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

\+ O.M.P. (T) (COMM) 24/2020 & I.A. 4099-101/2020

ENTERTAINMENT CITY LTD ... Petitioner

Through: Mr. Pradeep Aggarwal, Mr. Arjun Aggarwal and Mr. Pawas Agarwal, Advs.

Versus

ASPEK MEDIA PRIVATE LTD. ... Respondent

Through: Mr. Gaurav Mitra, Adv. with Mr. Muhammad Ali Khan, Mr. Omar Hoda, Ms. Aishwarya Mohapatra and Ms. Shriya Raychaudhari, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (ORAL)

% 03.06.2020

O.M.P. (T) (COMM) 24/2020

1. This matter has been taken up for hearing via video-conferencing.

2. Consequent to arbitral disputes arising between the petitioner and the respondent, O.M.P. (I) (COMM) 467/2018 and O.M.P. (I) (COMM) 479/2018 were preferred, by the petitioner, and the respondent, respectively, before this Court, for appointment of an

arbitrator to arbitrate on the disputes.

3. *Vide* order, dated 21st December, 2018, a learned retired Judge of this Court was appointed as Sole Arbitrator. The said order did not fix any fees, as payable to the learned Sole Arbitrator. Admittedly, the contract/agreement, dated 14th August, 2014, between the petitioner and the respondent, too, contained an arbitral clause, but does not fix any fees as payable to the Arbitrator.

4. Consequent on appointment of the learned Sole Arbitrator, a claim, for ₹ 71,76,11,202/-, with 18 % compound interest, was filed by the respondent, and a counter-claim of ₹ 64,34,20,140/- was filed by the petitioner.

5. The learned Sole Arbitrator, consequently, entered on the reference and proceeded to hear the parties.

6. The grievance of the petitioner, on the basis whereof the prayer for terminating the mandate of the learned Sole Arbitrator is being urged in these proceedings, essentially relates to the fees being charged by the learned Sole Arbitrator.

7. The main contention of the petitioner, in this petition, preferred under Section 14, read with Section 12(4) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act"), is that the fees, which the learned Sole Arbitrator has required the parties to pay, is in violation of the provisions of the Act. Inasmuch as the exact quantum of fees charged, by the learned Sole Arbitrator, is not

relevant for adjudication of the dispute before me, I deem it appropriate, in the interests of privacy, not to make reference thereto.

8. The precise issue, arising for consideration, is whether the fees chargeable by the learned Sole Arbitrator, in the present case, were subject to the statutory limits, stipulated in the 4th Schedule to the Act.

9. Suffice it to state that, consequent upon the directions issued by the learned Sole Arbitrator on 9th December, 2019, an application was preferred, by the petitioner, before the learned Sole Arbitrator, on 7th January, 2020, pleading that the fees demanded by her infracted Section 11(14) of the Act, read with the Fourth Schedule thereto. The petitioner also pleaded financial stringency.

10. *Vide* order dated 28th February, 2020 (impugned herein), the learned Sole Arbitrator rejected the aforesaid objection of the petitioner, regarding the fees charged by her. The specific finding of the learned Sole Arbitrator, on this point, as contained in the said order, may be reproduced as under:

> "The Respondent on the last date had moved an application seeking fixation of fee for the undersigned. The undersigned has been appointed by the Hon'ble High Court on a petition under Section 9 of the Arbitration and Conciliation Act, 1996 on 21.12.2018. The undersigned had been directed to give for disclosure under Section 12 of the said Act which is on record. The undersigned is not bound by the 4th Schedule; it can be considered as a guiding factor. In the instant case, there is a claim and counterclaim. The provision of Section 38(1) and (2) of the said Act noted in the fee shall be charged separately for the claim of the plaint. The fee will be charged according. The parties will calculate the amount. The judgement of the Hon'ble High Court reported as ***[2018 (4)***

ARBLR 168 (Delhi)] is relied upon. It inter alia reads as under:

> "15. Proviso to Section 38 (1) of the Act can only apply when there Arbitral Tribunal is not to fix its fee in terms of the 4th Schedule to the Act. It would not have any bearing on the interpretation to be put to the 4th Schedule. It is noted that as regards the even under the Amended Act, the Arbitral Tribunal is free to fix its schedule of fee in an ad hoc arbitration is conducted without the intervention of the Court. *Even where the Arbitral Tribunal is appointed by the Court under Section 11 of the Act, in absence of the rules framed under Section 11 (14) of the Act, it is not the case that the Arbitral Tribunal has to fix its fee in accordance with the 4th Schedule to the Act.* Therefore the proviso to Section 38(1) of the Act would have no bearing on the interpretation being put to the 4th Schedule and the phrase "Sum in dispute" therein."

The Respondent has not paid the fee in terms of the earlier directions. He under instructions undertakes to pay a sum of ₹ 5,00,000/- within a period of 2 weeks. The same be paid positively as inspite of repeated directions, the fee has not been paid by the Respondent. Today the Claimant has paid a sum of Rs. 4.50 lakhs (after deduction of TDS)."

