

(2023) 01 DEL CK 0128

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM.) No. 235 Of 2021

National Highways Authority Of India

APPELLANT

Vs

M/S IJM Gayatri JV

RESPONDENT

Date of Decision : 27-01-2023

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 31(8), 34, 36, 38, 38(2)

Citation : (2023) 01 DEL CK 0128

Hon'ble Judges : Neena Bansal Krishna, J

Bench : Single Bench

Advocate : Sudhir Nandrajog, Krishan Kumar, Nitin Pal, Angad Mehta

Judgement

Neena Bansal Krishna, J

I.A. 10890/2021 (u/S 36 of Arbitration and Conciliation Act, 1996)

1. The application under Section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'A & C Act, 1996') has been filed on behalf of the applicant/National Highways Authority of India (hereinafter referred to as 'NHAI') seeking stay of the operation of impugned Arbitral Award dated 04th February, 2021 passed by the Arbitrators comprising of Mr. Justice A.K. Sikri, Presiding Arbitrator, Mr. Justice R.C. Chopra, Co-Arbitrator, and Mr. K.B. Lal Singal, Co-Arbitrator only to the limited extent of the directions given by the Arbitral Tribunal (hereinafter referred to as "AT") to the petitioner Authority to pay the fee of the AT in disregard to Schedule-IV of A & C Act, 1996, which has formed the part of the Award.

2. It is submitted that the respondent had filed an application dated 12th November, 2020 stating that the fee as per the Schedule-IV of A & C Act, 1996 is Rs. 30,00,000/- per Arbitrator and the interpretation given to the Schedule by this AT, should not be accepted as the Judgement in the case of Rail Vikas Nigam Ltd. Vs. Simplex Infrastructures Ltd. O.M.P. (T) (COMM.) 28/2020 dated 10th July, 2020 for fixing the Arbitrator's Fees at Rs. 49,87,500/- was under challenge

in a Special Leave Petition before the Hon'ble Supreme Court.

3. The petitioner has chronicled the Orders made by the AT from time to time in regard to the AT's fee. In response to the application of the respondent (petitioner/NHAI) dated 12th November, 2020, the learned AT vide its Order dated 23th November, 2020 observed that the Supreme Court has not stayed the operation of the judgement and so long as the judgement remains in force, effect to that judgement has be given by the AT. Therefore, the fees was held to be rightly calculated in the Order dated 02nd November, 2020 in terms of the Schedule-IV as interpreted by the Co-Ordinate bench of this Court, which holds the field. Therefore, the application of the respondent (petitioner herein) was rejected.

4. Thereafter, learned AT vide its Order 24th November, 2020 noted that since the parties had already deposited Rs. 20,00,000, the balance amount of Rs. 29,87,500/- to each of the Arbitrators, was directed to be deposited by the parties, to be shared equally by the them.

5. Again, directions were issued by the AT vide its Orders dated 24th November, 2020 and 27th December, 2020 under Section 38 of the A & C Act, 1996 to the petitioner to deposit its share of fee or Rs. 9,93,750/- in the account of each of the Arbitrators on or before 25th January, 2021.

6. The Award in the matter was ready and the AT fixed the date 25th January, 2021 for the pronouncement of the Award. Again, directions were given by the learned AT that it shall have lien on the Award and it would neither be disclosed to the parties, nor the copy of the same shall be given till the payment of the balance fee as aforesaid was made. The learned AT also made clear that it shall incorporate necessary directions making the aforesaid payment made by the Claimant/ IJM Gayatri (JV) on behalf of the respondent/ NHAI (petitioner herein) as part of the costs of the Award. The learned AT vide its Order dated 22nd January, 2021 proceeded under Section 38(2) of A & C Act, 1996 for non-payment of the fee by the petitioner herein.

7. The petitioner/National Highways Authority of India has asserted that it had deposited its share of fee of Rs. 5,00,000/- was deposited on 18th December, 2020 and the petitioner had objected to the calculation of the arbitral fee as directed by the AT as the maximum fee payable to the Arbitral Tribunal was Rs. 30,00,000/-.

8. The respondent/Contractor has paid the alleged balance fee of Rs. 29,81,250/- to the AT and the AT has awarded the recovery of costs of Rs. 29,81,250/- against the petitioner herein for the arbitrator's fee paid on behalf of the petitioner/NHAI.

9. Aggrieved by the impugned Award dated 04th February, 2021 to the extent of the excess arbitral fee payable to the AT on the wrong interpretation of the Schedule-IV of A&C Act, 1996, a prayer is therefore made that the impugned

Award dated 04th February, 2021, to the extent of recovery of arbitral fee from the petitioner, be stayed.

10. Submissions heard.

11. The petitioner by way of present petition has raised a short question on the fixation of fee of the learned AT which is claimed to be violative of the public policy and substantive laws as enunciated and consistently laid down by the Hon'ble Supreme Court and the High Courts of this country and consequently, amounts to gross misconduct on the part of the learned AT.

12. The challenge is limited to the determination of whether the fee of the learned AT had been fixed in consonance with the Schedule-IV or is it contrary to the judgement in the case of Oil and Natural Gas Corporation Ltd. Vs. Afcons Gunanusa JV 222 SCC OnLine SC 1122 which was delivered after the date of the award.

13. The factual background is that an Arbitral Award delivered by a majority of 2:1 was challenged in this Court and was remanded back for constitution of a fresh Tribunal for the matter to be decided afresh and an AT was accordingly constituted comprising Mr. Justice A.K. Sikri, Presiding Arbitrator, Mr. Justice R.C. Chopra, Co-Arbitrator, and Mr. K.B. Lal Singal, Co-Arbitrator. In their first meeting held on 23rd September, 2020, it was agreed that the fee of members of the AT shall be paid as per Schedule-IV of the A & C Act, 1996. Prior to this order, Schedule-IV was interpreted by this Court Rail Vikas Nigam Ltd. (supra).

