

(2022) 07 DEL CK 0011

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 154 Of 2021, I. A. Nos. 5562, 5563, 5565 Of 2021

Kanti Bijlee Utpadan Nigam Ltd

APPELLANT

Vs

Paltech Cooling Towers & Equipments Ltd

RESPONDENT

Date of Decision : 05-07-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 7, 17, 31(7)(b), 33, 34, 34(4)
Micro, Small And Medium Enterprises Development Act, 2006 — Section 18

Citation : (2022) 07 DEL CK 0011

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Puneet Taneja, Laxmi Kumar, Manmohan Singh Narula, Ramesh Singh, Sakshi Mehley, Harshita Kumar

Final Decision : Allowed

Judgement

Vibhu Bakhru, J

1. Kanti Bijlee Utpadan Nigam Ltd (hereafter 'KBUNL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an arbitral award dated 30.12.2020 (hereafter the 'impugned award') delivered by an Arbitral Tribunal comprising of a Sole Arbitrator (hereafter the 'Arbitral Tribunal').

2. KBUNL was earlier a Joint Venture of NTPC Ltd. and Bihar Electricity Board and is currently, a 100% wholly owned subsidiary of NTPC Ltd. KBUNL was incorporated for the operation and maintenance of Units no.1 and 2 as well as installation of Units no. 3 and 4 of the Muzaffarpur Thermal Power Station located at Kanti, Distt., Muzaffarpur, Bihar.

3. Paltech Cooling Towers & Equipments Ltd (hereafter 'PCTEL') is, inter-alia, engaged in the business of manufacturing of cooling and chilling plants and has been registered as a small scale industry under the Micro, Small and Medium

Enterprises Act, 2006 (hereafter the 'MSME Act').

4. On 26.06.2010, KBUNL had invited sealed bids being IFD No. CS-0350-135-2 for "induced draft cooling tower package for Muzaffarpur Thermal Power Project Stage-II".

5. PCTEL submitted its bid and was declared successful. Thereafter, the contract was awarded to PCTEL through two separate Notifications of Award dated 09.08.2011 bearing (i) Ref No. CS-0350-1352-2-FC-NOA-24 for Ex-Works supply valued at Rs. 13,52,30,000/- (hereafter the 'Supply Contract') and; (ii) Ref No. CS-0350-1352-2-FC-NOA-25 for providing all services to be supplied by PCTEL for complete induced draft cooling tower package for Muzaffarpur Thermal Power Project, Stage-II, valued at Rs. 31,90,06,000/- (hereafter 'the Service Contract').

6. The Supply Contract and the Service Contract (collectively referred to as 'Contracts') were entered into between the parties on 10.09.2011. The work under the Contracts commenced from the date of Notification of Award, that is, 09.08.2011 and was to be completed within a period of 24 (twenty-four) months, that is, by 08.08.2013.

7. In terms of the Contracts entered into between the parties, KBUNL was required to retain 10% of the Contract Price until the Performance Guarantee Test (PGT) was conducted. In compliance with the said terms on 16.09.2011, PCTEL furnished two Performance Bank Guarantees, being Bank Guarantee No. 0407911BG0000141 for an amount of Rs. 1,35,23,000/- in relation to the Supply Contract and, Bank Guarantee No. 0407911BG0000140 for an amount of Rs. 3,19,00,600/- in relation to the Service Contract, issued by the State Bank of India in favour of KBUNL.

8. KBUNL claims that due to various reasons attributable to PCTEL, the works could not be completed within the stipulated time period, that is, by 08.08.2013 under both the Service Contract and Supply Contract. KBUNL further claims that seventeen time extensions were requested by PCTEL to facilitate completion of works which was granted without prejudice to KBUNL's right to levy liquidated damages in terms of the Contracts.

9. On 16.03.2016, PCTEL completed facilities Cooling Tower No. 3 (CT#3), Cooling Tower No. 4 (CT#4) and Control Room under Clause 24 of the General Conditions of Contract (GCC) (Commissioning and Completion of Facilities). The same was handed over to KBUNL along with the responsibility for its care and custody. On 21.04.2016, PCTEL informed KBUNL that it had completed the works under Clause 24 of the GCC and requested issuance of a certificate of Completion of Facilities ('COF') and release of its dues. Several meetings were held between KBUNL and PCTEL between May 2016 to December 2016 regarding PCTEL's request for issuance of certificate of COF and release of the balance payment.

