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

Date of Decision: 13th September, 2021

+ **O.M.P. (COMM) 270/2021 & I.As. 11671/2021, 11672/2021.**

CEC-CICI JV

..... Petitioner

Through: Mr. Anil Kher, Senior Advocate with
Mr. Sandeep Thukral, Advocate.

versus

GRIM-TECH PROJECTS INDIA (P) LTD

..... Respondent

Through: Mr. Sanjeev Anand, Senior Advocate
with Mr. B.K. Prasad, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter, 'the Act'*] has been filed by M/s. CEC-CICI Joint Venture [*hereinafter, 'JV'*] seeking setting aside of the Award dated 21st June, 2021¹ [*hereinafter, 'Impugned Award'*], partly allowing claims in favour of M/s. Grim-Tech Projects India Pvt. Ltd. [*hereinafter, 'Grim-Tech'*] and rejecting all the counter-claims. Grim-Tech is referred to as Claimant and JV as Counter-claimant / Respondent in arbitration.

¹ No. KV/MAA/397(B) (corrected on 16th July, 2021).

BRIEF FACTS

2. JV sub-contracted work in favour of Grim-Tech *vide* Work Order² dated 02nd January, 2013 [*hereinafter*, ‘**Work Order**’]. The description of the work given at para 5 of the Petition, is reproduced hereinbelow: -

- “5.1. *That the Petitioner was awarded Work of Design and Construction of Tunnel by Shield TBM, Tunnel by Cut & Cover, Underground Metro Station at Azadpur by Cut & Cover method and Ramps at Mukundpur and Shalimar Bagh for underground works on Mukundpur - Yamuna Vihar Corridor of Delhi MRTS Project of Phase III.*
- 5.2. *That the Tunnelling Work, for up and down lines, from Azadpur to Shalimar Bash (i.e. the South end) and from Azadpur to Mukundpur (i.e. the North end) were to be undertaken by the Petitioner by deploying two Tunnel Boring Machines (TBMs). The TBMs (for up and down lines) was required to enter the TBM launching shafts excavated to a depth of approx. 29 meters at South end of the proposed Azadpur Metro Station and exit from the Shalimar Bagh end. Thereafter, the TBMs were to be deployed at the TBM launching shaft excavated to a depth of approx. 29 meters excavated at the North end of the proposed Azadpur Metro Station and exit from the Mukundpur end.*
- 5.3. *To prevent collapsing of the Earth during excavation of the said shafts at South and North ends and to prevent ingress of Water in the said Launching Shafts, it was decided to provide Secant Piles in the North Shaft and the South Shaft as soil retaining Structures. The Secant Piles were to be cast in-situ and were to form a part of the permanent Works. Construction works of cast in-situ Secant Pile at Azadpur Station Box Area for DMRC CC – 04 Project Site were sub contracted to the Respondent (Claimant in the Arbitration proceedings) under Work Order No.: J6110RMD0132 dated 02.01.2013 for INR 4,20,44,155/-.”*

3. Disputes arose between the parties in relation to the above-noted Work Order. Grim-Tech claimed that the 7th and 8th RA Bills were unpaid and JV, on the other hand, contended that there were defects in the work executed for which remedial measures had to be undertaken through a third-

² Work Order No. J6110RMD0132

party, at the costs and risk of Grim-Tech. This led to disputes being referred to arbitration.

4. Grim-Tech raised following claims³: -

“(i) Claim No.1

For INR Rs. 1,46,26,099/- on account of Balance payment of pre-final bill/final bill and release of retention money alleged to be illegally retained by the Petitioner herein. The said claim comprised of two components namely:

- a) *Balance payment of work done amounting to INR 1,26,26,099/-, which was later on revised downwards to - Rs. 1,02,23,352/- by the Respondent itself after wrongly interpreting the amount as allegedly admitted by the Petitioner to be due, when such was not the case at all, and*
- b) *Release of Retention Money (RM) amounting to INR 20,00,000/-, which was again revised downwards on its own by the Respondent to Rs. 16,14,971/- later allegedly on the basis of Petitioner's submissions dated 31.08.2018 when such was not the case at all.*

