, or sale as aforesaid, the Contractor shall within ten days thereafter make good in cash or securities, endorsed as aforesaid, any sum or sums which may have been deducted from or*

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realized by the sale of, his performance Security or any part there of.

Government shall not be responsible for any loss of securities or for any depreciation in the value of securities while in their charge nor for loss of interest thereon."

Clause 58

"58. Refund of Performance Security.

The Performance Security deposit mentioned in condition 19 above may be refunded to the Contractor after the expiration of the defects liability period (vide Condition 40) by the P.M. provided always that the contractor shall first have been paid the final bill and have rendered a No-Demand Certificate on the form at Annexure 'G' to these conditions"

According to Mr. Singh, Clause 19.4 is applicable to the present situation wherein the appellant had substantial claims including amount of final bill against the respondent. Therefore, the Bank Guarantees furnished by the respondent were to secure the compensation and other sums of money payable by the respondent under the terms of the contract. Even the conditions requisite under Clause 58 were not satisfied, inasmuch as the learned Arbitrator erroneously postulated that the respondent has been paid the final bill, when the same is disputed in the Statement of Claims filed by the respondent itself wherein the first claim pertain to non-payment of the final bill. The learned Arbitrator has also held that whatever claims/compensation/damages are being claimed by the appellant from the respondent in the arbitral proceedings would have to be proved. It is the submission of Mr.

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Singh that if the claims are proved in final award the appellant would not be merely retaining the Bank Guarantee but would be seeking to encash it.

14. That apart, he submitted that the learned Arbitrator has disregarded the requirement of issuing a 'no-demand certificate' on the ground that the same runs contrary to Section 28 of the Indian Contract Act, 1872, when there is nothing to suggest the same.

15. He stated that the interpretation adopted by the learned Arbitrator violates the terms of the contract and is therefore, patently illegal and opposed to the public policy of India. The illegality committed by the learned Arbitrator while interpreting the contractual provisions goes to the root of matter, as the said interpretation forms the bed rock of the impugned order. He has sought the prayers as made in the appeal.

16. Ms. Amrita Panda, learned counsel appearing for the respondent stated that pursuant to the order of the learned Arbitrator dated January 12, 2022, the respondent filed an application contending that the respondent already has a Bank Guarantee of ₹4,05,56,000/- which is valid till August 28, 2023 and therefore, instead of depositing a fresh Bank Guarantee for ₹3,00,00,000/- against the release of ₹14,05,56,000/-, the respondent be permitted to retain one Bank Guarantee for ₹4,05,56,000/- and the other Bank Guarantee for ₹10,00,00,000/- be released to the respondent. The learned Arbitrator *vide* order dated February 19, 2022 allowed this prayer.

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17. She has submitted at the outset that it is trite law that the ambit of Section 37 of the Act 1996 is not similar that of a regular appeal. The Supreme Court as well as this Court have, in a plethora of decisions held that unless the discretion exercised by the Tribunal is perverse and contrary to law, the appellate Court ought not to interfere with the order, merely because the appellate Court in the exercise of its discretion would have acted otherwise. According to her, the *locus classicus* on this point is ***Wander Ltd. v. Antox India Pvt. Ltd., 1990 Supp SCC 727***. She placed further reliance on the judgments of this Court in the cases of ***Bakshi Speedways v. Hindustan Petroleum Corporation, MANU/DE/2046/2009***; ***Shiningkart Ecommerce Pvt. Ltd. v. Jiyayum Data Ltd., 2019 SCC OnLine Del 11464*** and ***Sona Corporation Ltd. v. Ingram Micro India Ltd., 2020 SCC OnLine Del 300***.

18. It is the case of the respondent as contended by Ms. Panda that the appellant in the final bill sent by the appellant itself on March 15, 2021 showed that ₹4,49,07,199/- was recoverable by the appellant from the respondent. However, at this stage, admittedly the appellant failed to adjust the Bank Guarantee (s) worth ₹3,00,00,000/- which it had already encashed. Further, the appellant admitted in its letter dated July 23, 2021 that ₹6,29,60,450.50/- which had been charged against the respondent was actually the amount the appellant had claimed from the erstwhile contractor for the project. Therefore, the said amount also

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could not be imposed on the respondent. After adjusting these two figures, a sum of ₹4,80,53,251/- would become payable to the respondent herein. It is on this basis that the respondent filed the application under Section 17 of the Act of 1996 before the Arbitrator.

19. She stated that the impugned orders have judicially balanced the equities inasmuch as the appellant already has the encashed Bank Guarantee(s) of ₹3,00,00,000/-, in addition to which, till the conclusion of arbitration, the appellant is also secured by the Bank Guarantee of ₹4,05,56,000/-. Against this total amount of ₹7,05,56,000/- the counter claim filed by the appellant is to the tune of ₹15 crore wherein approximately more than ₹7 crore has been claimed as interest under various heads. Therefore, the Tribunal has protected the interest of the appellant in an appropriate manner.