10. On 12.01.2017, PCTEL sent a letter requesting KBUNL to release payment in relation to the Supply Contract for (a) BBU of Installation service amounting to

Rs. 1,01,29,500/- and; (b) 10% of the total ex-work price of the main equipment for the entire contract amounting to ₹1,30,35,000/-. Thereafter, by another letter dated 31.03.2017, PCTEL once again requested KBUNL for issuance of certificate of COF for the facility being duly completed on 16.03.2016. PCTEL sent several reminder letters dated 01.05.2017, 27.05.2017, 07.06.2017 and 30.06.2017 for issuance of certificate of COF and release of the balance payments.

11. A certificate of COF was provided to PCTEL on 12.07.2017 with the date of completion of works recorded as 16.03.2016. The said certificate, expressly stated that PCTEL would complete the outstanding items pertaining to various minor/major balance works found in Cooling Tower Nos. 3 and 4 as well as other sites. PCTEL was also asked to complete the PGT and to discharge its obligations under the Defect Liability Period.

12. PCTEL, on 22.11.2017, informed KBUNL that both the Performance Bank Guarantees (PBGs) amounting Rs. 4,54,23,600/- ought to be returned within 90 days from the date of completion of the Defect Liability Period. PCTEL stated that since the defect liability period came to end on completion of 18 months from the date of completion of COF, that is on 15.09.2017, therefore, KBUNL was required to return both Performance Bank Guarantees within 90 days thereafter, that is by 15.12.2017.

13. PCTEL sent a letter dated 13.12.2017 stating that the PGT was to be conducted within a period of 12 months from the date of completion of the facility (which was on 16.03.2016), however, since the certificate of COF was issued only on 12.07.2017, the delay in conducting the PGT could not be attributable to PCTEL. It further requested KBUNL to release 10% of payment of approximately Rs. 4.5 crores. KBUNL averred that in its letter dated 16.12.2017, it informed PCTEL that the certificate of COF was conditional on completion of balance works and since the same still remained pending, the PBGs would not be released. KBUNL vide letter dated 20.12.2017 called upon PCTEL to complete the outstanding balance work including conducting the PGT.

14. By a letter dated 13.02.2018, KBUNL inquired about the pending status of balance works/punch point works from PCTEL. By another letter dated 14.02.2018, KBUNL reminded PCTEL that the pending works still remained incomplete and for this reason, it was unable to process the release of the PBGs. On 19.02.2018, PCTEL informed KBUNL that it had completed all Mechanical Punch points as mentioned in the conditions of the certificate of COF except a single item which was 'VMS commissioning' and assured KBUNL that the balance civil work will be completed soon. PCTEL further stated that the delay in rectification of the balance punch points was due to financial liabilities incurred by it as due payments were withheld by KBUNL despite repeated requests. By a letter dated 23.02.2018, PCTEL responded to KBUNL's letter dated 13.02.2018 and stated that the delay in carrying on the PGT is due to reasons attributable to KBUNL alone. This is because first, the PGT could have been carried on without completion of punch points as it would not have affected the PGT. And second,

that KBUNL plant was not ready within one year from the date of COF and thus, the PGT could not be conducted due to reasons attributable to KBUNL. In any event, it informed KBUNL to release immediate payment of the balance due.

15. PCTEL approached the Chairman and Managing Director of NTPC Ltd vide letter dated 06.03.2018 regarding release of pending payment of Rs. 4.5 crores which was withheld by KBUNL on account of PGT and was overdue since October 2016. In this regard PCTEL stated that that as per the Contract, the PGT was to be carried out within 12 months from the COF date, that is by March 2017. Since, the time to conduct the PGT had elapsed due to reasons not attributable to PCTEL, it refused to carry out the PGT.

16. In response to the letter dated 06.03.2018, KBUNL vide its letter dated 16.03.2018 stated that the request of PCTEL for release of the PBGs would be considered after successful completion of the PGT. On the same date, that is 16.03.2018, PCTEL informed KBUNL that it had already completed 80% of the Civil Portions Work and that only VMS commissioning was left. PCTEL further stated that on several occasions, reminders and requests were made to KBUNL to send its representatives to check completion of the civil portion work however, KBUNL had continued to act in contravention to the terms agreed between the parties.

17. PCTEL sent another reminder letter on 21.03.2018 to the Chairman and Managing Director of KBUNL for release of the PBGs as the facilities stood completed on 16.03.2016. A similar letter of the same date was also addressed to the Secretary, Ministry of Power informing them of the behaviour of KBUNL regarding non-discharge of the PBGs and non-release of the outstanding payments.

18. On 09.04.2018, KBUNL reiterated its earlier position that the PBGs and the outstanding payments will be released only after successful completion of the PGT. In the meanwhile, KBUNL addressed a letter to the Manager of State Bank of India to extend the Bank Guarantee bearing no. 0407911BG0000140 beyond 08.05.2018 and in the event the Bank Guarantee is not extended, the amount of the Bank Guarantee being Rs. 3,19,00,600/- should be remitted to KBUNL.