(ii) Claim No.2

Claim on account of quantities deviated from the agreed quantities amounting to INR 6,05,973/-

(iii) Claim No.3

Claim on account of loss of overheads and profit and losses and damages due to breach of the Petitioner (Respondent in the Arbitration proceedings) herein amounting INR 10,00,000/-, later reduced by the Respondent to INR 2,16,864/-

(iv) Claim No.4

Loss due to machinery non-use and delay due to breach of contract attributable to the Petitioner (Respondent in the Arbitration proceedings) - Rs. 12,00,000/-

(v) Claim No.5

Pre-suit, pendente-lite and future interest @ 15% p.a.

³ Reproduced from Para 11 at Page Nos. 18 and 19 of the Petition.

- (vi) Claim No. 6
Costs - Rs. 7,50,000/-”

5. JV denied its liability, contested the claims, and raised following counter-claims⁴: -

- “(i) Counter-claim No.1
Towards recovery of costs of remedial measures carried out for rectification of defects in south shaft aggregating to INR 76,92,258/- comprising of three components, namely:
- a) Construction of additional 21 Secant Piles amounting to INR 63,73,022/-*
 - b) Pile chipping works amounting to INR 8,06,476/- and*
 - c) Pile repair by shotcrete method amounting to INR 5,25,990/-*
- (ii) Counter-claim No.2
Liquidated Damages amounting to INR 42,04,415/-
- (iii) Counter-claim No.3
Towards interest @15% p.a.”

6. The learned Arbitrator has allowed Claim Nos. 1, 5 and 6 [listed at para 4 above] in favour of the Grim-Tech and rejected all the counter-claims of JV. Aggrieved by the outcome, JV has challenged the Impugned Award.

CONTENTIONS & ANALYSIS

7. Mr. Anil Kher, Senior Counsel for the JV, contends that findings of the learned Arbitrator are in ignorance of vital evidence, without any basis, and contrary to the terms of the Work Order. His three-fold challenge to the Impugned Award, can be summarized under the following heads: -

- I. Limitation
- II. Adjustment of the TDS and WCT – Amount(s) Awarded under

⁴ Reproduced from Para 12 at Page No. 20 of the Petition.

Claim No. 1

III. Expenditure incurred for rectifying defects – Rejection of Counter-claim No. 1

I. RE: LIMITATION

8. The 7th and 8th RA Bills were raised on 28th March, 2013 and 17th April, 2013, respectively. Arbitration was invoked on 11th August, 2017 and therefore, the claims are *ex facie* barred by limitation.

9. Reliance placed upon the letter dated 21st April, 2015 issued by JV to hold that the claims are within time, is completely misconceived. The said letter does not amount to acknowledgment of liability. The learned Arbitrator has misinterpreted the said communication by reading it selectively, and not as a whole. If the said letter is read holistically, it would show that the JV has nowhere admitted its liability towards Grim-Tech. Therefore, conclusion drawn by the learned Arbitrator that the claims were within the statutory period of limitation is in ignorance of the fact that the cause of action, if any, arose in favour of Grim-Tech from the date when they had submitted the last/ 8th RA Bill for payment *viz.* on 17th April, 2013 and not anytime later.

10. The conclusion arrived at by the learned Arbitrator that the letter dated 21st April, 2015 provides fresh lease of limitation period is erroneous. There is no specific promise to pay in the said letter – it does not extend the period of limitation as the same is not an acknowledgment of liability, as contemplated under Section 18 of the Limitation Act, 1963.

11. The meetings held on 25th September, 2017 and 02nd November, 2017 with Grim-Tech, for settlement of claims could not have revived limitation. The same were held as a consequence of receipt of arbitration notice and were towards an attempt to settle the issue amicably before initiating arbitration proceedings.

