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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 240/2019**

Date of Decision : 2nd July, 2019

DY.CE/C (NORTHERN RAILWAY) JAMMU TAWI

..... Petitioner

**Through: Ms.Pragya Sharma, Mr.Vijay
Kumar Pandey, Advs.**

versus

M/S BUMI GEO ENGINEERING LTD

..... Respondent

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA 8678/2019

Exemption allowed, subject to all just exceptions.

IA 8680/2019 (delay of 55 days in re-filing the petition)

For the reasons stated in the application, the delay is
condoned and application stands allowed.

O.M.P. (COMM) 240/2019 & IA 8679/2019 (Stay)

1. This petition has been filed under Section 34 of the
Arbitration and Conciliation Act, 1996 challenging the Arbitral
Award dated 29.10.2018 passed by the Arbitral Tribunal
adjudicating the disputes that have arisen between the parties in

relation to the works of rectification and rehabilitation of damaged portion of Tunnel No.10 between chainage 28/200 and 29/200 located between Katra-Resai section of Udhampur-Srinagar-Baramulla Rail Link Project (Contract Agreement No.74-W/16/104/SLT/T-10/WA/Pt-1 dated 08.11.2010).

2. The limited challenge of the petitioner to the Impugned Award is on the disallowance of recovery of Rs.9,65,364.64 for non-construction of site office by the respondent and the refusal of the Arbitral Tribunal to strictly enforce Clause 12.1.1 of the Contract Agreement regarding recovery of excess steel and cement at double the prevailing procurement cost at the time of last issue plus 5% freight.

3. As far as the claim on account of non-construction of the site office is concerned, counsel for the petitioner submits that as the site office was admittedly not constructed at the Udhampur end of the tunnel, the petitioner was entitled to recover the cost of the same in the final bill.

4. This issue has been considered by the Arbitral Tribunal and the Arbitral Tribunal has concluded as under:

“37. The fact that the site offices at both end as per specification given in the contract were not provided is admitted. The only issue is whether the Claimant should be exempted from paying damages for this in view of the fact that the Udhampur end, being unavailable/inaccessible and Reasi end was fully refurnished. The fact that site conditions did not allow

construction of desired site office, though denied by respondent, but appears to be correct as the respondent did not make it an issue during five years of execution. Only at the time of preparation of final bill the issue has surfaced. The Claimant has filed a communication dated 17.03.2012 wherein it has been pointed out that the other end was not available. The Claimant has also filed some photographs with the tribunal which were internally shared amongst the employees of the Claimant and which demonstrate such unavailability of the other end.

38. Tribunal observes that although contract provides that site office should be constructed but it does not state what should be done in case it is not feasible to provide such a site office. It definitely does not provide that recovery from the contractor will be made on account of that. Admittedly construction of site office is not part of the scope of work for which contract has been awarded. Provision of such an office was only to facilitate execution and management of work. The fact that work has been successfully completed would imply that some alternative arrangement were made in lieu of the regular site office. This would have also meant some difficulties in execution resulting in extra cost in execution. Claimant submission that "due to non availability of front was a major reason for the loss of time and resources for us. We have however not claimed anything extra on this account" has not been contested by respondent. Claimant thus has not really saved any money on account of not providing the said site office.

In view of above AT concludes that the recovery from the claimant on account of non provision of site office is not justified. Hence counter claim of Respondent is rejected."

5. In my view, the finding of the Arbitral Tribunal cannot be said to be unreasonable so as to warrant any interference of this Court.

6. As observed by the Arbitral Tribunal, the site office at the Udhampur end was not constructed by the respondent due to the site being unavailable /inaccessible. This issue was not taken up by the petitioner with the respondent for the entire period of five years taken for the execution of the work but was raised only at the time of preparation of the final bill. As observed by the Arbitral Tribunal, construction of site office was not part of the scope of work and was required only to facilitate execution and management of the work. The fact that the work has been successfully completed and the respondent did not save any money on account of not providing the site office, prevailed upon the Arbitral Tribunal to hold that the deduction was, not justified. I have no reason to disagree with the said findings of the Arbitral Tribunal.

7. As far as the strict enforcement of Clause 12.1.1 of the Agreement is concerned, the said Clause is reproduced hereinunder:

“12.1.1 In the case, cement and/or steel is issued to the contractor/s free of cost or on the cost to be recovered for use on the work, the supply thereof shall be made in stages limited to the quantity/quantities computed by the Railway according to the prescribed specifications and approved drawings as per the agreement. The cement and/or steel issued in excess of the requirements as above shall be returned in perfectly good conditions by the contractor to the Railway immediately after completion or determination of the contract. If the contractor/s fail/s to return the said stores, then the cost of cement and/or steel issued in excess of the requirement computed by the

Railway according to the specifications and approved drawing will be recovered from the contractor/s @ twice the prevailing procurement cost at the time of last issue viz. (purchase price + 5% freight only). This will be without prejudice to the right of the Railway to take action against the contractor/s under the conditions of the contract for not doing/completing the work according to the prescribed specifications and approved drawings. If it is discovered that the quantity of cement and steel used is less than the quantity ascertained as herein before provided the cost of the cement and/or steel not so used shall be recovered from the contractor/s on the basis of the above-stipulated formula.”

8. A reading of the above clause would clearly show that the cement and /or steel is issued to the contractor in stages based on the quantity computed by the Railways according to the prescribed specifications and approved drawings. The excess cement and/or steel has to be returned by the contractor immediately after completion or determination of the contract. Incase, the contractor fails to return the said material then the cost of cement and/or steel issued in excess of requirement computed by the Railway according to the specifications and approved drawings was to be recovered from the contractor at twice the prevailing procurement cost at the time of last issue, which is purchase price plus 5% freight.

9. The Arbitral Tribunal has interpreted the said Clause and held that the recovery of twice the procurement cost is in nature of damages. The Arbitral Tribunal has further held that the

petitioner was unable to show any loss suffered by it due to failure of the respondent to return the steel. In light of this finding, the Arbitral Tribunal has allowed the recovery at the rate of only the cost of material issued and not the penal rate provided in Clause 12.1.1.

10. Counsel for the petitioner submits that the recovery of double the procurement cost was not in the form of damages but was a contractual term, which the Arbitral Tribunal has failed to enforce thereby rendering the Award liable to be set aside.

11. I am unable to agree with the said submission of the counsel for the petitioner. The recovery of double the procurement cost is on account of the failure of the contractual obligation of the respondent/contractor to return the excess steel immediately upon the completion of the work. The same therefore, is in nature of damages. The Arbitral Tribunal has correctly appreciated the effect of Clause 12.1.1 of the Contract Agreement and applying the ratio of judgment of the Supreme Court in ***Kailash Nath Associates vs. Delhi Development Authority & Anr.***, (2015) 4 SCC 136 has rightly held that as the petitioner was unable to prove any loss or damage suffered by it due to such breach of contract by the respondent, it was not entitled to recover damages at double the procurement cost. I find no reason to interfere with the findings of the Arbitral Tribunal.

12. Consequently, I find no merit in the present petition and the same is dismissed with no order as to costs.

NAVIN CHAWLA, J

JULY 02, 2019

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