14. In the procedural meeting held on 02nd November, 2020, it was noted that on receipt of the arbitral record, considering the amount claimed by the Claimants as per the Schedule-IV as incorporated by this Court, the fee payable to each of the Arbitrators comes to Rs. 49,87,500/- and accordingly, directions were issued for payment of the arbitral fee to each of the learned Arbitrators.

15. The petitioner herein, (which was the respondent in the arbitration proceedings), did not consent to the quantification of the fee payable to the learned Arbitrators and failed to deposit the same.

16. In the case of Rail Vikas Nigam Ltd. (supra), the question for consideration was whether the maximum fee payable to the learned Arbitrators in accordance with Schedule-IV was Rs. 30,00,000/-. The principles were discussed in detail and it was held that the ceiling was not Rs. 30,00,000/-, but the fixed fee was Rs. 19,87,500/- as prescribed in Entry No. VI as the base fee chargeable, in addition to 0.5% of the claim amount and the ceiling of Rs. 30,00,000/- was imposed on the variable component which was in addition to the base fee of Rs. 19,87,500/-. The fee thus payable to the learned Arbitrators as per Schedule-IV was determined at Rs. 49,87,500/-. The learned AT specifically observed that though this judgement was under challenge before the Hon'ble Supreme Court, the prevailing law as on the date of fixation of fees and even pronouncement of Award was Rs. 49,87,500/- as propounded in Rail Vikas Nigam Ltd. (supra).

Accordingly, the orders were made for payment of the fee of the learned Arbitrators.

17. The fee fixation was done in accordance with the prevailing law and cannot be held to be either against the public policy or the substantive law of the land as it existed on the said date.

18. In Oil and Natural Gas Corporation Ltd. (supra), the Hon'ble Supreme Court has provided a clarification on the legislative intent behind the introduction of the Fourth Schedule and also capped the Fees under Fourth Schedule as Rs.30,00,000 or as may be mutually agreed by the parties. The relevant paragraphs read as under:

"197. The LCI 246th Report (supra), indicates that the legislative intent behind the introduction of the Fourth Schedule was to put an end to the practice of arbitrators charging exorbitant fees from the parties taking their services in ad hoc arbitrations. Consequently, when we have the option of setting the ceiling of the fees in the Fourth Schedule at either Rs. 30,00,000 or Rs. 49,87,500, we believe it would be appropriate to choose the lower amount since it would be in keeping with legislative intent. The 2015 Arbitration Amendment Act was clearly enacted with the intent to give effect to the recommendation of the LCI 246th Report on the point. Thus, we hold that the ceiling of Rs. 30,00,000/- in entry at Serial No. 6 of the Fourth Schedule is applicable to the sum of base amount and the variable amount, and not just the variable amount.

xxx xxx xxx

219. I would respectfully agree with D.Y. Chandrachud J. that the process of fixation of fee by the arbitral tribunal should be in accordance with public policy underlying arbitration, that is, with agreement and consensus of the parties who bear the cost of arbitration. The arbitral tribunal should be transparent and disclose the fee structure and terms of payment at the preliminary stage, so that an unwilling party can express its willingness. No party should feel compelled to agree and therefore, it is necessary that the consent of the parties in writing should be taken. This exercise undertaken at the initial stage would avoid embarrassing situations and prevent delay and litigation. The suggestion in Sanjeev Kumar Jain (supra) that the parties before nomination should ascertain the fee structure from the prospective arbitrators is salutary. At the same time, I would accept that fee fixation is a matter of the procedure and relates to conduct of arbitration, and for reasons supra and as held below, is an obligation as well as a right conferred on the arbitral tribunal. Therefore, even in cases where consensus between the parties or with the arbitral tribunal is not possible, the arbitral tribunal is entitled to fix the professional fee payable for adjudication, as without fee fixation, except in cases of pro bono arbitration, the arbitral tribunal would be unable to proceed further to decide and adjudicate the disputes. It goes without saying that the fee so fixed should be fair and reasonable.

220. I would now proceed to examine the specific provisions which, according to

me, make the legal position clear as they empower an arbitral tribunal to fix its fee. Sub-section (8) to Section 31, as originally enacted before its substitution by Act No. 3 of 2016, had stipulated that unless otherwise agreed by the parties, the arbitral tribunal shall fix the cost of arbitration. The explanation to this Section clarified that the expression 'costs' for the purpose of the sub-section, means reasonable costs relating to the fees and expenses of the arbitrator and the witnesses. The sub-section emphasised that the agreement between the parties is paramount and binding. The arbitral tribunal is entitled to fix costs of arbitration, which includes the fee and expenses of the arbitrator, if the agreement between the parties is wordless and silent as to the fee payable to the arbitral tribunal."

19. It is quite evident that the fixation of arbitral fee by the learned AT cannot be faulted at this stage as it was done in accordance with the prevailing law as enunciated in Rail Vikas Nigam Ltd. (supra). There is no ground made out for granting a stay.

20. The learned AT had observed that the challenge to the judgement of this Court in Rail Vikas Nigam Ltd. (supra) though pending before the Hon'ble Supreme Court, had not been stayed. However, the Apex Court has now decided this issue in Oil and Natural Gas Corporation Ltd. (supra). The petitioner is at liberty to agitate its challenge to the fee of the AT in its petition under Section 34 of A & C Act, 1996.

21. Accordingly, the application is disposed of.

O.M.P. (COMM.) 235/2021 & I.A.10226/2021

22. List before the Roster Bench on 22.02.2023.