12. *Per contra*, Mr. Sanjeev Anand, Senior Counsel for Grim-Tech argues that findings of the learned Arbitrator are based on a correct interpretation of documents and material placed on record. He makes the following submissions on the issue of limitation: -

- (a) The letter dated 25th March, 2015 reveals that the JV had debited an amount of Rs. 42,733,755/- *vide* communication dated 19th March, 2015. Grim-Tech refuted the debit note and called upon the JV to release payment towards pending dues. The cause of action, also arose when the Grim-Tech unlawfully and unilaterally raised the debit note. Thus, the arbitration proceedings commenced within limitation.
- (b) The communication dated 21st April, 2015 also unequivocally and unambiguously indicates that JV had acknowledged that payment was due to the Grim-Tech. The finding of the learned Arbitrator, on this issue, based on the facts and material placed before him, are in accordance with law of limitation and merits no interference.

ANALYSIS

13. Before dealing with JV's challenge, it would be apposite to take note of the findings of the learned Arbitrator on this issue; the same are reproduced hereinbelow: -

- “22. On the basis of facts on record, there is absolutely no merit in the contention of the respondent regarding the plea of limitation raised in the statement of defence and counter-claims [RD-I].
23. Per contra, the claimant in its submissions has relied upon the letter dated 21.04.2015 of the respondent [page 84-87 of CD-II] in which it is clearly stated that the payments due for the work done and release of retention money in terms of clause 3.3 and 3.6 respectively of the Work Order have been withheld for adjustment against the claims of the respondent for the defective work done by the claimant. **Thus the letter dated 21.04.2015 of the respondent is an acknowledgement in writing in respect of the payment due to the claimant and in terms of section 18 of the limitation Act 1963, fresh period of limitation is to be computed from the date of acknowledgement, that is 21.04.2015.** This proposition has been held by the Apex Court in the case of **National Aluminium Company Limited Versus G.C. Kanungo** [(2009) 14 SCC 365]. Accordingly, the limitation period of three years as per Article 137 of Limitation Act 1983 is to be computed from 21.04.2015 and will end on 20.04.2018. Since the undisputed date of Invocation of arbitration is 11.08.2017 [page 127 of CD-II], it is held that claim No.1 is not barred by limitation.
24. In the case of **Hari Shankar Singhania and Ors Vs Gaur Hari Singhania & Ors** [MANU/SC/1686/2006 : (2006) 4SCC 658] **it has been held by the Apex Court that as long as the parties are in dialogue, it cannot be asserted that a limitation under Article 137 has commenced.** This principle was reiterated to the Hon'ble Supreme Court in the case of **Shree Ram Mills Ltd. Vs Utility Premises (P) Ltd.** [MANU/SC/199/2007 : (2007) 4 SCC 549] wherein it was held that if the disputes are under negotiation or consideration, then the Limitation for arbitration purpose would be deemed to have not commenced.
25. **It is a matter of record that the parties in terms of clause 11.3 of the Work Order, tried to settle all the disputes amicably but did not succeed and the failure of the process of amicable settlement, as per respondent's letter dated 13.12.2017, has been placed on record by the claimant at page 146 of CD-II. Hence as per para above, cause of action for limitation under Article 137 of the Limitation Act, 1963 arose on 13.12.2017.** Since the claimant had invoked arbitration vide letter dated 11.08.2017 even before 13.12.2017, it is held that none of the claims are time barred.”
[Emphasis supplied]

14. In the opinion of the Court, the reasoning of the learned Arbitrator is completely justified and warrants no interference. This becomes clear from the communication dated 25th March, 2015 issued by Grim-Tech to JV wherein, the former expressed their anguish on the debit note raised by latter, in relation to the Work Order. The said communication reads under: -

“Our ref No. GTPL/CEC-CC04/0325/15

Dated:- 25-03.2015

*To,
The Project Manager,
CEC-CICI JV,
G-8, 3rd Floor, Model Town-III,
Delhi-110009*

Kind Attn.:- Mr. Christopher Cooper, (Project Leader)