19. PCTEL sent another letter to KBUNL on 16.04.2018 requesting release of Bank Guarantee bearing number 0407911BG0000140 as it would ease its financial burden. On 18.04.2018, KBUNL informed PCTEL that the release of the PBGs was connected to the defect liability period and the certificate of completion was conditional on completion of pending punching points. However, according to PCTEL the information set out by KBUNL in the said letter were made with mala fide intention.

20. By a letter dated 28.04.2018, PCTEL informed KBUNL that in a meeting held between PCTEL and NTPC on 25.04.2018, PCTEL agreed that the PGT shall be conducted by KBUNL through an Indian Agency. It was further agreed that since the cooling tower #3 was in operation from March, 2015 and cooling tower #4

from March, 2016, it would not be possible to meet the parameters which would be applicable to a new installation and thus, aging/de-rating of the cooling towers should be taken into consideration. KBUNL was further asked to release the PBGs before the expiry date, that is by 08.05.2018. The aforesaid was communicated by PCTEL to KBUNL on 28.04.2018.

21. Further discussion was held between PCTEL and KBUNL on 03.05.2018 regarding conduction of the PGT by an Indian Agency instead of a CTI approved agency. PCTEL informed KBUNL that the PGT can be conducted if NTPC Ltd. releases both the PBGs however, KBUNL was reluctant to release the PBGs as PGT was being conducted by an Indian Agency and not a CTI, USA approved agency. The minutes of the meeting was communicated by PCTEL to KBUNL on 04.05.2018 along with a request letter to release the PBGs of Rs. 4.5 crores by 07.05.2018.

22. Several meetings took place between PCTEL and KBUNL from March 2018 till June 2018. PCTEL sent another letter to KBUNL on 12.07.2018 explaining the situation as well as the terms and conditions regarding the PGT and the payments being withheld by KBUNL.

23. By its letters dated 07.07.2018 and 09.07.2018, KBUNL notified PCTEL that it would carry out the Performance Evaluation Test. On 07.08.2018, the Performance Evaluation Test was carried out by KBUNL through an independent agency – Central Power Research Institute (CPRI) and it concluded in its report that in Cooling Tower No.3 there was a shortfall of 3.2 degrees Celsius and for Cooling Tower No.4 there was a shortfall of 3.9 degrees Celsius. KBUNL in its letter dated 24.08.2018 called upon PCTEL to rectify the performance deficiencies and carry out the PGT within the stipulated time period to facilitate the release of PBGs and the PGT payments.

24. However, PCTEL filed a Writ Petition before this Court being WP (C) No. 9380/2018 and sought release of the PBGs and payments linked to the PGT. By an order dated 07.09.2018, this Court dismissed the Writ Petition leaving PCTEL to avail appropriate remedy under the dispute resolution clause provided under the Contracts.

25. On 21.09.2018, KBUNL once again called upon PCTEL to complete the balance works and to conduct the PGT for the two Cooling Towers. PCTEL once again approached this Court by filing a civil suit being Civil Suit No. CS (OS) No. 499/2018. By an order dated 04.10.2018, the civil suit was dismissed as withdrawn with liberty to avail appropriate legal remedy.

26. By a letter dated 09.10.2018 issued by the State Bank of India, it was informed that the both the PBGs were extended for another period of three months upto 08.08.2018, again extended upto 08.10.2018 and then again extended upto 08.11.2018. On 08.10.2018, KBUNL wrote a letter to the State Bank of India for invocation of the PBGs. Accordingly, the State Bank of India remitted a sum of Rs. 4,54,23,600/- in favour of KBUNL on 10.10.2018.

However, on 15.01.2019, KBUNL returned the encashed Bank Guarantees and fresh Bank Guarantees were submitted by PCTEL in favour of KBUNL.

27. Thereafter, KBUNL approached the Micro, Small and Medium Enterprise Facilitation Council, Chandigarh (hereafter 'MSMEFC') and sought the dispute between the parties to be resolved as per Section 18 of the MSME Act. The MSMEFC referred the disputes to arbitration and appointed Mr RP Bhasin, (Retd.) District and Sessions Judge, Haryana as the sole arbitrator.

28. In terms of Clause 3 read with Clause 6.2.7 (ii) of the GCC, the Courts at Delhi have exclusive jurisdiction and venue for arbitration was at Delhi. In light thereof, KBUNL approach this Court by way of an Arbitration Petition No. 136/2019 and sought the appointment of arbitrator and venue of arbitration should be in line with the GCC read with Section 7 of the A&C Act. With the consent of the parties, this Court by an order dated 13.03.2019 directed the venue of Arbitration to be shifted to Delhi.

