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

\+ **O.M.P. (COMM). 181/2020**

BUMAR PCO SPOLKA ACKYJNA ..... Petitioner

Through: Mr. V.N. Koura & Ms. Paramjeet Benipal, Advocates (M-9810037778)

versus

UNION OF INDIA ..... Respondents

Through: Mr. Suman Jyoti Khaitan, Mr. Vikas Kumar, Mr. Nubair Alvi, Mr. Harish Kumar Garg, Advocates along with Mr. Vikram Singh, Under Secretary, Mr. Praveen Dudeja, DS, Mr. Aman Yadav, Lt. Col., Mr. Vikram Verma, Director (M-9968636993)

**CORAM:**
**JUSTICE PRATHIBA M. SINGH**

**O R D E R**

% **12.03.2020**

1. The present petition under Section 34 of the Arbitration & Conciliation Act, 1996 (*hereinafter, 'the Act'*) challenges the final award dated 21st November, 2012, subsequently modified on 21st January, 2013 passed by a 3-member Arbitral Tribunal.

2. The brief background is that the Petitioner - Bumar PCO Spolka Ackyjna (*hereinafter, 'Petitioner'*), a Polish Company had entered into an agreement dated 1st March, 2002, with the Union of India, for supply of Thermal Imager Fire Control system.

3. Disputes had arisen between the parties, which had resulted in termination of the contract and encashment of the performance bond for a sum of US$3,636,960.40, by the Union of India. The disputes were referred

to a three-member Tribunal in terms of the arbitration agreement between the parties. Ld. Tribunal, decided the disputes and the operative portion of the award reads as under:-

> *"5. THE TRIBUNAL'S DECISION*
> *5.1 Neither party disputes the Tribunal's power to grant the appropriate relief in respect of the Claimant's Claim and the Counterclaim in light of the decisions made on each of the issues by the Tribunal, the Tribunal ORDERS as follows:*
> *a) leave to the Claimant to amend its name to "Bumar Zolnniez Spolka Akcyjna".*
> *b) the Contract is valid and remains in existence;*
> *c) the Respondent is not liable to pay the sums claimed by the Claimant in its Statement of Claim;*
> *d) the Respondent's Counterclaim is dismissed;*
> *e) In the event the parties, for whatever reason, agree to terminate the Contract, the Respondent is to return to the Claimant the full sums encashed by it under the Performance Bond together with the cost of the one set of the Drawa-T system supplied by the Claimant to the Respondent for the CUT;*
> *f) In the event that the parties agree that the Contract is to be performed, the Claimant is to restore to the benefit of the Respondent a fresh Advance Bank Guarantee for the advance payment to be made by the Respondent to it, in accordance with Article 4 of the Contract. In addition, the Respondent is to return to the Claimant the full sums encashed by it under the Performance Bond and the Claimant is to restore to the benefit of the Respondent, pursuant to Article 5 of the Contract, a fresh Performance Bond.*
> *6…………*
> *7. **SUMMARY OF CONCLUSIONS – FORMAL AWARD***
> *The Tribunal having carefully considered the documentary evidence, the oral evidence and the submission of the parties and having given due weight*

*thereto and rejecting all submissions to the contrary, hereby makes, issues and publishes this Final Award and for the reasons set out above FINDS, AWARDS AND ORDERS as follows:*

*(1) Finds that the Tribunal has no jurisdiction to decide the claim in respect of the one set of Drawa T system supplied by PHZS Cenzin to CVRD in 1995;*

*(2) Save as aforesaid, Finds that the Tribunal has jurisdiction to decide the Claimant's claims and the Counterclaim;*

*(3) Finds that the Claimant is not entitled to succeed on the Claimant's claims;*

*(4) Dismisses the Counterclaim;*

*(5) Orders the Contract to be still in force;*

*(6) Orders in the event the parties for whatever reason agree to terminate the Contract, the Respondent to return to the Claimant the full sums encashed by it under the Performance Bond together with the cost of the one set of the Drawa-T system supplied by the Claimant to the Respondent for the CUT"*

