

(2018) 07 DEL CK 0424

In the Delhi High Court

Case No : O.M.P. (T) (Comm.) 39 OF 2018 & Ia No. 6559, 9228 OF 2018

National Highways Authority Of India

APPELLANT

Vs

Gammon Engineers And Contractor Pvt Ltd

RESPONDENT

Date of Decision : 20-07-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 7, 11, 11(14), 14, 31A, 31(8), 37

Citation : (2018) 07 DEL CK 0424

Hon'ble Judges : NAVIN CHAWLA, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sr.

No.", "Particulars of fees

and expenses", "Amount

payable per

Arbitrator

per Case

where total

sum of all

claims or

counter-

claims in the

case before

AT is up to

Rs. 100

Crore.", "Amount

payable per

Arbitrator

per Case

where total

sum of all

claims or

counter-

claims in the

case before

AT is above

Rs. 100

Crore and

up to Rs. 500

Crore", "Amount

payable per

Arbitrator

per Case

where total

sum of all

claims or

counter-

claims in the

case before

AT is above

Rs. 500

Crore

1., Fee, "(i)Rs.

25,000/- per

day.", "(i)Rs.

40,000/- per

day.", "(i)Rs.

50,000/- per

day.

., "(ii) 25%

extra on fee", "(ii)10% extra

on fee at (i)", "(ii)10% extra

on fee at (i)

., "procedure as

per Section-

29(B) of

A&C Act; or

10% extra on

fee at (i)

above if

award is

published

within 6

months from

date of

entering the

reference by

AT; ", "within 6

months from

date of

entering the

reference by

AT; ", "within 6

months from

date of
entering the
reference by
AT;
,, "Alternatively,
the
Arbitrator
may opt for a
lump-sum fee
of Rs. 5.00
lakh per case
including
counter-
claims." "Alternatively,
the
Arbitrator
may opt for a
lump-sum fee
of Rs. 8.00
lakh per case
including
counter-
claims." "Alternatively,
the
Arbitrator
may opt for a
lum-sumfee
of Rs. 10.00
lakh per case
including

counter-

claims.

2., "Reading Charges â?

One Time", "Rs. 25,000/-

per

arbitrator

per case

including

counter

claims", "Rs. 40,000/-

per

Arbitrator

per case

including

counter

claims.", "Rs. 50,000

per

Arbitrator

per case

including

counter

claims

3., "One-time charges for

Secretarial Assistance

and Incidental

Charges (telephone,

fax, postage etc.)", "Rs. 25, 000/-

per

arbitrator

per case", "Rs. 25, 000/-

one-time per

arbitrator

per case", "Rs.25,000/-

one-time per

arbitrator

per case

4., One-time Charges for, "Rs. 40,000/-", "Rs. 50,000/-", "Rs.60,000/-

, "publishing/declaration

of the Award", "per

arbitrator", "per

arbitrator", "per

arbitrator

5., "Other Expenses (as per actual against bills subject to ceiling given below)",,,

(i), Travelling Expenses, "Economy Class (by air), First Class AC (by train) and AC Car (by road)",,,

(ii), Lodging and Boarding, "Rs. 15,000/- per day (Metro Cities); or

Rs. 8,000/- per day (in other cities); or

Rs. 5,000/- per day, if any Arbitrator makes

own arrangement",,,

6., Local Travel, "Rs. 2,000/- per day",,,

7., "Extra Charges for

days other than

meeting days

(maximum for 2x1/2

days)", "Rs. 5,000/- per ½ day for outstation

Arbitrator",,,

Note, "1. Lodging, boarding and travelling expenses shall be allowed only

for the arbitrator who is residing 100 kms., away from the venue of

the meeting.",,,

, "2. Delhi, Mumbai, Chennai, Kolkata, Bengaluru and Hyderabad

shall be considered as Metro Cities." , , ,

â??39. Arbitrators can be appointed by the parties directly without the intervention of the court, or by an institution specified in the arbitration agreement. Where" , , ,

there is no consensus in regard to the appointment of arbitrator(s), or if the specified institution fails to perform its functions, the party who seeks arbitration can file" , , ,

an application under Section 11 of the Act for appointment of arbitrators. Section 11 speaks of the Chief Justice or his designate â??appointingâ? an arbitrator. The , , ,

word â??appointâ? means not only nominating or designating the person who will act as an arbitrator, but is wide enough to include stipulating the terms on which" , , ,

he is appointed. For example, when we refer to an employer issuing a letter of appointment, it not only refers to the actual act of appointment, but includes the" , , ,

stipulation of the terms subject to which such appointment is made. The word â??appointâ? in Section 11 of the Act, therefore, refers not only to the actual" , , ,

designation or nomination as an arbitrator, but includes specifying the terms and conditions, which the Chief Justice or his designate may lay down on the facts and" , , ,

circumstances of the case. Whenever the Chief Justice or his designate appoint arbitrator(s), it will be open to him to stipulate the fees payable to the arbitrator(s)," , , ,

after hearing the parties and if necessary after ascertaining the fee structure from the prospective arbitrator(s). This will avoid the embarrassment of parties having to , , ,

negotiate with the arbitrators, the fee payable to them, after their appointment.â??" , , ,