Sub:- Secant Piling Work at CC-04 at Azadpur DMRC Project

Ref:- Your letter no. CEC-CICI/CC-04/SUBC/OU/LE/CN/15/3674 Dated-19-03-15

Dear Sir,

“This has the reference of the aforesaid work and are in receipt of the above letter, we are shocked and surprised to see that you are debiting Amount of Rs. 42,733,755.00, Your debit note is not acceptable to us which were unjustified. We would like to bring following facts into your attention as detailed below:-

- 1. Our whole of the work had been carried out in the close supervision of CEC Engineer and all POUR Cards had been signed by CEC/DMRC Staff.*
- 2. Car contract was a purely a labour contract and you have debited all labour cost as well as material cost to us, which were unjustified.*
- 3. We had never been consulted / communicated during the course of modification of Piles. All of sudden, we have received such a huge debit note.*
- 4. In south shaft area the soil strata was very bad, mostly loose sand and we used to get RMC supply irregularly. Due to delay in supply of RMC, collapse in borehole occurred, that resulted in exposed of Piles.*

Therefore, your debit note is not justified and not acceptable and you are again requested to release our payment without any further delay. ”

[Emphasis supplied]

15. Thereafter, JV vide its communication on 21st April, 2015, *inter alia*, stated as under: -

“Hence in view of the above, your payments are withheld with JV under Main contractor’s right under subcontract clause no. 3.3, 3.6 page no. 5. Also, in compliance to these clause 3.3, 3.6 and 6 of GCC, please find attached an “Annexure A”, JV’s interim claim for damages amounting to Rs. 42,733,755/- on account of remedial works, delays in works only attributable to subcontractor and its impact on other works under Main contractors right under subcontract under clause no. 6 of subcontract page 7. This interim claim of damages is being submitted to you without prejudicing our right to revise the claim as per the final cost incurred by JV on account of ongoing remedial works, or any other impact on main contract or other works. Therefore, in view of the above-mentioned facts and circumstances, it is apparent that vide your letters you are merely avoiding your responsibilities and hence you are hereby notified to stop sending us these false and concocted letters. Also, vide this letter we are giving you a last and final opportunity to pay INR 42,733,755/- at the earliest, failing which we shall be initiating all the remedies available as per provisions of sub-contract and as per law of the land.”

[Emphasis supplied]

16. The afore-said extract indicates that JV withheld payment(s) by placing reliance upon certain clauses of the General Conditions of Contract [hereinafter, ‘GCC’]. In effect, JV acknowledged the dues payable to Grim-Tech, and in addition made a demand for damages. Therefore, the aforesaid communication dated 21st April, 2015, coupled with the fact that the debit note was also raised in 2015, gave rise to a cause of action for Grim-Tech to initiate action for resolution of disputes.

17. Besides, the communication dated 13th December, 2017 issued by JV

to Grim-Tech suggests that parties were negotiating an amicable resolution of disputes in good faith. When the same failed, JV recognised that dispute stood crystalized, as stated in the said letter. The annexure enclosed thereto catalogues the pending dues and constitutes an unequivocal acknowledgment of amounts due under 7th and 8th RA Bills, which were the subject matter of arbitration proceeding.

18. In view of the above, the Court does not find any ground to interfere with the findings of the learned Arbitrator on the aspect of limitation and accordingly, this contention of JV is rejected.

II. RE: ADJUSTMENT OF THE TDS AND WCT – AMOUNT(S) AWARDED UNDER CLAIM NO. 1

19. Mr. Kher makes the following submissions on the above captioned issue: -

- (a) While awarding claims against 7th and 8th RA Bills, the learned Arbitrator has not adjusted the amounts deducted by the JV towards TDS and WCT; the said statutory dues stand paid to the respective authorities and should have been adjusted against the amounts awarded. If the said dues are taken into consideration, only an amount of Rs. 17,64,970/- would be due and payable to Grim-Tech.
- (b) The RA Bills were not supported by document(s). They were also uncertified. Grim-Tech did not proceed towards certification of the Bill in the entire intervening period – i.e., from the date the 8th RA Bill was raised viz. 17th April, 2013, till the date of invocation viz. 11th August, 2017. Therefore, the learned Arbitrator could not have

awarded an amount against uncertified bill(s).