4. The above award was modified as under:

> "*Page 35, paragraph 7(6) of the Final Award shall read as follows:*
>
> *Orders in the event the parties for whatever reason agree to terminate the Contract, the Respondent to return to the Claimant the full sums encashed by it under the Performance Bond."*

5. On 20th May, 2019, Mr. V. N. Koura, ld. counsel appearing for the Petitioner submitted to the Court that the Arbitral Tribunal had itself given two options to the parties as per paragraph 7 (6) in the event parties agreed to terminate the contract and para 5 (5.1) (f) in the event the parties agree to go ahead and perform the contract. Mr. Koura had submitted that his client has instructed him that the Petitioner is willing to abide by paragraph 7 (6) and treat the contract as having been terminated, without prejudice to its

rights and contentions, if the Respondent is willing to return the full sum under the performance bond which was encashed by it.

6. On 20th May, 2019, after perusing the two options given by the Arbitral Tribunal, this Court has observed as under:

> *"4. A perusal of the two options given by the Arbitral Tribunal clearly shows that in the event parties agreed mutually to terminate the contract, the Respondent would be liable to return the entire sum of US$3,636,960.40 encashed under the performance bond. Admittedly, the Respondent – Union of India has not challenged this award. Thus, since the Petitioner now no longer wishes to consider the award as being one that is to be performed but that which has to be terminated, the consequences under paragraph 7(6) of the award would trigger."*

7. Ld. counsel for the Union of India had then sought time to seek instructions in the matter. On 23rd July, 2019, and on subsequent dates, the matter is being adjourned to enable the Government to revert with instructions.

8. On 6th March, 2020, it was informed that the Government has taken a decision in the matter. Today, the decision of the Competent Authority has been placed before the Court. The same is contained in letter dated 3rd March, 2020 addressed to the ld. counsel. Paragraph 2 of the said letter is reproduced below:

> *"1…………..*
> *2. The above matter has been examined in the Ministry of Defence and it has been decided with the approval of the Competent Authority to:*
> *(a) Terminate the Contract No.13(i)91/D(Proc) dated 1st March, 2002 signed with Przemyslowe*

*Centrum Optyki (PCO), Poland for procurement of Qty.250 TIFC DRAWA-T for a total value of approx. USD 73 Million (Approx. Rs.349 Cr.).*
*(b) Return to the Vendor (M/s Bumar PCO SpolkaAkecyjna), the full amount (US $* 3,636,960.40*) of encashed Performance Bond."*

9. A perusal of the above shows that the Union of India has agreed to release the entire amount of the performance bond to the tune of US $ 3,636,960.40. Since the Government has now consented to the return of the entire sum, the award would be satisfied in terms of paragraph 7 (6 ) upon the entire payment being made.

10. Accordingly, it is directed that the sum of US $ 3,636,960.40 be paid to the Petitioner by way of bank transfer on or before 31st May, 2020. The amount in US Dollars shall be credited directly to the bank account of the Petitioner, the details of which shall be confirmed by Mr. Koura, ld. counsel within one week to Mr. Khaitan, ld. counsel for the UOI. Upon the payment of the amount being made, the award shall stand satisfied and the disputes between the parties shall be fully and finally settled. No further claims of the Petitioner against the UOI would be outstanding.

11. If the amount as agreed is not paid by 31st May, 2020 as requested by the UOI, the Petitioner is permitted to move an application to seek payment of interest on the said amount from the date of the award.

12. The time till 31st May, 2020 has been given specifically at the request of the Union of India, which is represented by counsel instructed by the officials of the Ministry, who are present today in Court.

13. The petition stands disposed of in these terms. All pending applications are also disposed of.

14. List for reporting on the progress of the payment on 29th May, 2020.

*Dasti.*

**PRATHIBA M. SINGH, J**

**MARCH 12, 2020**

*Rahul/RG*