

GAHC040005222025

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WA/18/2025

M/s Peto Dumpum Enterprise and Anr
B Sector, Near Raj Bhawan, Itanagar, Papum Pare District, Arunachal Pradesh 791111
represented by Mrs Yamje Loriak Tamin, Daughter of Kirjom Dulom, resident of B
Sector, Itanagar, PO and PS Itanagar, Papum Pare District, Arunachal Pradesh 791111

2: Tapu Loriak Tamin
Age:
Occupation :
Son of Shri Jita Loriak
resident of Block-2C
RKM Hospital
PO and PS Itanagar
Papum Pare District
Arunachal Pradesh 79111

VERSUS

The Union of India and 4 Ors
represented by the Secretary, Govt of India, Ministry of Defence, 101-A, South
Block, New Delhi.

2:The Border Road Organization
Age: 0
Occupation :
represented by Director General
Ministry of Defence
Seema Sadak Bhawan
Ring Road
Naraina
Delhi Cant
New Delhi 110010

3:The Chief Engineer BRO cum Authority Engineer
Age: 0

Occupation :
BRO Project BRAHMANK
C/o APO
Pasighat
AP 931722

4:The Commander BRO cum Team Leader cum Senior Highway Engineer
Age: 0
Occupation :
HQ 44
Border Roads Task Force
Pin 930044
C/o 99 APO

5:The Deputy Commissioner
Age: 0
Occupation :
Tato
Shi Yomi District
Arunachal Pradesh

Advocate for the Petitioner : P J Saikia, Arun Yun, Maryum Sora, Geli Taye, Kemo Lollen, K J Saikia, Manisha Nirola

Advocate for the Respondent : Marto Kato, GA (AP), DSGI

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA
HONOURABLE MR. JUSTICE ANJAN MONI KALITA

Date on which judgment was reserved : **03.03.2026**

Date of pronouncement of judgment : **07.05.2026**

Whether the pronouncement is of the operative part of the judgment? : **Yes**

Whether the full judgment has been : **NA**

pronounced?

JUDGMENT AND ORDER(CAV)

Anjan Moni Kalita, J.

Heard Mr. P. J. Saikia, learned Senior Counsel assisted by Ms. M. Nirola, learned counsel for the appellants. Also heard Mr. M. Kato, learned DSGI appearing for the Respondent Nos. 1 to 4 and Ms. P. Pangu, learned Government Advocate appearing for the Respondent No. 5.

2. The instant intra-court appeal has been filed by the Appellants assailing the Judgment and Order dated 04.03.2025, passed by the learned Single Judge in WP(C) No. 03 (AP) of 2024.

3. The facts leading to the filing of the instant writ appeal are briefly summarised herein below:

A. The Appellants and one M/s Velecha Engineering Ltd., had entered into a Memorandum of Understanding (MoU) on 13.10.2020, for submitting a tender for "Construction and Upgradation of Tato-Mechuka Road on EPC mode" (herein after referred to as 'Contract Work'). As per the said MoU, the tender is to be submitted in the name of the aforesaid M/s Velecha Engineering Ltd., and if the work is awarded to M/s Velecha Engineering Ltd., the Appellants will be entitled to execute the entire work, on back to back basis. In the tender process, M/s Velecha Engineering Ltd., came out as a successful bidder and Letter of Acceptance was issued in favour of M/s Velecha Engineering Ltd. As per the terms of the

MoU, the Appellants submitted the Bank Guarantee, for the successful tenderer, i.e., M/s Velecha Engineering Ltd., for a sum of Rs.2,03,49,000/- (Rupees Two Crores Three Lakhs and Forty Nine Thousand) only for the aforesaid Contract Work. However, the Respondent No. 3, vide it's letter dated 07.10.2021, approved the Appellants as the sub-contractor only for 49% of the value of the Contract Work, amounting Rs.33,23,67,000/- (Rupees Thirty Three Crores Twenty Three Lakhs and Sixty Seven Thousand) only under the aforesaid M/s Velecha Engineering Ltd. The Appellants started the execution of the work and completed 49% of the Contract Work. However, further progress could not be made as the authority failed to settle approximately about 1.25 Km area, for which an amount of Rs. 20,00,00,000/- (Rupees Twenty Crores) only had been earmarked and due to rejection of the prayer of the aforesaid M/s Velecha Engineering Ltd., for extension of time, the Appellants apprehended that the authorities may impose liquidated damages on the aforesaid bills, which were yet to be submitted. The Appellants faced with the aforesaid, submitted a representation to the respondent authorities on 28.11.2023, praying for releasing the Bank Guarantee and not to impose liquidated damages on the bills. While the aforementioned representation was pending, the respondent authorities terminated the Contract with the aforesaid M/s Velecha Engineering Ltd., vide it's letter dated 16.12.2023. In view of the aforesaid termination, the Appellants approached this High Court by filing the aforesaid writ petition for release of their dues and other consequential reliefs.