29. PCTEL filed its Statement of Claims, claiming that a sum of Rs. 45,95,10,542/- along with interest be decreed in its favour. The said amount includes the balance amount, Bank Guarantees amount, escalation and all loss of business income, loss of capital, Bank Guarantees extension charges, establishment cost, interest on margin money, penalty imposed by the Govt., idle charges, expenses of site visits as well as compensation for mental agony. PCTEL further claimed interest both pendente lite and future interest at compound interest with monthly rests at three times of the bank rate notified by the Reserve Bank of India, that is at the rate of 6.5% monthly rate until realization of the decrimal amount.

30. KBUNL also raised the following counter-claims: (i) liquidated damages amounting to Rs. 2,27,11,800/- due to delay caused in completion of the works; (ii) liquidated damages amounting to Rs. 43,94,35,898/- due to shortfall in the performance of Cooling Tower #3 and Cooling Tower #4; (iii) amount of Rs. 25,22,000/- towards cost of performance evaluation test carried out by KBUNL; (iv) an amount of Rs. 3,17,59,046/- in the even PCTEL fails to discharge its liability on account of non-compliance of labour laws; (v) declaration be issued that PCTEL would indemnify KBUNL for an amount of Rs. 70,41,310/- or any other amount determined by MSME Facilitation Council, Patna or any other authority regarding payment of outstanding dues of PCTEL to its sub-vendors namely M/s Jai Mata Dee Construction; (vi) sum of Rs. 37,08,428/- or any other higher amount as determined by the Statutory Authorities to be paid by KBUNL to PCTEL for use of Royalty paid items; (vii) payment of Rs. 5,40,000/- along with interest from PCTEL with respect to release of payment but no work being carried out; (viii) an amount of Rs. 7,04,046/- with interest, in favour of KBUNL towards material taken on record but not returned; (ix) sum of Rs. 56,21,912.8/- along with interest towards the risk and cost of work carried out by KBUNL on account of PCTEL failing to execute the same; (x) a sum of Rs. 5,65,207/- to be paid to KBUNL for the work carried out at the risk and cost of PCTEL; (xi) interest

at the rate of 14.5% per annum for the counter claims (i) to (iv) from the date of cause of action till the date of the award and in terms of Section 31(7)(b) of the A&C Act from the date of award till the date of payment; and (xii) cost of arbitration.

31. The Arbitral Tribunal delivered the impugned award on 30.12.2020 and awarded a lump sum amount of Rs. 5,50,00,000/- on all counts including the bank guarantee amount as well as interest component amount in favour of PCTEL. The Arbitral Tribunal further directed KBUNL to pay a sum of Rs. 11,32,360/- in favour of PCTEL towards costs of the arbitral proceedings. The Arbitral Tribunal rejected all counter-claims raised by KBUNL on grounds that the same were raised after a gap of 11 months, that is on 31.08.2019, and were merely a counter blast to frustrate the lawful dues of PCTEL.

32. It is relevant to note that at the material time, the Bank Guarantees, in question, for a sum of Rs. 4,54,23,600/- were valid and had not been encashed. The Arbitral Award did not specifically discharge the Bank Guarantees, however, it awarded a lumpsum of Rs. 5,50,00,000/- on all accounts including the Bank Guarantees. In the aforesaid context, PCTEL filed an application under Section 33 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), inter alia, stating that it was unable to interpret the amount required to be paid by KBUNL after discharge of the Bank Guarantees. It, accordingly, sought following clarifications.

“(a) Clarify the award dated 30.12.2020 to the extent of the manner in which the bank guarantees bearing numbers 0440219BG0000008 and 0440219800000009 are to be discharged by the Respondent;

(b) Clarify the award dated 30.12.2020 to the extent of the amount to be paid by the Respondent to the Claimant after the discharge of the bank guarantees;

(c) Clarify whether the amount incurred by the claimant in the extension of bank guarantees is included in the awarded amount of Rs. 5,50,00,000/- (Rupees Five Crore Fifty Lacs Only), and

(d) Pass any other direction(s) that this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case.”

33. The Arbitral Tribunal dismissed the said application by an order dated 08.01.2021 as being without any merit.

34. KBUNL has also filed an application in this Court under Section 34(4) of the A&C Act, inter alia, stating that the impugned award has led to confusion on two accounts. First, it had failed to give a reason as to how the amount of Rs. 5,50,00,000/- (Rupees Five Crores and Fifty Lacs) had been arrived at; and second whether the amount awarded was inclusive or exclusive of the Bank Guarantees. According to PCTEL, the impugned award does not suffer from any infirmity apart from lack of reasons and therefore, it prays that the present petition be adjourned to enable the Arbitral Tribunal to take appropriate action

for eliminating the grounds for setting aside the Arbitral Award.