20. She has relied upon the judgment of this Court in ***Bharat Sanchar Nigam Ltd. v. Teracom Ltd., OMP (COMM) 431/2019***, dated March 28, 2022 to contend that performance security cannot be retained after acknowledgement of due performance of contract. In the present case, the appellant issued completion certificate to the respondent in July 2018, thereby acknowledging due performance. The defects liability period also expired in August 2020. However, the appellant has still been withholding the performance security given by the respondent worth ₹14,05,56,000/- in contravention to the law laid down by this

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Court. It is her argument that ***Bharat Sanchar Nigam Ltd. (supra)*** makes it clear that that performance security cannot be withheld to secure counter claims, which is what the appellant is seeking to do, and what has been interdicted by the learned Arbitrator.

21. That apart, she stated that at present the respondent is performing more than five contracts with the same appellant, and they have three ongoing arbitral disputes and seven disputes involving approximately ₹30 crore engulfed in execution proceedings awarded in favour of the respondent and against the appellant. She has sought dismissal of the appeal.

22. Having heard the learned counsel for the parties and perused the record, the only issue which arises for consideration is whether the learned Arbitrator was justified in passing the order dated January 12, 2022, further modified by order dated February 19, 2022, directing the appellant herein to release the Bank Guarantee for ₹10 crore to the respondent and retain the Bank Guarantee for ₹4,05,56,000/-. To decide this issue, the following facts as borne out from the record, need to be noted.

23. The respondent has placed on record of the learned Arbitrator a final bill prepared by the appellant for a sum of ₹4,49,07,199/-. On the other hand, the appellant, along with its Statement of Counter-Claims, placed on record final bill showing an amount of ₹5,98,62,665.68 as recoverable from the respondent. It is the case of the appellant herein that the final bill filed by the

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appellant includes an adjustment of ₹3,00,00,000/- i.e., the amount of Bank Guarantee(s) already encashed by the respondent.

24. Further, the Schedule of Credit recorded by the appellant in the final bill is ₹29,54,94,186/- as against ₹23,25,33,736/- mentioned by the respondent. This difference, i.e., of ₹6,29,60,450.59/-, according to the respondent, arose because the same is liable to be claimed by the appellant from the previous contractor and not from the respondent herein. Even with regard to the claim made by the appellant qua the previous contractor, an issue has arisen in terms of the letter dated October 20, 2021 that the actual quantity of steel purchased by the previous contractor was 6574.811 MT and not 8350.320 MT as depicted earlier. In other words, the difference of 1775.509 MT has to be accounted for by the respondent herein.

25. The learned Arbitrator noting the fact that the counter claim of the appellant was for ₹5,98,62,665.68, has adjusted the said amount from ₹6,29,60,450.59 and directed the refund of an amount of ₹30,97,784.91 (*vide* paragraph 32 of the order dated January 12, 2022) to the respondent.

26. The plea of Mr. Jaswinder Singh is primarily that the counter claims of the appellant being for ₹14,04,35,140.12 plus 24% *pendente lite* and future interest and ₹60,00,000/- towards costs, and the respondent admittedly being in financial distress, if the counter claims are allowed, the amount can be recovered by encashing the Bank Guarantees. The plea is countered by Ms.

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Amrita Panda by stating the appellant has already encashed two Bank Guarantees for a total of ₹3,00,00,000/- and in addition the appellant has been secured by the Bank Guarantee of ₹4,05,56,000/-. So against this total amount of ₹7,05,56,000/- the counter claim filed by the appellant is to the tune of ₹14,04,35,140.12, wherein approximately more than ₹7 crore has been claimed as interest. Therefore, the Tribunal has protected the interest of the appellant in an appropriate manner.

27. It is clear that the learned Arbitrator, for the purpose of interim relief, after adjusting the counter claim of the appellant for ₹5,98,62,665.68, against the amount of ₹6,29,60,450.59 charged against the previous contractor, has directed the release of ₹30,97,748.91 to the respondent, which means that the only further amounts claimed by the appellant are the following:-

i. Non-submission of CPM network by the respondent amounting to ₹25,24,000/- ;

ii. Interest on over-payment to the respondent amounting to ₹4,19,84,605.62;

iii. Interest on excess mobilisation advance given amounting to ₹3,30,70,805.50;

iv. *Pendente lite* and future interest at 24% p.a.;

v. Cost of reference to arbitration calculated tentatively at ₹60,00,000/-.

Suffice it to state, these claims would fructify in favour of the appellant when and only if, the same are allowed pursuant to due adjudication by the learned Arbitrator.

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28. The only issue which now arises is whether the learned Arbitrator should have protected appellant herein for the complete counter claims.

29. As noted from the order dated February 19, 2022, the learned Arbitrator has directed retention of Bank Guarantee for an amount of ₹4,05,56,000/- ,which according to me shall balance the equities between the parties, as the counter claims of the appellant, which mainly consist of interest under various heads, are still required to be adjudicated by the learned Arbitrator. In that sense, the same is not a determined debt. The right of the appellant to claim such amount would only fructify upon final adjudication by the learned Arbitrator.