(emphasis supplied) , , ,

15. In *Â Ariba Â India Â Private Â Ltd. Â vs. Â ISPAT Â Industries Â Ltd.* MANU/DE/3103/2011, this Court had observed that:" , , ,

â??132. â?|. The institution of arbitration, just like the courts, are created with the litigant, i.e. consumer of justice being the central figure. It is to provide judicial" , , ,

service to the litigating public, so as to preserve law and order in the society,

that the courts have been established and all other alternate dispute resolution modes," , , , ,

including arbitration, have been evolved. Just like the courts have not been created for the benefit of the Judges and the support staff, similarly, the arbitrations are" , , , ,

not conducted to advance the cause of the learned arbitrators.â?? , , , ,

16. In Union of India vs. Singh Builders Syndicate, (2009) 4 SCC 523, the Supreme Court had expressed its dismay at the fees being charged by the Arbitral Tribunal" , , , ,

and observed as under:- , , , ,

â??22. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel" , , , ,

constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and" , , , ,

one party agrees to pay such fee, the other party, which is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not" , , , ,

be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator," , , , ,

may prejudice his case or create a bias in favour of the other party which readily agreed to pay the high fee. , , , ,

24. What is found to be objectionable is parties being forced to go to an arbitrator appointed by the court and then being forced to agree for a fee fixed by such , , , ,

arbitrator. It is unfortunate that delays, high costs, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth" , , , ,

of arbitration as an effective dispute resolution process. Delay and high costs are two areas where the arbitrators by self-regulation can bring about marked , , , ,

improvement.â?? , , , ,

17. To answer the above concern expressed by the Supreme Court, the Law Commission of India in its Report No. 246 recommended amendments to be made to the" , , , ,

Arbitration and Conciliation Act, 1996. The relevant paragraphs of the Report in relation to the Fees of Arbitrators are reproduced hereinunder:-" , , , ,

â??Fees of Arbitrators,,,,

10. One of the main complaints against arbitration in India, especially ad hoc arbitration, is the high costs associated with the same â?" including the arbitrary",,,,,

unilateral and disproportionate fixation of fees by several arbitrators. The Commission believes that if arbitration is really to become a cost effective solution for,,,,

dispute resolution in the domestic context, there should be some mechanism to rationalise the fee structure for arbitrations. The subject of fees of arbitrators has been",,,,,

the subject of the lament of the Supreme Court in Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523 where it was observed:",,,,,

â??[T]he cost of arbitration can be high if the arbitral tribunal consists of retired Judgesâ?!",,,,,

There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judges are arbitrators. The large number of sittings,,,,

and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even",,,,,

exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at",,,,,

least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their",,,,,

capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay",,,,,

such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that",,,,,

refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high",,,,,

fee.â??",,,,,

11. In order to provide a workable solution to this problem, the Commission has

recommended a model schedule of fees and has empowered the High Court to frame",,,,

appropriate rules for fixation of fees for arbitrators and for which purpose it may take the said model schedule of fees into account. The model schedule of fees are,,,,

based on the fee schedule set by the Delhi High Court International Arbitration Centre, which are over 5 years old, and which have been suitably revised. The",,,, schedule of fees would require regular updating, and must be reviewed every 3-4 years to ensure that they continue to stay realistic.",,,,

12. The Commission notes that International Commercial arbitrations involve foreign parties who might have different values and standards for fees for arbitrators;,,,,

similarly, institutional rules might have their own schedule of fees; and in both cases greater deference must be accorded to party autonomy. The Commission has, " ,,,,

therefore, expressly restricted its recommendations in the context of purely domestic, ad hoc, arbitrations.â??",,,,

18. Based on the above recommendation, the legislature, while making amendments to the Act by way of Arbitration and Conciliation (Amendment) Act, 2015, has",,,,

introduced Schedule IV to the Act. Section 11(14) of the Act further provides for framing of rules for the purpose of determination of the fees of the Arbitral Tribunal,,,,

and the manner of its payment to the Arbitral Tribunal, after taking into consideration the rates specified in the Fourth Schedule.",,,,