- (c) The letter dated 21st April, 2015 clearly stated that there was nothing payable on account of any bill and that only Retention Money was withheld due to non-performance/ non-removal of defects and abandoning of the contract by Grim-Tech.
- (d) The methodology adopted by the learned Arbitrator for arriving at the award amount of Rs. 62,27,699/- in favour of Grim-Tech, is erroneous. The amount certified as “*work done*” attracts the levy of statutory deductions such as – TDS and WCT. JV has paid the amount towards TDS and WCT, for which credit has been availed by Grim-Tech, however, the same has not been taken into consideration by the learned Arbitrator. If that amount is subtracted, the balance amount payment to Grim-Tech will get reduced substantially. The learned Arbitrator has misinterpreted and misconstrued admissions on part of JV, when actually there were none. The documents relied upon by Grim-Tech clearly mentioned that the amounts were not payable, and the retention money was withheld due to the default on the part of Grim-Tech.

20. In reply, Mr. Anand made the following submissions: -

- (a) He drew attention of this Court towards the ‘GrimTech Final Account Statement’ given as Annexure-1 to the communication dated 13th December, 2017 wherein, balance amount payable towards the 7th and 8th RA Bills is accounted for and reflects the amounts towards – TDS and WTC.
- (b) As regards the amount awarded against uncertified Bills *viz.* 7th and

8th RA Bills (submitted on 28th March, 2013 and 17th April, 2013, respectively), the learned Arbitrator has made the necessary adjustments/ deductions and awarded only the amount payable by JV against Claim No. 1.

ANALYSIS

21. The learned Arbitrator's findings on this issue are as follows: -

“37. *Annexure-I at page 148 of CD-II is the ‘Grimtech Final Account statement’ which was sent by the respondent to the claimant vide letter dated 13.12.2017 [pages 146 to 148 of CD-II]. In Annexure-I, net bill amount of RA-7 and R-8 is shown as Rs. 90,98,783 in the 2nd Table and it is clearly stated in the Table that RA-7 and RA-8 are not certified.*

38. *The net bill amount of Rs. 90,98,783 of uncertified bills along with the amount of retention money works out to Rs. 1,31,61,144 as per para 31 above. In the 3rd Table of Annexure-I, the aforesaid amount of Rs. 1,31,61,144 is shown as adjusted against the cost of Rs. 4,27,33,755 for rectification work carried out at the risk and cost of the claimant. There is logic in the contention of the claimant as per paras 32 & 33 above that since the respondent has considered uncertified amounts of RA-7 and RA-8 for adjustment against the cost of rectification works, it amounts to admission on the part of the respondent that uncertified amounts of RA-7 and RA-8 are payable. However, the objection of the respondent that the no payment can be made against uncertified bills cannot be ignored. Accordingly, it is held that in the absence of unequivocal certification of RA-7 and RA-8, the amount of Rs. 1,02,23,352 worked out in para 32 above is not payable.*

39. *As per para 35 above, the claimant by referring to 2nd para at page 16 of the statement of defence [RD-1] has contended that an amount of Rs.62,27,699 is payable for the work done as per respondent's own admission. The para of RD-1 referred to above reads as under:*

"The respondent submits the aforesaid amount [i.e. Rs.62,27,699 and Rs.19,53,915] are not payable to the claimant on account of delay in execution of works and failure to rectify the deductive and defects at secant piles, which was executed by the respondent at the

risk and cost of the claimant. The respondent is independently claiming the cost in respect of these by its counter-claim".

40. *As per para 36 above, the respondent by referring to page 7 of the statement of defence [RD-1] submitted that amount of Rs.62,27,699 is not payable on account of claimant's failure to justify its entitlement for payment. Relevant extract from page 7 of RD-1 is reproduced below:*

"The amounts legitimately due to the claimant were duly paid as per the Work Order. The claimant had raised 8 running account bills. The last running account bill no.8 was submitted under cover of letter dated 17.04. 2013 [Ex. C-09 CD-2/111) and the cumulative net amount of the said RA bills amounts to Rs 3,47,79,696 out of which, Rs.2,85,51,997 has been paid to the claimant.