Reasons and Conclusion

35. It is seen that the impugned award runs into 152 pages. Out of the same, 142 pages are reproduction of pleadings. Another 4 pages are devoted to general principles of law with no particular application to the facts of the present case. The findings and the reasons are discernible from the remaining 3 pages of the impugned award. This Court is unable to appreciate the manner in which the said impugned award has been drafted. The Arbitral Tribunal has reproduced the statement of claim; reply to the statement of defence; rejoinder filed by the claimant (PCTEL); PCTEL's application dated 29.06.2019, under Section 17 of the A&C Act; KBUNL's reply to the said application; PCTEL's application dated 08.07.2019 under Section 17 of the A&C Act; KBUNL's reply to the said application; statement of counter-claims filed by KBUNL; PCTEL's reply to the counter-claims; KBUNL's rejoinder to the counter-claims; PCTEL's application dated 13.10.2019, under Section 17 of the A&C Act;; KBUNL's reply to an application dated 10.11.2019; PCTEL's reply to the said application dated 17.11.2019; KBUNL's rejoinder to the said application dated 23.11.2019. These pleadings have been reproduced verbatim including all grammatical errors and the opening and closing formal passages. The Arbitral Tribunal has neither listed out any issues nor points for determination. It has also not discussed the various claims and counter-claims raised by the concerned parties. After reproducing the pleadings and applications as stated above and after referring to general principle of law, the Arbitral Tribunal had proceeded to record its conclusions and findings without discussing the rival claims or contentions in any detail.

36. It is, thus, necessary to examine the impugned award to ascertain whether it addresses the disputes between the parties even though it is economical in discussing the same.

37. The Arbitral Tribunal has found that KBUNL had failed to correctly assess the period for completion of the works in question. The Arbitral Tribunal had noted that time for completing the Contracts had been extended sixteen times and had reasoned that this was on account of failure on the part of KBUNL to correctly assess the period for completing the works. PCTEL had agreed that the Contracts would be completed within a period of 24 months. However, extension of time was sought and granted on various occasions. The Arbitral Tribunal has not alluded to any document on record or the reasons set out in the various documents for seeking extension of time. It has assumed that since extension of time had been granted on a number of occasions, KBUNL had incorrectly assessed the period required for completion of the works.

38. The Arbitral Tribunal has faulted KBUNL in not fixing the reasonable period for completion of the works assigned while completely overlooking that the time period as specified in the Contracts (24 months) was agreed to by both parties. There is no express finding that the delay had occasioned on account of failure

on the part of KBUNL to perform any of its obligations under the Contracts. It is material to note that it was not PCTEL's case in its statement of claim that the period of 24 months, as agreed under the Contracts, was unreasonable or that KBUNL had incorrectly assessed the period required for completion of the Contracts. Notwithstanding that it was not the case set up by PCTEL, the Arbitral Tribunal, without referring to any material, has returned the finding by surmising that frequent extensions were on account of incorrect assessment of the period required to complete the Contracts.

39. The Arbitral Tribunal also concluded that PCTEL had completed the facilities on 16.03.2016. This conclusion is based on the Certificate of COF dated 12.07.2017 issued by KBUNL. It was KBUNL's case that the Certificate of COF was a conditional one as it specifically provided that it did not absolve PCTEL from completing certain unexecuted works and to conduct the PGT. The Arbitral Tribunal rejected the aforesaid contention. The Arbitral Tribunal concluded that the Certificate of COF was issued in a casual manner. However, there is no reason indicated by the Arbitral Tribunal for the aforesaid conclusion. The relevant extract of the impugned award indicating the aforesaid conclusion is reproduced below:

"I am further of the clear opinion that later-on the respondent had realized that the certificate of completion of facilities as issued by it could be detrimental to their interests before a court of law with the result that the lower functionaries of the respondent had invented the concept of conditional completion of facilities certificate which is my views was/is nothing but twisting of facts and cannot be allowed and as such I return a firm finding that date of 16.03.2016 had/has to be taken as completion of facilities in the matter and I hold accordingly. From the facts on record of the case, it is clear that as per contract a period of 18 months was provided as defects liability period from the date of completion of the facilities and from the facts on record it had been fully established that the defects liability period in question had expired on: 15.12.2017 including 90 days period thereafter. From the facts on record of the case, it has been proved that the functionaries of the respondent should have discharged the bank guarantees on 15.12.2017. The stand taken by the learned counsel for the respondent to the effect that completion of facilities as stated by the claimant was never achieved on 16.03.2016 and that the certificate of completion as issued by the respondent was a conditional one and that the claimant had to do a lot of pending works before getting the completion certificate has to be rejected because the bare perusal of the certificate as issued by the respondent to the claimant available on the record of the case would show that it was/is a final completion certificate. Even otherwise the words "conditional certificate" for completion of facilities was never a part of the contract agreement executed between the parties and also never figured in any of the documents exchanged between the parties during the execution of the works. From the facts on record, it had been established that later on the lower functionaries of the respondent realizing that they had already issued certificate of completion of facilities used the word "conditional certificate"