30. I must state, the plea of Mr. Singh is that the appellant is within its right to retain the Bank Guarantees, as one of the conditions stipulated under Clause 58 of the GCC require the Performance Bank Guarantees to be refunded to the contractor after the expiration of the defect liability period, which presupposes that the contractor has been paid the final bill, which condition has not been fulfilled in the case. His contention is that as the respondent in its Statement of Claims before the learned Arbitrator has raised an issue of non-payment of final bill. This plea fails to impress this Court. It is the case of the appellant itself that there is no amount payable to the respondent as per the final bill. If that be so, the appellant cannot now blow hot and cold and say that since the final bill has not been paid to the respondent, the

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condition stipulated in Clause 58 has not been satisfied. I find myself in agreement with the conclusion drawn by the learned Arbitrator in paragraphs 35 and 36 of the order dated January 12, 2022. Further, I find that the learned Arbitrator has rightly relied upon the judgment of this Court in ***Intertoll Ics Cecons. O & M Co. Pvt. Ltd. v. National Highways Authority of India, 2013(1) ArbLR 515 (Delhi).***

31. The submission of Ms. Panda that the Performance Bank Guarantee could not have been retained by the appellant on a belief that it would be entitled to recover the amounts of counter claims from such Performance Bank Guarantees, is appealing to this Court. This I say so, noting the decision of a coordinate Bench of this Court in ***Bharat Sanchar Nigam Limited (supra)***, wherein it is held as under:-

> *"15. The contention that BSNL was entitled to forfeit the Performance Bank Guarantee even though Teracom had performed the Contract, is bereft of any merit. Teracom had submitted the Performance Bank Guarantee, which was initially for a term of three years with effect from 18.12.2010. Thus, the Performance Bank Guarantee expired on 17.12.2013. However, BSNL had insisted that the same be extended as at the material time; the Contract had not been fully performed. The Arbitral Tribunal noted that the Performance Bank Guarantee was successively extended eight times. The last extension was up to 30.09.2017. However, since the Performance Bank Guarantee was not extended thereafter, BSNL had invoked the same. It is important to note that the Performance Bank*

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Guarantee was invoked not because BSNL had claimed that any amount was due to it or that Teracom had failed to perform the Contract; it was done solely for the reason that the No Claim Certificates (NCCs) had not been issued by various Circles and therefore, BSNL was required to be secured for due performance of the Contract in question. There was no occasion for BSNL to forfeit any amount recovered against the Performance Bank Guarantee because BSNL had not made any claim regarding failure on the part of Teracom to perform its obligations under the Contract.

16. The contention that BSNL is entitled to forfeit the amount on encashment of the Bank Guarantee, apart from being unmerited, runs contrary to the defence set up by BSNL in its Statement of Defence. Paragraph 7 of its Statement of Defence filed before the Arbitral Tribunal is relevant and set out below:

> *"7. Further, the bank guarantee was a security given by the Claimant to ensure that the goods were supplied to the Respondent in terms of the Purchase Order dated 02.02.2011. The successful delivery of the goods could only be ascertained once the Respondent received NCC/ TOC from the respective Circles. Since the Respondent had not received the required NCC/ TOC from all its Circles, the bank guarantee had to be kept alive. However, the Claimant failed to keep the bank guarantee alive and therefore in December, 2017 when the Bank refused to extend the bank guarantee any further and asked the Respondent to encash it instead. Therefore, the Respondent was constrained to encash the bank guarantee only because the Bank refused to extend the same. It is pertinent to mention that the same has been*

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> *encashed in terms of the Performance Bank Guarantee itself. As mentioned above, even though the same has been encashed, it is kept as a security deposit and the amount shall be released to the Claimant once it completes its contractual obligations towards the Respondent."*
>
> *17. It is clear from the above that it was BSNL's contention that it was holding the money recovered from invoking the Performance Bank Guarantee as a security deposit, which would be refunded to Teracom after the NCCs were received from various Telecom Circles.*
>
> *18. The Arbitral Tribunal had noted that the witness examined by BSNL [Mr Sanjesh Kumar Kaim, AGM (SE), BSNL] had affirmed in his affidavit dated 04.01.2019 that BSNL had received the Takeover Certificates / No Claim Certificates (TOC/NCC) from all the concerned twenty-four State Telecom Circles of BSNL. The Arbitral Tribunal also noted that BSNL had clarified by a clarification dated 03.06.2019, that the last NCC was received from the Kolkata Circle on 20.10.2018. The aforesaid findings of the Arbitral Tribunal are not disputed.*
>
> *19. In view of the above, the Arbitral Tribunal had rightly directed refund of the amount recovered by BSNL from invocation of the Performance Bank Guarantee in question. <u>There is no principle in law whereby BSNL could be permitted to retain the Performance Security after it had acknowledged due performance of the Contract</u>."*
>
> *(emphasis supplied)*

32. In the present case, due performance of the contract has been acknowledged by the appellant when it issued the Completion

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Certificate in July 2018. If that be so, the appellant cannot claim any right to hold on to the Performance Bank Guarantees after July 2018.

33. In view of my above discussion, I find that this appeal is bereft of any merit. The same is dismissed. No costs.

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34. In view of the above, this application has become infructuous and is dismissed as such.

V. KAMESWAR RAO, J

DECEMBER 12, 2022*/ds*

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