The balance amount of Rs.62,27,699 and the retention amount of Rs.19,53,915 is not payable to the claimant on account of claimants failure to justify its entitlement for payment, the delay in execution of works and failure to rectify the defective and deficient secant piles, which work was executed by the Respondent at the risk and cost of the claimant. The claimant is also not entitled to the amounts claimed in the SOC. No loss or damage has been suffered by the claimant on account of the respondent. The allegations made by the claimant are vague and devoid of any specifics or particulars"

41. *On conjoint reading of the above extracts for statement of defence [RD-1], it is evident that cumulative amount of work done as per RA-8 submitted by the claimant is Rs.3,47,79,696 out of which an amount of Rs.2,85,51,997 has already been paid. Accordingly, an amount of Rs.62,27,699 has been worked out by the respondent as due to the claimant for work done but the balance amount has not been paid by the respondent on account of deficient secant piles, delay in execution of work non-rectification of defective secant piles and for delay in execution of work and failure to justify the entitlement of payment.*
42. *To realise the cost of rectification of defective and deficient secant piles, the respondent raised counter-claim No.1 of Rs.76,92,258 which has been rejected as per para 96 infra. For delay in execution of work, the respondent has raised a counter-claim No.2 of liquidated damages but during 8th hearing held on 12.06.2020 the respondent stated that this claim is not pressed [para 8.2 of the proceedings]. As regards justification of entitlement, the*

respondent itself has justified the amount payable for the claim as Rs.62,27,699 by considering the cumulative amount of work done as Rs.3,47,79,696 against which payment of Rs.2,85,51,997 has been made.”

22. The above extracted portion of the Impugned Award reveals that the learned Arbitrator has proceeded to award the claim on the basis of the admissions of the JV. These admissions are apparent on the basis of the documents placed on record.

23. The Court does not find merit in the contention of the JV, that the amount under TDS and WCT is to be adjusted over and above the awarded amounts. Annexure-1 to the communication dated 13th December, 2017, crystallizes the amounts which were found to be due and payable under 7th and 8th RA Bills. This is clearly an admission on the part of JV. The said Annexure appended to the communication, is reproduced as under: -

ANNEXURE-1

GRIMTECH FINAL ACCOUNT STATEMENT

CERTIFIED

Figures in INR

S. No. Wo. No. Date	Gross bill Amount	TDS @2%	WCT @4%	Retention Reduction @5%	Net Paid
Cummulative Payment Statement against WO (As per enclosed Annexure 1)	69,736,398	1,403,476	2,424,777	3,506,193	62,401,952

NOT CERTIFIED

Description	Gross Claimed	TDS	WCT	Retention	Payable (Not claimed)
Bill Not Certified (RA-7 & 8) against order no. J6110RMD0132	10,223,352	204,467	408,934	511,168	9,098,783

Net Amount Payable including Retention (Aprx)	13,116,144
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Debit Notes for Payments on behalf of Grimtech to his suppliers	-516,427
Cost of Rectification work carried out on Risk & Cost of M/s Grimtech	-42,733,755
Delay Cost	To be Confirmed
Net Payable (Excluding Delay Cost)	-30,134,038

24. The aforesaid Annexure exhibits that TDS as well as WCT has been deducted from the gross amount payable. In the RA Bills as well, deductions towards TDS and WCT have been reflected and accounted for. There is thus no error in the findings rendered by the learned Arbitrator. Significantly, the ground upon which the challenge to the Impugned Award is mounted is an entirely factual issue; it is not covered under any of the grounds enumerated in Section 34 of Act.

25. In view of the above, this contention is without merit and is accordingly, rejected.

III. RE: EXPENDITURES INCURRED FOR RECTIFYING DEFECTS – REJECTION OF COUNTER-CLAIM NO. 1

26. Mr. Kher further argued that the learned Arbitrator has wrongly denied payments due to the JV towards expenditures incurred for rectification of defects. He made the following submissions: -

(a) In terms of the requirements under the Work Order, Grim-Tech was

duly notified of the defects – several communications regarding the same were placed on record. Although the communications have been taken note of by the learned Arbitrator, however, they are not discussed in the Impugned Award.