for the 1st time while filing reply to the claim petition on 29.06.2019, though the claim petition had been filed as back as on 27.11.2018. From the facts on record, it had been proved that the commercial operation of Unit-1 had started on 18.03.2017 and of Unit-II on 01.07.2017. The contention of the learned counsel for the respondent to the effect that completion of facilities certificated dated 12.07.2017 was a conditional one issued at the behest of the claimant and to facilitate the claimant for release of the stage payment was/is of little consequence because when the lower functionaries after evaluating all aspects of the case had issued a completion certificate, the respondent cannot get out of it unless it had taken departmental action against the subordinate officials who had become instrumental in issuing a wrong certificate of completion of facilities."

40. The question whether facilities were fully completed on 16.03.2016 is a contentious one. According to KBUNL, it had issued the said Certificate of COF to enable PCTEL to collect certain funds notwithstanding that certain works were required to be completed. As is apparent from the above, the Arbitral Tribunal had rejected the aforesaid contention and had concluded that the facilities were completed on 16.03.2016, which was the date as mentioned in the certificate dated 12.07.2017. According to the Arbitral Tribunal, the said certificate was not conditional and referring the same as a conditional certificate, was an afterthought. The Arbitral Tribunal had observed that the Certificate of COF was mentioned as a conditional one for the first time in the Statement of Defence filed by KBUNL. It is contended on behalf of KBUNL that the aforesaid conclusion is, ex facie, erroneous.

41. At this stage, it is relevant to refer to the Certificate dated 12.07.2017. The said letter is reproduced below:

"8. Form of completion certificate

Date: 12.07.2017

IFB No.CS-0350/135/2 Dated 26.06.2010

Name of Contract: Supply and Installation of Induced Draft Cooling Tower of MTPP, Stage-II (2x195MW).

LOA No. CS-0350-135-2-FC-NOA-24 & CS-0350-135-2-SC-NOA-25 dtd - 09.08.2011

To,

M/s Paltech Cooling Towers & Equipments Ltd.

B-604, Sushant Lok-1, Gurgaon,

Haryana,

Dear Sir,

Pursuant to GCC Clause 24 (Commissioning and completion of the Facilities) of

the General Conditions of the Contract entered into between yourselves and the Employer dated 09.08.2011 relating to the Supply and Installation of Induced draft cooling tower, we hereby notify you that the following part(s) of the Facilities was (were) complete on the date specified below, and that, in accordance with the terms of the Contract, the Employer hereby takes over the said part(s) of the Facilities, together with the responsibility for care and custody and the risk of loss thereof on the date mentioned below:

1. CT#3 and CT#4 and Control Room:

2. Date of Completion: 16.03.2016

However you are required to complete the outstanding items listed in the attachment hereto as soon as practicable.

This letter does not relieve you of your obligation to complete the execution of the Facilities including Guarantee Test(s) in accordance with the Contract nor or your obligations during the Defect Liability Period.

Very truly yours,

[R. K. Sinha]

Chief Executive Officer

KBUNL, Kanti"

42. It is relevant to note that a list of balance works to be completed running into 3 pages was attached to the said letter and finds a reference in the said letter/certificate.

43. A plain reading of the certificate of COF indicates that it expressly provided that PCTEL was required to complete certain works. However, as noted above, the Arbitral Tribunal had rejected the contention that the certificate of COF was conditional, inter alia, on the ground that KBUNL had mentioned the same as a conditional one for the first time in the Statement of Defence. It was contended on behalf of KBUNL that the contemporaneous correspondence between the parties had also referred the said certificate of COF as a conditional one. However, the Arbitral Tribunal has completely ignored the said contention. It has not alluded to the documents referred to by KBUNL in particular PCTEL's letter dated 18.12.2017. PCTEL had sent the said letter dated 18.12.2017, inter alia, stating that the weather for conducting the PGT was not fit and the parties would have to wait for the summer season to conduct the said test. The relevant extract of the said letter reads as under:

"Apart from the PG Test of CT-3 & CT-4 which is pending due to longer time taking of approval of PG Test Procedure which we got very shortly but the time of conducting the PG Test is not fit for this weather so we have to wait for the coming summer season.