(Emphasis supplied)

11. It is in these circumstances that the present petition has been filed.

12. The prayer clause in the petition reads thus:

> "(a) terminate the mandate of the Ld. Sole Arbitrator appointed by this Hon'ble Court to adjudicate the dispute pending between the parties and appoint a substitute Ld. Sole Arbitrator and direct that the arbitration to be held under the aegis of DIAC;
>
> (b) the fee of the substituted arbitrator may be fixed taking into consideration the amount already paid by

the parties towards arbitral fee and in terms of the provisions of Section 11(14) read with the Fourth Schedule of the Act of 1996;

(c) pass such other and further order or orders as this Hon'ble Court deem fit and proper in the facts and circumstances of the present case."

13. As noted above, the present petition has been preferred under Section 12(4) read with Section 14 of the Act.

14. Section 12 of the Act contains the grounds on which the mandate of an Arbitrator can be questioned by a party. Sub- sections (3) and (4), thereof, read thus:

"**12. Grounds for challenge. –**

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(3) An arbitrator may be challenged *only* if –

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

15. The use of the word "only", in sub-section (3) of Section 12 evinces, unmistakably, the statutory intent of delineating the grounds of challenge, available under Section 12, to the two contingencies

stipulated therein, i.e. the existence of justifiable doubts, regarding the independence or impartiality of the arbitrator, or absence of required qualifications. Concededly, neither of these disabilities would apply to the learned Arbitrator in the Present Case, and Mr. Aggarwal, fairly, did not seek to so submit. Instead, he seeks to contend that sub-section (4) of Section 12 of the Act is a standalone provision, and that, inasmuch as the fees charged by the learned Sole Arbitrator, in the present case, constitute "reasons of which (the petitioner) became aware" after her appointment, the present challenge is maintainable under Section 12(4).

16. I am unable to agree. In my view, sub-Section (4) of Section 12 cannot be regarded as a standalone provision and has, necessarily, to be read with in conjunction with sub-Section (3) of Section 12. The grounds for challenge, available under Section 12 of the Act, are statutorily limited to those contemplated by sub-Section (3) thereof, i.e., where there are justifiable doubts regarding the independence and impartiality of the learned Sole Arbitrator, or where he does not possess the qualifications agreed to by the parties. If the continuance of the mandate, of the arbitrator, is challenged on either of these grounds, sub-section (4) of Section 12 postulates, as a further condition, that the applicant became aware of the ground of challenge after the appointment of the arbitrator. Section 12 of the Act, therefore, does not apply, in the present case, as the invocation, thereof, by the petitioner has, consequently, to be regarded as misconceived.

17. Mr. Aggarwal, however, seeks to fall back on Section 14(1)(a) of the Act.

18. Section 14 deals with situations in which there is "failure or impossibility to act" on the part of the learned Sole Arbitrator, in which case, too, the mandate of the Arbitrator terminates.

19. For ready reference, sub-sections (1) and (2) of Section 14 of the Act – which alone are relevant – may be reproduced thus:

> "**14. Failure or impossibility to act. –**
>
> (1) The mandate of an arbitrator shall terminate if –
>
> (a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and
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> (b) he withdraws from his office or the parties agree to the termination of his mandate.
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> (2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate."

20. Mr. Aggarwal seeks to invoke clause (a) of Section 14 (1). He submits that, as the fees charged by the learned Sole Arbitrator, in the present case, are not in accordance with Section 11 (14) of the Act, the learned Sole Arbitrator has become *de jure* unable to perform her functions.

21. To the extent that, if the fees charged by an Arbitrator are in contravention of the provisions of the Act, the Arbitrator may be regarded as having become *de jure* unable to perform her, or his, functions, and that the mandate of such an Arbitrator would be determinable under Section 14(1) of the Act, I am of the opinion that there can be no possible cavil.

22. Did, however, the fees charged by the learned Sole Arbitrator, in the present case, actually infract Section 11(14) of the Act, as contended by Mr. Aggarwal?

23. On a consideration of the applicable statutory provisions, and the decisions, on which my attention has been drawn, I am of the opinion that the answer to this poser has necessarily to be in the negative.

24. Section 11 of the Act deals with appointment of Arbitrators. Sub-section 14 of Section 11, as it stood on the date of appointment of the learned Sole Arbitrator, read thus:

> **"11. Appointment of arbitrators. –**
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> *****
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> (14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule."

25. On a bare reading of sub-Section (14) of Section 11, as reproduced hereinabove, it is apparent that the reliance by Mr.Aggarwal, thereon, is completely misconceived.

26. The said provision merely empowers this Court to frame rules, for the purpose of determination of fees of arbitral tribunals, taking into consideration the rates specified in the Fourth Schedule.