- (b) All these communications indicate that there were due compliance of Clause 8.2 of the Work Order and therefore, the finding of the learned Arbitrator denying the Counter-claim No. 1 is totally unjustified, perverse, and liable to be set aside.

27. *Per contra*, Mr. Anand made the following submissions: -

- (a) The learned Arbitrator rightly rejected Counter-claim No. 1 and held that the contractual obligations stipulated in the Work Order were not complied with by the JV, with regard to expenditures incurred on:
 - (i) 21 defective secant piles constructed by Grim-Tech; (ii) Pile chipping work by the JV; and (iii) Pile repair work by shotcrete method – the learned Arbitrator rightly noted that there was no record of the JV informing Grim-Tech that there were any defect(s), as per Clause 8.2 of the Work Order.
- (b) The Warranty Period⁵ under the GCC stipulates that – “*The Warranty Period expires immediately after all the Piles have been Exposed, Inspected and Accepted as complete by the Main Contractor*”. The last letter written by JV on the alleged rectification issue, was dated 13th June, 2013, wherein it stated that – “*All the piles of the north shaft and station area and that of below 1st layer in south shaft are yet to be exposed*”. Therefore, reliance on this communication by the JV

⁵ Annexed at Page 135 of the Petition.

to contend that, prior-notice for rectification of damaged secant piles was given to Grim-Tech, is erroneous. The secant piles were yet to be exposed/ inspected as is clear as per JV's own communication. The aforesaid communication read in conjunction with the Warranty Period clearly establish that certain portions of the secant piles at Azadpur Station are yet to be exposed/ inspected. Additionally, the alleged defect(s) were during the Warranty Period, the provisions of Clause 8.2 of the Work Order were required to be complied with.

ANALYSIS

28. The findings on Counter-claim No. 1 of the learned Arbitrator, are as follows: -

“92. *The defects observed by the respondent in the piles of station box area stated to be similar to the defects in the piles of south shaft [Work Order No. 055]. Therefore the remedial measures stated to have been carried out by the respondent for the defective piles of station box area are the same as in the case of south shaft. The following remedial measures have been carried out for the station box area:*

- | | | | |
|----|-------------------------------------|---|---------------|
| a. | Construction of 21 additional piles | : | Rs. 63,73,022 |
| b. | Pile chipping | : | Rs. 8,06,476 |
| c. | Pile repair by shotcrete method | : | Rs. 5,25,990 |

93. **Construction of 21 Additional Piles:** *This component of the counter claim is the remedial measures of providing 21 additional piles behind the 21 defective piles constructed by the claimant. The distinct numbering of 21 defective piles is as per para 2.2(c) of Final Written Submission [RD-7]. The break-up of the payment made to various agencies for construction of 21 additional piles is as per para 84 above.*

93.1 *In accordance with the provisions of clause 8.2 of the Work Order [page 45 of CD-II], the respondent has to notify the defects in writing to the claimant, Clause 8.2 reads as under:*

“If any material or workmanship furnished by the sub-contractor

is determined by the main contractor, either during the construction period or during the applicable Warranty Period, to be defective as not complying with the requirements of the sub-contract, the Main Contractor will notify the Sub-contractor in writing that such material or workmanship is rejected. There upon the sub-contractor shall at his own expenses immediately remove or replace or correct such defective material or workmanship by complying strictly with all requirement of the sub-contract" [Emphasis supplied].

93.2 As stated in para above, 21 additional piles were provided behind 21 defective secant piles constructed by the claimant. It is not on record that the respondent had notified any defect in any of the 21 piles as per the provisions of clause 8.2 of the Work Order. It is also not on record that the respondent had rejected any of the 21 piles in terms of clause 8.2 of the Work Order, it is thus obvious that the respondent has not complied with the provisions of clause 8.2 of the Work Order before carrying out the remedial measure of providing 21 additional piles. The relevant provision of clause 8.2 has been emphasized in clause 8.2 reproduced in para above.