In case of balance punch points mention in conditional COF is not pending only

VMS commissioning and tidbit grouting of CT-4 is under process and all rest of punch points has been attended and corrected. For your ready reference the commissioning team of M/s Fouress Marshall will come very shortly.”

[underlined for emphasis]

44. It is apparent from the above that PCTEL had also referred to the Certificate of COF as a conditional certificate. Although this was pointed out by KBUNL, the Arbitral Tribunal had ignored the same. The conclusion that the certificate of COF was mentioned as a conditional one for the first time in the Statement of Defence filed on behalf of KBUNL is palpably erroneous as it was referred to as a conditional certificate in the contemporaneous correspondence between the parties prior to commencement of the arbitral proceedings.

45. The said letter also clearly indicates that it was not PCTEL's case at the material time that it was not required to conduct the PG Test and it had accepted the conditions mentioned in the certificate without protest. However, the Arbitral Tribunal had rejected this contention as well. The relevant extract of the impugned order reads as under:

“Another contention of the learned counsel of the respondent to the effect that the conditional COF (completion of facilities) dated 12.07.2017 was accepted by the claimant without any protest as is clear from the documents of the respondent has to be rejected and I reject the same being meritless because from the facts on record it is abundantly clear that the claimant had suffered due to the conduct of the respondent in not releasing its lawful remaining payment.”

46. PCTEL had not raised any plea in its Statement of Claim that its letter dated 18.12.2017 was sent under any economic coercion.

47. The Arbitral Tribunal also accepted PCTEL's contention that since the PG test was not conducted within one year of the COF, it was absolved from performing any such test.

48. Based on the aforesaid finding, the Arbitral Tribunal has awarded a lump sum amount of Rs. 5,50,00,000/- including the bank guarantees in favour of PCTEL.

49. As noted herein before, PCTEL had raised several claims. It had claimed a sum of Rs. 8,66,54,681/- as the amount illegally withheld by KBUNL. It had further sought discharge of the bank guarantees aggregating a sum at Rs. 4,54,23,600/-. In addition, it had claimed that it had suffered heavy losses on account of withholding of payment and quantified the same at Rs. 3,89,82,746/-. It had also claimed compensation for loss on account of non-return of the bank guarantees. It further claimed establishment cost of site with effect from 16.03.2016 till date at the rate of Rs. 2.5 lacs per month quantified at Rs. 77,50,000/-. PCTEL had made eighteen claims for an aggregate sum of Rs. 45,95,10,542/- including the amount of bank guarantees. In addition, PCTEL also claimed interest at the rate of 6.5% per annum on the aforesaid amount. Against the aforesaid claims, the Arbitral Tribunal had awarded a lump sum amount of

Rs. 5,50,00,000/-. There is no basis for the aforesaid quantification. The Arbitral Tribunal has awarded the said amount solely for the reason that in its view the same would meet the ends of justice. Plainly, an award of an arbitrary amount against specified claims, without adjudication of the said claims is unsustainable. There is no determination of the amount as payable by KBUNL to PCTEL on account of supply of goods or damages allegedly incurred by it. The award of an arbitrary amount without any discernible basis cannot be sustained.

50. PCTEL's application under Section 34(4) of the A&C Act is also unmerited. According to PCTEL, the present proceedings are required to be adjourned as the award of Rs. 5,50,00,000/- in its favour has led to confusion on two counts. First, it has failed to give any reasons as to how the aforesaid figure has been arrived at against the eighteen claims made by it for an amount of Rs. 45,95,10,542/-; and second, it is not clear whether the amount is inclusive of the bank guarantees.

51. This Court is unable to accept the above contention. There is no confusion as to the reasons that have persuaded the Arbitral Tribunal to award a sum of Rs. 5,50,00,000/-. The Arbitral Tribunal has clearly indicated that it has awarded the said sum as the same would meet the ends of justice. The amount quantified by the Arbitral Tribunal is not based on any calculations and therefore, there is no ground to adjourn the proceedings to enable the Arbitral Tribunal now to conjure up any basis for such calculation. It is clear from the impugned award that the amount has been ascertained in an arbitrary manner without adjudicating any claims made by PCTEL as according to the Arbitral Tribunal, the same would meet the interest of justice.

52. The impugned award also makes it explicitly clear that a sum of Rs. 5,50,00,000/- includes the amount of bank guarantees. PCTEL had filed an application under Section 33 of the A&C Act seeking clarification in this regard, which was dismissed by the Arbitral Tribunal as unmerited.