B. The respondent authorities by filing their Affidavit-in-opposition denied the contentions made by the Appellants in the writ petition. The stand taken by the respondent authorities was that the respondent authorities had given the Contract Work to M/s Velecha Engineering Ltd., on 15.06.2021 and on their request for approval of the Appellants as a sub-contractor, to execute 49% value of the Contract Work, as per Clause 4.2 of EPC contract, the same was approved by the authorities, vide it's letter dated 07.10.2021. The stand was that the Appellants executed only 26.21% of the Contract Work, for which the payment had already been released to the EPC Contractor, namely, M/s Velecha Engineering Ltd. It was also contended by the respondent authorities that no further bill(s) had been submitted by the EPC contractor, i.e. M/s Velecha Engineering Ltd. regarding any further progress of work on the ground. It was contended that the contract was terminated on 16.12.2023 due to the EPC Contractor's default, vide it's letter dated 16.12.2023, as per the EPC Contract entered with the EPC Contractor, namely, M/s Velecha Engineering Ltd. It was contended that as per Article 23.6 (i)(a), upon termination on account of contractor's default under Clause 23.1, the authority has the right to en-cash and appropriate the performance security, additional performance security, if any and the retention money or in the event the contractor's failure to replenish or extend the performance security and additional security, if any, claim the amount stipulated in clause 7.1 as agreed pre-determined compensation to the authority for any losses, delays and cost of completing the works and maintenance, if any. In terms of

the aforesaid, the respondent authorities en-cashed the Bank Guarantee and deducted the pre-determined compensation in terms of the aforesaid EPC Contract. It was contended that the respondent authorities had full right to en-cash the aforesaid amount on the default of the EPC Contractor under the terms and conditions of the Contract and the Appellants' contention to have completed more than 49% of the work was baseless as only 26.21% work had been completed as per the specification.

C. After hearing the parties, the writ petition was disposed of with the following direction:

“Under the given facts and circumstances and also in the light of the submissions advanced by the learned advocates of both sides, this Court is inclined to dispose of this petition with the following directions:

i. In terms of the joint verification regarding the work executed by the petitioners having already been carried out by the respondent authorities and a report thereof being prepared, a work completion certificate to that extent what the petitioners have executed shall be issued to them by the respondent numbers 1 to 4;

ii. In respect of the issue of liquidated damages, compensation and releasing of the performance bank guarantee, etc., the petitioners stand relegated to seek redress in appropriate Civil Court for recovery of the amount forfeited by the respondent authorities, if so advised;

iii. All pending bills, if not paid in the meantime, shall be released in favour of the petitioners in terms of the joint verification report.”

4. The instant writ appeal has been filed by the Appellants being aggrieved primarily by the direction given by the learned Single Judge at paragraph 24(ii) of the impugned Judgment and Order dated 04.03.2025. The Appellants' main ground of appeal is that the Contract Work, i.e., Tato-Mechuka Road work was awarded to the EPC contractor, namely, M/s Velecha Engineering Ltd. and there is a contract between the aforesaid M/s Velecha Engineering Limited and the respondent authorities, however, there is no back-to-back agreement for the sub-contract between the EPC Contractor and the sub-contractor, i.e., the present Appellants. Since there is no privity of contract between the respondent authorities and the Appellants, none of the conditions of the EPC Contract dated 15.06.2021 executed between the EPC Contractor, i.e., M/s Velecha Engineering Ltd. and the respondent authorities shall be binding on the Appellants. It is the contention of the Appellants that since the aforesaid Contract is not binding upon the Appellants, the learned Single Judge ought not to have passed the direction contained in paragraph 24 (ii) of the impugned Judgment and Order dated 04.03.2025, thereby relegating the Appellants to the Civil Court.

5. The other ground taken by the Appellants is to the effect that since the Appellants have completed 49% of the work, the action of the respondent authorities of deducting the liquidated damages to the tune of 10% of the total contract value is not justifiable. The Appellants contended that in terms of the aforesaid contract also, since the Appellants had completed their own portion of 49% of the work and the contract had to be terminated due to the default committed by the EPC Contractor, namely, M/s Velecha Engineering Ltd., by not

performing their remaining 51% of the work, if there is any, then liquidated damages on the amount of 49% of the contract value should have been imposed, provided the breach is proved by the respondent authorities as due to the default of the Appellants. Since there was no finding to that effect, the respondent authorities ought not to have deducted the whole 10% of the contract value in the instant case. The Appellants also contended that the Bank Guarantee was, in fact, submitted by the Appellants for the whole Contract Work whereas, they were responsible only for 49% of the total work. Therefore, the invocation of the Bank Guarantee for the total value of the Contract Work by the respondent authorities is not correct.

