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

+ **FAO(OS) (COMM) 351/2019, CM APPL. 51922/2019**

& CM APPL. 51924-51925/2019

DY CE/ C (NORTHERN RAILWAY) JAMMU

TAWI

..... Appellant

Through Mr. Himanshu Upadhyaye, Advocate.

versus

M/S BUMI GEO ENGINEERING LTD

..... Respondent

Through None.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ORDER

% 19.12.2019

1. The appellant/Northern Railway is aggrieved by the dismissal of a petition filed by it under Section 34 of the Arbitration and Conciliation Act, 1996 whereunder a challenge was laid to the Award dated 29.10.2018, passed by the Arbitral Tribunal that has adjudicated disputes between the parties in relation to the work 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/Petitioner-1 dated 08.11.2010).

2. In the Section 34 petition, the appellant/Northern Railway had assailed the impugned Award on two grounds. Firstly, the grievance raised

was that the Arbitral Tribunal had erred in disallowing a recovery of a sum of Rs.9,65,364.64 for non-construction of the site office by the respondent and secondly, a grievance was raised against the refusal on the part 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 the last issue, plus 5% freight.

3. Both the said grounds have been turned down by the learned Single Judge and the Section 34 petition was dismissed by the impugned order dated 02.07.2019.

4. Mr. Upadhayaye, learned counsel for the appellant states at the outset that the scope of the present appeal is confined to the findings returned by the learned Single Judge in respect of the enforceability of Clause 12.1.1 of the Contract Agreement governing the parties.

5. We may first reproduce below Clause 12.1.1 of the Contract Agreement for ease of reference:

“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.”

6. As per the aforesaid clause, the parties had agreed that the appellant/Northern Railway shall issue cement and/or steel to the respondent/contractor at various stages, based on the computation undertaken by it on the quantity, according to the prescribed specification and the approved drawings. It was further agreed that the excess cement and/or steel shall have to be returned by the respondent/contractor upon completion or determination of the contract and if it fails to do so, then the cost of cement and/or steel issued in excess of the requirement as computed by the appellant/Northern Railway, would be recovered from the respondent/contractor at twice the prevailing procurement cost at the time of last issue, i.e. purchase cost plus 5% freight. Clause 12.1.1 was duly examined by the Arbitral Tribunal, which held thus : -

“58. We agree that this Tribunal is bound by the terms of the contract between the parties and there is no dispute that clause 12.1.1 provides for recovery at twice the cost of the material plus 5% freight charges. However, the issue before this Tribunal is whether clause 12.1.1 is to be mechanically and blindly invoked without regard to the difficult working conditions of the subject project and the fact that the respondent has failed to prove any loss or damage entitling it to recovery at twice the cost of the material plus 5% freight charges.

59. We are of the view that clause 12.1.1 stipulates an amount to be paid by way of penalty for breach of the contract and therefore falls under Section 74 of the Indian Contract Act. In terms of the judgment in **Kailash Nath Associates v. DDA** (reported as (2015) 4 SCC 136), which was cited by the counsel for the Claimant, it appears to be settled law that even under Section 74, a party must prove its loss in order to be awarded the liquidated amount mentioned in the contract. **In this case, no such loss or damage has been proved, nor is it the case of the respondent that such loss or damage if any was incapable of being proved or quantified. Consequently, we agree with the Claimant that the respondent is entitled to recover the shortfall in reinforcement steel only at the cost of the material issued and not at the penal rate provided in clause 12.1.1. Therefore, we permit recovery only to the extent of Rs.21,73,093/- in favour of the respondent, which has already been fairly accepted by the claimant.**

(emphasis added)

7. The learned Single Judge examined the views expressed by the Arbitral Tribunal and opined that he was not inclined to accept the submissions made on behalf of the appellant/Northern Railway that recovery of double the procurement cost of cement/steel cannot be treated as damages, but ought to be treated as a term of contract and is therefore enforceable. Citing the decision of the Supreme Court in the case of Kailash Nath Associates v. DDA, reported as (2015) 4 SCC 136, the learned Single Judge opined that a claim for recovery of double of the procurement cost of cement/steel on account of failure on the part of the respondent/contractor to discharge its obligation under the contract of returning the excess cement/steel was in the nature of damages and in circumstances where the appellant/Northern Railway had failed to prove that it had suffered any loss

or damages due to the said breach, on the part of the respondent/contractor, it was not entitled to recover damages and double the procurement cost.

8. Mr. Upadhyaye, learned counsel for the appellant seeks to draw our attention to para-56 of the Award wherein the submissions of the respondent/contractor have been recorded on the interpretation of Clause 12.1.1 to urge that even the respondent had admitted that it had accepted recovery of Rs.21,73,093/- on account of shortfall of reinforcement steel calculated at the cost of the material quoted by Northern Railway itself.

9. In our opinion, the said acceptance on the part of the respondent/contractor on the aforesaid count would not go to strengthen the case of the appellant/Northern Railway for the reason that the respondent/contractor had clearly disputed its liability to pay the cost of the material as was demanded by the appellant on two counts; firstly that the working conditions at the site were difficult and secondly for the reason that the appellant had failed to prove any loss or damages suffered by it to claim entitlement to any rate and, therefore, this can hardly be treated as an admission on the part of the respondent to hold that it had admitted its liability to pay penalty rates, as sought to be urged on behalf of the appellant.

10. We are in complete agreement with the view expressed by the Arbitral Tribunal, duly ratified in the impugned order passed by the learned Single Judge that in the absence of any loss or damages, the appellant/Northern Railway could not claim recovery of penal rates even if the contract permitted recovery at such rates.

11. For the aforesaid reason, we are of the opinion that the impugned order does not warrant any interference and is accordingly upheld. The present appeal is dismissed *in limine* alongwith the pending applications.

HIMA KOHLI, J

ASHA MENON, J

DECEMBER 19, 2019/MK