93.3 In view of the findings as above, it is held that the component of counter-claim No.1 of Rs.63,73,022 relating to the construction of 21 additional piles is not tenable and is therefore, rejected.

94. **Pile Chipping:** During execution of work it was noticed by the respondent, as stated at page 50 of Final Written Submission [RD-7], that excess quantity of concrete had been used during casting of some of the piles which resulted in bulging of concrete of the piles for which DMRC sent 'Non-Conformance Reports' to the respondent. It is not on record that these non-conformance reports were sent by the respondent to the claimant. It is also not on record that after exposure of piles of station box area the respondent had pointed out the defect of bulging of concrete in any of the pile to the claimant. The respondent had not rejected any pile due to bulging of concrete of the pile. It is not on record that before taking up the chipping of piles to remove extra concrete, the respondent had put the claimant on notice to undertake the chipping of pile. Thus the respondent has not fulfilled its contractual obligation of intimating the defects in writing to the claimant in terms of clause 8.2 of the Work Order.

94.1 In view of the findings as above, it is held that the claim of Rs.8,06,476 for chipping of concrete is untenable and is therefore,

rejected.

95. ***Pile repair by shotcrete method:*** It is stated in para (a) at page 52 of the Final Written Submission [RD-7] that on exposure, it was observed that some of the secant piles in station box area were having exposed reinforcement. As a remedial measure for rectification of the defect, these piles were required to be strengthened by providing a layer of concrete by shotcrete method. It is not on record that the respondent had pointed out the defect of exposed reinforcement in any of the piles of the station box area to the claimant. It is also not on record that before taking up the rectification of defective piles by shotcrete method, the respondent put the claimant on notice to take up the rectification work. **By not intimating the defect of exposed reinforcement to the claimant before taking up the remedial measure, the claimant failed to comply with the provisions of clause 8.2 of the Work Order.**

- 95.1 In view of the findings as above, the third component of counter-claim No.1 for Rs.5,25,990 is held as untenable and accordingly, the claim is rejected.

96. Thus all the three components of counter-claim No.1 have been rejected as per paras above.”

[Emphasis supplied]

29. The afore-said findings are based on non-compliance of Clause 8.2 of the Work Order, reproduced in the afore-noted extracted portion of the Impugned Award. In terms of the said clause, the JV was required to notify Grim-Tech of the defect(s) which were rejected by the Main-Contractor – viz. DMRC. On this issue, a finding of fact has been rendered by the learned Arbitrator, based on the interpretation in terms of the Work Order and the material on record. The said finding, being factual does not merit any interference. That apart, the last communication whereby JV intimated Grim-Tech of the alleged defects is dated 13th June, 2013. The relevant portion of the said communication reads as under: -

*“Please refer the above letters and kindly note that the piles at south shaft have been exposed only up to 1st layer where rectification work is going on. **All the piles of north shaft and station area and that of below 1st layer in***

south shaft are yet to be exposed. As has been informed to you that any and all rectification works on these will be carried out at your cost and risk.”

[Emphasis supplied]

30. A perusal of the said communication would show that, as on the said date there was no exposure of piles. There is also no prior intimation to Grim-Tech, under Clause 8.2 of the Work Order, before undertaking remedial measures. It has also been pointed out that the alleged defect(s), were during the Warranty Period. Therefore, JV had to necessarily bring out the exact nature of alleged the defect(s) in material or workmanship that were rejected by Main Contractor – viz. DMRC. The communication, noted above does not meet the requirements of Clause 8.2 of the Work Order. It is not open to the Court to re-examine and reappraise the evidence considered by the Arbitral Tribunal and to hold that the conclusion reached by the Tribunal is wrong. Therefore, the Court does not find any ground to interfere with the finding of the learned Arbitrator on this issue.

31. In view of the foregoing, the present petition along with pending applications are dismissed.

SANJEEV NARULA, J

SEPTEMBER 13, 2021

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(corrected and released on 18th October, 2021)