19. The Fourth Schedule to the Act, however, is not mandatory, but provides for a reasonable fee structure that may be adopted by the High Court in form of Rules," ,,,,

while appointing an Arbitrator under Section 11 of the Act and may also be used by the parties and the arbitrators for arriving at a consensus on the fees payable to,,,,

the Arbitral Tribunal.,,,,

20. What is to be noted and remembered is that the terms of appointment of the arbitrator are governed by the agreement between the parties and the arbitrator on the,,,,

fee payable to the Arbitral Tribunal. Where there is no express agreement about fees and expenses, the right to remuneration would be on the basis of an implied

term",,,,

to pay reasonable remuneration to the Arbitral Tribunal for its services. However, where an offer/request for appointment as arbitrator is made stipulating the terms of",,,,

such appointment, including fee, the arbitrator cannot accept such appointment, while rejecting the other terms.",,,,

21. In Mr.K.K. Sarin and Ors. (Supra), this Court had considered the issue whether the Arbitral Tribunal is bound by the agreement between the parties regarding the",,,,

fees payable to the Arbitral Tribunal and held as under:-,,,,

â??22. Therefore, even though I agree with the senior counsel for the petitioner that the arbitrators are bound by the agreement between the parties as to the",,,,

payment of fee and if the said fee is not acceptable to them, are free not to accept the office as an arbitrator and/or to recuse themselves and cannot demand fee in",,,,

supersession of the said agreement but in the facts of the present case I find the petitioner to have agreed to the fee schedule. The agreement between the petitioner,,,,

and the respondent as to the fee schedule could always be novated and in this case is found to have been novated. Even otherwise there is no justification,,,,

whatsoever for the petitioner to have agreed to pay and paid fee higher than agreed and/or as per its circular in arbitration-I and to make a grievance with respect,,,,

thereto at the fag end of the proceedings in arbitration-II. The ASG had handed over a compilation of judgments on waiver but in view of above, it is not felt",,,,

necessary to cite the same. The first challenge of the petitioner thus fails.â??,,,,

(emphasis supplied),,,,

22. In Madras Fertilizers Limited (Supra), the High Court of Madras had held that a party cannot be forced to pay fees higher than what they are capable of paying to",,,,

the Arbitrator. It was held as under:-,,,,

â??22. The words used in Section 14(1)(a) is that the mandate of an Arbitrator shall terminate if he has become de jure unable to perform his functions. (emphasis,,,,

supplied). It is true that the second respondent is ready to go ahead with the proceedings, but somehow, the proceedings got bogged down in the light of

the",,,,

controversy with regard to fixation of fees by the second respondent. The word 'Perform his functions used in Section 14(1)(a) will simply performing his functions,,,,,

effectively without any bias and with full confidence of both the parties. Performing this functions does not simply going through the motion without instilling,,,,,

confidence in the minds of the parties.,,,,

23. Now, if the mandate is not terminated and the second respondent is permitted to continue with Arbitration proceedings, it will amount to forcing a higher fee on",,,,

the petitioner which they are not capable of paying. Further, after these controversies, disputes, exchange of correspondences, etc. with regard to fixation of fee, if",,,,

the second respondent continues the Arbitration proceedings, the petitioner may not be in a proper frame of mind to proceed with the arbitration before the second",,,,

respondent. They will definitely have some doubt as to the conduct of the Arbitrator and this doubt would certainly lead to loss of confidence. Therefore, such an",,,,

unpleasant situation is to be avoided in the best interest of the parties including the Arbitrator.,,,,

25. A perusal of the fees fixed by the Honâ??ble Chief Judge would reveal that the maximum fees fixed by him for arbitration proceedings is Rs. 1 lakh. It is true that,,,,,

the second respondent is not named in the Panel of Arbitrators constituted by the Honâ??ble Chief Justice. It is equally true that the second respondent fixed his,,,,,

fees at Rs. 15 lakhs on 3.8.2005 prior to the first Circular dated 20.03.2006. But a comparison of the fees fixed by the Honâ??ble Chief Justice and the second,,,,,

respondent Arbitrator would definitely make it very clear that the fees fixed by the second respondent is on the higher side, justifying the petitioner which is a Public",,,,

Sector undertaking facing financial problems, requesting the second respondent for reduction of fees. However, the second respondent is not ready to accede to the",,,,

request as he is of the opinion that as the Counsel for the petitioner has already consented to for the fixation of fees, the petitioner should pay the same as fixed

by",,,,

him. In this context, the learned Senior Counsel for the petitioner has rightly submitted that the acceptance of the fees by the Counsel is not the criterion, but it is the",,,,

ability and capacity of the petitioner to pay the same. I am also of the considered view that even if the Counsel gives her consent, it is not binding on the petitioner",,,,

as it is the petitioner who is the right person to decide about its financial capability and ability. Besides this, the petitioner wrote letters to the second respondent",,,,

informing about its financial conditions and requesting him to reduce his fees.,,,,