27. A similar challenge had come up before this Court in ***NHPC Ltd. v. Larsen & Toubro Ltd***[1]., in which it was noted that no rules, under Section 11 (14) of the 1996 Act, had been framed by this Court. The position continues, till date.

28. Though Mr. Aggarwal seeks to rely on the Delhi International Arbitration Centre(Administrative costs and Arbitrators' Fees) Rules, 2018 (hereinafter referred to as "the DIAC Fees Rules"), the reliance is obviously misconceived, as the said Rules apply only where the arbitrator is appointed by the Delhi International Arbitration Centre (DIAC), consequent on the parties moving the DIAC in that regard. They do not govern cases in which the arbitrator is appointed by the Court directly, without the intervention of the DIAC.

29. While on the issue, it merits mention that Section 11(14) of the Act was, *inter alia*, amended by the Arbitration and Conciliation (Amendment) Act, 2019, to read thus::

> "(14) The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral

[1] **Order dated 4th September, 2018 in O.M.P. (T) (Comm.) 81/2018**

tribunal subject to the rates specified in the Fourth Schedule."

30. "Arbitral institution" is defined, in clause (ca) of Section (2) of the Act, thus:

> " "arbitral institution'' means an arbitral institution designated by the Supreme Court or a High Court under this Act;"

31. In this context, it may also be noted that arbitral institutions are designated under Section 11 (3A) of the Act.

32. Admittedly, the learned Sole Arbitrator, in the present case, was not appointed by the DIAC, or by any other arbitral institution, but by the order, dated 21st December, 2018, of this Court.

33. Reverting, now, to the pre-amended sub- section (14) of Section 11 of the Act, the position remains that, till date, no rules have been framed under Section 11(14) of the Act by this court, whereby or whereby fees of Arbitrators, directly appointed by the court, could be governed.

34. In view thereof, the reliance, by Mr. Aggarwal, on Section 11(14) of the Act, is also misconceived.

35. Mr. Gaurav Mitra, learned counsel appearing for the respondent, has invited my attention to the decisions of this Court in ***NHPC Ltd.***[1], ***G.S. Developers & Contractors Pvt. Ltd. v. Alpha Corp***

Development Pvt. Ltd[2] and ***Delhi State Industrial Development Corporation Ltd. v. Bawana Infra Development (P) Ltd***[3], in which similar challenges, to the fees fixed by the arbitrators directly appointed by the High Court, have been repelled, and it has been categorically held that arbitrators, appointed by the court, may in the absence of any fees having been fixed by the court itself, or any stipulation, regarding fees, finding place in the contract or agreement between the parties, determine their own fees.

36. Clearly, therefore, no legal exception could be taken to the finding, of the learned Sole Arbitrator, in the order, dated 28th February, 2020, to the fact that the rates of fees fixed in the Fourth Schedule to the 1996 Act, were not necessarily binding on her.

37. It was always open to the petitioner, as one of the parties to the agreement dated, 14th August, 2014, to insist on the incorporation, therein, of a condition regarding fees payable in arbitral proceedings. The petitioner did not choose to do so. Neither, apparently, did the petitioner insist on any fees being fixed, at the time of appointment of learned Sole Arbitrator by this Court, on 21st December, 2018. Having not done so, I am of the opinion that it is certainly not open to the petitioner, at this stage, to seek termination of the mandate of the learned Sole Arbitrator on the sole ground of the fees, fixed by her, or to invoke, for the said purpose, Section 14(1)(a) of the Act. It cannot, in my view, be said that the learned Sole Arbitrator has become *de jure* unable to perform her functions.

[2] **261 (2019) DLT 533**

38. Mr. Aggarwal also pleaded financial stringency. He submits that his client has become virtually sick and that, owing to the present COVID-2019 pandemic, his client, which is running amusement parks and other such institutions, has reached the stage where it is at the cusp of dissolution. He also sought to submit that, pursuant to certain orders passed by the Supreme Court, 41.95% of the shares of M/s Unitech Limited, in the petitioner-company, have been permitted to be sold, and the sale thereof is being monitored by a committee constituting a learned retired Judge of this Court.

39. These submissions, in my view, are extraneous to the issue at hand.

40. It must be remembered that Section 14(1)(a) contemplates the mandate of an Arbitrator, *if the Arbitrator* becomes *de jure* or *de facto* unable to perform his functions, and not if *one of the parties* becomes *de facto* unable to continue with the arbitral proceedings, on account of financial stringency or otherwise.

41. No case, for holding that the learned Sole Arbitrator has become, *de jure*, or *de facto*, unable to perform her functions, exists, in my opinion, in the present case.

42. Resultantly, the prayer of the petitioner, for termination of the mandate of the learned Sole Arbitrator, has necessarily to fail.

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[3] **MANU/DE/1995/2018**

43. The petition is accordingly dismissed, with no orders as to costs.

44. I.As. 4099-101/2020 do not survive for consideration, and are also, consequently, disposed of.

C. HARI SHANKAR, J.

JUNE 03, 2020
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