6. In view of the aforesaid, the Appellants have challenged the impugned order dated 04.03.2025, passed by the learned Single Judge to the effect as mentioned above.

7. Mr. P. J. Saikia, learned Senior Counsel for the Appellants submits that the concerned Bank Guarantee valued at Rs.2,03,49,000/- was submitted by the Appellants in terms of the aforesaid Memorandum of Understanding (MoU) that was entered into between the Appellants and the EPC contractor, namely, M/s Velecha Engineering Ltd., dated 13.10.2020, much before the tender process as well as signing of the aforesaid EPC Contract dated 15.06.2021. He submits that as per the MoU, after submission of the tender in the name of the EPC Contractor, M/s Velecha Engineering Ltd., if the contractor is successful then the whole contract was to be executed by the Appellants and in view of that understanding, the Bank Guarantee for the whole work was submitted by the Appellants on behalf of the EPC contractor to the respondent authorities. However, later on when the respondent authorities, vide their letter dated

07.10.2021, approved only 49% of the Contract Work to be done by the Appellants, the Appellants though approached the respondent authorities about the issue, the same remained unanswered. Therefore, he submits that since the Appellants are responsible only for 49% of the Contract Work which they have completed, the entire amount of the Bank Guarantee ought not to have been invoked and en-cashed by the respondent authorities as the termination of the contract is not due to their default, rather the same is attributable to the EPC contractor, namely, M/s Velecha Engineering Ltd.

8. The learned Senior Counsel submits that the Appellants have completed 49% of the work which was given to them but due to the default of the EPC contractor, namely M/s Velecha Engineering Ltd., who couldnot complete any of their 51% of the work, the contract was terminated by the respondent authorities. Therefore, apparently the default is attributable to the EPC contractor, namely M/s Velecha Engineering Ltd and that being so, the deduction of liquidated damages of 10% of total value of the Contract is not correct and the same at best could have been proportionate to the percentage of work performed by them. He further submits that since the EPC Contract dated 15.06.2021 is not binding upon Appellants as they are not a party to the EPC Contract, the liquidated damages could not have been deducted by the respondent authorities from the sub-contractor, which does not have any privity of contract with the respondent authorities. He submits that there has been an apparent error and illegality committed by the respondent authorities in deducting the liquidated damages from their legal dues and the same cannot be sustained under the laws. Therefore, the direction passed by the learned Single Judge should be interfered with by this court in appeal.

9. Mr. Saikia, the learned Senior Counsel has relied on certain cases in support of his case to the effect that since the Appellants are not a party to the EPC Contract, the same is not binding on them. We have considered the cases cited by him.

10. Mr. M. Kato, learned DSGI for the respondent Nos. 1 to 4 in his submissions contended that there is no privity of contract between the Appellants and the respondent authorities and the deduction of liquidated damages has been made from the bill of the EPC Contractor on the whole amount as the Contract has to be terminated due to default of the EPC Contractor. Therefore, he submits that there is no wrong in deduction of the liquidated damages as well as invocation of the Bank Guarantee submitted by the EPC contractor, namely, M/s Velecha Engineering Ltd. He further submits that the respondent authorities were unaware that the Bank Guarantee has been submitted by the Appellants on behalf of M/s Velecha Engineering Ltd., as same is not on record and not a matter to be looked into by the respondent authorities.

11. We have heard the submissions made by the learned counsel appearing for the respective parties and have gone through the materials available on record.

12. It is seen that the EPC Contract was entered into between the EPC Contractor, namely, M/s Velecha Engineering Ltd. and the respondent authorities on 15.06.2021. Subsequent to the aforesaid Contract and on the request of the EPC Contractor, the respondent authorities, i.e., SE(Civil) OFFG Chief Engineer Project, Brahmanik has approved the sub-contractor, i.e., the Appellants with a condition that the sub-contractor shall not be allowed to execute work more

than 49% value of the Contract Work. It was also made clear in their approval letter that the EPC contractor, M/s Velecha Engineering Ltd. shall at all times be responsible and liable for its obligations under the EPC Contract. It is seen that after the signing of the aforesaid EPC Contract, there was no back-to-back contract that was entered into between the EPC Contractor, i.e., M/s Velecha Engineering Ltd. and the Appellants, though there was a MoU between the two dated 13.10.2020. During the execution of the Contract Work, it is contended that 49% part of the Contract Work was executed by the Appellants in the name of the EPC Contractor, i.e., M/s Velecha Engineering Ltd. It is also seen that an escrow account was opened jointly by M/s Velecha Engineering Ltd. and the Appellants for operating and maintaining the payments received for the execution of the Contract Work as per the terms and conditions of the aforesaid escrow account. Payments were never released to the sub-contractor, i.e., Appellants directly by the respondent authorities.