26. Because of this long drawn controversy with regard to fixation of fees by the second respondent, the arbitration proceedings could not make a headway. Therefore",,,,

taking into considerations the totality of the facts and circumstances, I am of the considered view that the second respondent has become de jure unable to perform",,,,

his function effectively warranting his mandate to be terminated as per Section 14(1)(a) of the Act 1996.â??",,,,

23. Reliance of the counsel for the respondent on Section 31A read with Section 31(8) of the Act cannot be accepted as Section 31(8) of the Act forms part of the,,,

â??terms and conditions of the Arbitral Awardâ??. In the Award the Arbitral Tribunal can fix the â??costsâ?? that are payable by one party to another in the arbitration,,,

proceedings. Section 31A of the Act provides for various aspects of such â??costsâ? that the Arbitral Tribunal has to bear in mind while passing its Award. It is true,,,

that one such criterion is of the fees of the Arbitrator, however, as noted above, this is only one of the aspects to be considered while determining the costs payable",,,,

by one party to another in terms of the Arbitration Award.,,,,

24. The Law Commission of India in its Report No. 246 had given the following reasons for recommending introduction of Section 31A to the Act:,,,

â??70. Arbitration, much like traditional adversarial dispute resolution, can be an expensive proposition. The savings of a party in avoiding payment of court fee, is",,,,

usually offset by the other costs of arbitration â?" which include arbitratorâ?'s fees and expenses, institutional fees and expenses, fees and expenses in relation to" ,,,,

lawyers, witnesses, venue, hearings etc. The potential for racking up significant costs justify a need for predictability and clarity in the rules relating to apportionment" ,,,,

and recovery of such costs. The Commission believes that, as a rule, it is just to allocate costs in a manner which reflects the partiesâ?' relative success and failure" ,,,,

in the arbitration, unless special circumstances warrant an exception or the parties otherwise agree (only after the dispute has arisen between them)." ,,,,

71. The loser-pays rule logically follows, as a matter of law, from the very basis of deciding the underlying dispute in a particular manner; and as a matter of economic" ,,,,

policy, provides economically efficient deterrence against frivolous conduct and furthers compliance with contractual obligations." ,,,,

72. The Commission has, therefore, sought comprehensive reforms to the prevailing costs regime applicable both to arbitrations as well as related litigation in Court" ,,,,

by proposing section 6-A to the Act, which expressly empowers arbitral tribunals and courts to award costs based on rational and realistic criterion. This provision" ,,,,

furtheres the spirit of the decision of the Supreme Court in Salem Advocate Bar Association v Union of India, AIR 2005 SC 3353, and it is hoped and expected that" ,,,,

judges and arbitrators would take advantage of this robust provision, and explain the â?'rules of the gameâ?' to the parties early in the litigation so as to avoid" ,,,,

frivolous and meritless litigation/arbitration.â?' ,,,,

25. A reading of the above would clearly show that the â?'costsâ?' under Section 31(8) and 31A of the Act are the costs which are awarded by the Arbitral Tribunal ,,,,

as part of its award in favour of one party to the proceedings and against the other. ,,,,

26. The deletion of words â?'unless otherwise agreed by the partiesâ?' in Section 31A only signifies that the parties, by an agreement, cannot contract out of" ,,,,

payment of â?'costsâ?' and denude the Arbitral Tribunal to award â?'costsâ?' of arbitration in favour of the successful party. The Judgment of this Court in ,,,,

Gayatri Jhansi Roadways Limited (Supra) relied upon by the counsel for the respondent does not take note of the above decisions or the report of the aw,,,,

Commission. The said judgment is, therefore, per incuriam. I am informed that the said decision is pending challenge before the Supreme Court by way of a Special",,,,,

Leave Petition. In any case, the said Judgment was passed on an appeal under Section 37 of the Act and did not consider the contours of Section 14 of the Act.",,,,,

27. In my view, the Arbitral Tribunal is bound by the Arbitration Agreement between the parties, which is the source of its power. The Arbitral Tribunal cannot",,,,,

accept the appointment in part and rewrite the Arbitration Agreement between the parties.,,,,,

28. In view of the above, the mandate of the Arbitral Tribunal shall stand terminated. The parties may appoint a substitute Arbitrator in terms of the Arbitration",,,,,

Agreement between them within a period of 15 (Fifteen) days from today. The Arbitral Tribunal so constituted shall proceed from the stage where the proceedings,,,,

stood before the existing Arbitral Tribunal.,,,,,

29. The petition is allowed in the above terms and with no order as to cost.,,,,,