53. The counter-claims made by KBUNL were also rejected summarily as the Arbitral Tribunal concluded that the same had been raised as a counterblast to PCTEL's claim at a belated stage. The Arbitral Tribunal also concluded that the delay in execution of the works was on account of KBUNL in issuing the Certificate of COF. It is difficult to reconcile this finding with the Arbitral Tribunal's finding that PCTEL had "left some balance works which had to be got completed by the respondent at its own level/cost". It was KBUNL's case that the cooling towers did not meet the requisite parameters and thus, it was entitled to liquidated damages. KBUNL had referred to certain clauses of the Contracts which are set out below:

"CLAUSE NO.

FUNCTIONAL GUARANTEES & LIQUIDATED DAMAGES

1.00.00

PERFORMANCE GUARANTEES AND LIQUIDATED DAMAGES

1.01.00

Performance Guarantees

1.01.01

The Bidder shall guarantee that the equipment offered shall meet the ratings and performance requirement stipulated for various equipments covered in this specification. The Bidder shall also furnish a declaration in the manner prescribed and included in the relevant section of the bid forms/bid proposal sheets for certain guaranteed parameters which shall attract levy of liquidated damages for shortfall in performance.

1.02.00

Liquidated Damages for Short fall in Performance

1.02.01

All the cooling towers shall be subjected to Performance and Guarantee Test in line with the stipulation of relevant cause of general technical Conditions to prove the performance guarantee of all intermediate equipments. An indicative procedure to be followed for these Performance & Guarantee Test is given in sub-section titled "COOLING TOWERS-INDUCED DRAFT (MECHANICAL)" of this technical specification.

1.02.02

Should the results of the Performance & Guarantee Test as stipulated in General Technical Requirements show that the equipments have failed to meet the guaranteed parameters, the Contractor shall carry out modifications, if considered necessary, within 90 days of such tests.

1.02.03

If the equipment and overall tower performance fails to meet the guarantees, the Contractor shall be provided an opportunity to carry out modifications and rectifications within a reasonable time as may be decided by the Engineer to make good the deficiencies and improve the performance to guaranteed value at no extra cost to the Employer.

1.02.04

Bidder shall guarantee that the equipments offered shall meet the ratings and performance requirement stipulated for various equipments covered in these specifications.

1.02.05

The cold water temperature as specified in technical data sheets shall be

guaranteed by the Contractor for the design conditions of CW flow, range, ambient WBT specified in technical data sheet and design power consumption guaranteed by the Bidder.

1.02.06

For the cooling tower, the test circulating water flow shall be corrected for change in test fan power consumption as compared to the design fan power consumption using the cube root formula. "Predicted cold water temperature" shall then be arrived at from the guaranteed cold water temperature by correcting the same for the test conditions of range, ambient conditions and corrected circulating water flow using the performance curves furnished by the contractor. In case the 'Test cold water temperature' is higher than the "Predicted cold water temperature", Employer reserves the right to reject/accept the tower after assessing the liquidated damages which shall be worked out as given below:-

For every 0.2 deg. Centigrade rise in Cold Water Temperature above the guaranteed Value.

US \$ 173,855 per cooling tower.

The Liquidated damages shall be pro-rata for fractional parts of the deficiencies.

A maximum tolerance of 0.3 deg Centigrade in the cold water temperature shall however be allowed to take care of design & instrument uncertainties and inaccuracies. No other tolerance shall be permitted.

1.02.07

Bidders to note that the liquidated damages for shortfall in water temperature shall be worked out for all the cooling towers as described in relevant clause in Sub-section IIIA01, of Part – B of this Technical Specification."

54. This dispute was not addressed. The Arbitral Tribunal merely accepted that PCTEL was not required to conduct a PG Test.

55. This Court is of the view that the impugned award entered in favour of PCTEL is without any basis and without adjudicating any of the claims raised by PCTEL. In addition, the Court is also of the view that the decision of the Arbitral Tribunal to summarily reject the counter-claims cannot be sustained. The Arbitral Tribunal's conclusion that the counter-claims are belated is, ex facie, erroneous. The counter-claims are not barred by limitation and cannot be rejected on the grounds of delay.

56. For the reasons as aforesaid, the petition is allowed. The impugned award is set aside. The parties are at liberty to refer the disputes to arbitration afresh.

57. In the meanwhile, the Registry is directed to return the Bank Guarantees furnished by PCTEL in favour of KBUNL to KBUNL. The Bank Guarantees shall be extended for a period of at least two months and shall not be encashed for a

period of eight weeks. In the meanwhile, the parties, are at liberty to seek appropriate remedies.

58. The parties are left to bear their own costs.

59. All pending applications are also disposed of.