13. It is also seen that there is a dispute regarding completion of the work by the Appellants as though the Appellants contended that they have completed their 49% of the Contract Work, the respondent authorities have contended that only 26.21% of the Contract Work was completed by the Appellants and for the same, the due money has already been released to the EPC Contractor. They also contended that no further bills have been submitted by the EPC Contractor regarding any further work. It is seen that the contract was terminated on 16.12.2023 due to the EPC Contractor's default in terms of the EPC Contract.

14. The Hon'ble Single Judge, vide its order letter 04.03.2025 has directed for a joint verification regarding the work executed by the Appellants, a report to be submitted and thereafter, all the pending bills, if not paid in the meantime, shall

be released in favour of the Appellants in terms of the joint verification. Therefore, the only issue which has been contended by the Appellants is the issue regarding liquidity damages, compensation and invocation of the Bank Guarantee. As far as invocation of Bank Guarantee is concerned, though it has been claimed by the Appellants that the Bank Guarantee was obtained by them on behalf of the EPC Contractor, namely, M/s Velecha Engineering Ltd. for the entire work in the Contract, it is seen from the records that the Bank Guarantee was submitted in the name of M/s Velecha Engineering Ltd. for the entire contract work and no separate bank guarantees were submitted for their respective portion of works, i.e., 49% and 51% respectively by the Appellants and the EPC Contractor. It is also cannot be made out from the record that the money for the Bank Guarantee was, in fact, paid by the Appellants, as claimed by them except a covenant in the aforesaid MoU. Therefore, this being a disputed question of fact, the writ court has rightly did not go into the adjudication of the aforesaid issue and the same has been kept open for the Appellants to raise the same before a competent forum, i.e., the Civil Court.

15. As far as liquidated damage is concerned, in the facts of the instant case, in our opinion, the issue cannot be adjudicated before this Court. It is seen that there is still a dispute about the percentage of completion of the Contract Work by the Appellants though the Appellants contended that they have completed 49% of the Contract Work. The respondent authorities contended that only 26.21% of the work has been completed by the Appellants. Further, the settled law regarding claiming of liquidity damages under Sections 73 and 74 of the Contract Act has been discussed in a catena of cases by the Hon'ble Supreme Court. The ratio laid down by the Hon'ble Supreme Court in the case of ***State of Karnataka v. Sri Rameshwara Rice Mill*** reported in **(1987)2 SCC 160**,

which is followed in the case of ***J. G. Engineers Private Ltd vs. Union of India and Another*** reported in **(2011)5 SCC 758**, provides that the question of whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided only by an adjudicatory forum, i.e., a Court or an Arbitral Tribunal. The entitlement to claim compensation against a breach of contract by opposite party is contained in Sections 73 and 74 of the Indian Contract Act, 1872. Section 73 of the Contract Act contemplates award of damages for losses suffered by breach of contract by the opposite party and Section 74 of the Contract Act stipulates that in a case, a contract is broken and a sum is named in the contract as the amount to be paid in case of such breach, whether or not actual damage or loss is proved to have been caused thereby, the aggrieved party is entitled to receive from the opposite party who has broken the contract, a reasonable compensation not exceeding the amount so named. Therefore, under Sections 73 and 74 of the Contract Act, before imposing any amount of compensation against a contractor, the primary responsibility of the employer is to fix the liability against the contractor on the basis of quotient facts that contractor has breached the contract by delaying performance beyond stipulated time. Unless such breach is established, the question of imposition of any amount of compensation does not arise at all.

16. Therefore, in the instant case, if the appellants have any grievances about the employer, i.e., the respondent authorities, imposing liquidated damages, which is not agreeable to the Appellants, the same can be properly adjudicated in the right forum and such right forum is obviously the civil court or an Arbitration Tribunal, in case the same is there in the contract. In the instant

case, since the Appellants are raising the issue about wrongful deduction of liquidated damages in the Contract, wherein they are claiming not to be a party, in our considered opinion, the learned Single Judge has rightly directed the Appellants to seek redressal of the same in an appropriate civil court.

17. In view of the aforesaid discussions, we are of the considered view that there is no infirmity in passing the direction at paragraph 24 (ii) in the impugned Judgment and Order dated 04.03.2025. Accordingly, the instant appeal being devoid of any merit, is dismissed.

JUDGE

JUDGE

Comparing Assistant