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

Date of decision: 20th July, 2018

\+ O.M.P. (T) (COMM.) 39/2018 & IA No. 6559/2018 & 9228/2018

NATIONAL HIGHWAYS AUTHORITY OF INDIA
..... Petitioner
Through: Mr.Sudhir Nandrajog, Sr. Adv. with Mr.Santosh Kumar & Mr.Manan Gill, Advs.

versus

GAMMON ENGINEERS AND CONTRACTOR PVT LTD
..... Respondent
Through: Ms.Awantika Manohar & Ms.Khushboo Kumari, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking termination of the mandate of the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Agreement dated 07.02.2006, for work of widening and strengthening to 4 lane of the existing single/ intermediate lane carriageway of NH-57 section from km - 230.00 to km 190.00 (Forbesganj-Simrahi Section) in the State of Bihar on

East West Corridor under NHDP Phase-II (Contract Package C-II/BR-3) awarded by the petitioner to the respondent.

2. The above said Agreement contains an Arbitration Agreement in form of Clause 5 thereof which is reproduced hereinbelow:-

> *"5. The parties are desirous that the remuneration and other expenses payable to the Arbitrators as per arbitration clause for referring the dispute between the parties arising out of the said Contract to the Arbitral Tribunal for resolution in accordance with the procedure laid down there in, shall be as follows:-*
> *i. That the maximum limit for fee payable to each Arbitrator per day shall be Rs. 5000/- subject to a maximum of Rs. 1.5 lakh per case.*
> *ii. That each Arbitrator shall be paid a reading fees of Rs. 6000/- per case.*
> *iii. That each Arbitrator shall be paid Rs. 5000/- by way of secretarial assistant per case.*
> *iv. That each Arbitrator shall be paid Rs. 6000/- per case towards incidental charges like telephone, FAX, postage etc.*
> *v. That other expenses based on actual against presentation of bills, shall also be reimbursed to each Arbitrator subject to the following ceiling (applicable for the days of hearing only).*
> *(a) Travelling expenses – Economy class (By Air), First Class AC (By train) and AC car (By road).*
> *(b) Lodging and boarding – Rs. 8000/- per day in Metro cities (Delhi, Mumbai, Chennai & Kolkata), Rs. 5000/- per day in other cities OR Rs. 2000/- per day if any Arbitrator makes his own arrangement.*
> *(c) Local travel – Rs. 700/- per day.*
> *vi. Charges for publishing the Award – Maximum of Rs. 10,000/-*
> *vii. That in exceptional cases, such as cases involving major legal implication/wider ramification/higher financial stakes etc. a special fees structure could be fixed in consultation with the Contractor/Supervision consultant and with the specific*

approval of the Chairman, NHAI before appointment of the Arbitrator."

3. A reading of the above Clause would show that the parties have not only agreed to have their disputes settled through arbitration but also prescribed the fees that shall be payable to the Arbitral Tribunal.

4. The petitioner thereafter, issued a Circular dated 01.06.2017 whereby it, *inter alia*, amended the fee structure payable to the Arbitrators in form of Annexure 3 thereof. The said Annexure is reproduced hereinbelow:-

"Annexure-3

Schedule of Expenses and Fee payable to the Arbitrators

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 at (i) above in case of fast-track	*(ii)10% extra on fee at (i) above if award is published*	*(ii)10% extra on fee at (i) above if award is published*

		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-sum fee of Rs. 10.00 lakh per case including counter-claims.*
2.	*Reading Charges – 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.*			

Additional Notes:

i) In case of arbitrations under SAROD Rules of Arbitration, SAROD may consider to revise its order dated 08.01.2016 as per the above schedule. Thereafter only, the above schedule shall be applicable subject to modifications made by SAROD, if any.

ii) The above schedule of fees and expenses shall be applicable to all meetings of ATs being held on or after the date of issue of this Circular where the fee structure of NHAI has been followed by the Arbitral Tribunals on its own or in pursuance of the provision in original agreement or Supplementary Agreement between the parties.

iii) In case of future bidding/ contracts, the fee structure as may be determined by the NHAI from time to time, may be included as part of the Bidding/ Contract Documents and the acceptance of the above fee

structure by the Contractors/ Concessionaries/ Consultants may be kept as a pre-condition for signing the contract."

5. Disputes having arisen between the parties, the petitioner vide its letter dated 14.07.2017 appointed its nominee Arbitrator, *inter alia*, stipulating the following condition:-

> *"3. The Terms & Conditions and Fee applicable may be considered as per the Policy Circular of NHAI dated 01.06.2017 (copy enclosed). The time period of the arbitration shall be as prescribed by the Arbitration & Conciliation Act, 1996 as amended by the Amendment Act, 2015 (3 of 2016)."*

6. The respondent also nominated its Arbitrator and the two Arbitrators thereafter appointed a Presiding Arbitrator.

7. In the arbitral proceedings held on 23.08.2017, the Arbitral Tribunal *inter alia* directed the following with respect to the fees payable to the Arbitral Tribunal:-

> *"1.12.1 Fees:*
> *(a) The Claimant informed that there is no agreement between the parties regarding the fees of the AT*
> *(b) The Respondent requested that fees of the AT may be fixed in terms of the instructions issued by NHAI vide their circular dated 01.06.2017*
> *(c) The Tribunal considered the matter and decided that the fees of the AT shall be regulated as per provisions of the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015."*

8. As the fees fixed by the Arbitral Tribunal was more than the one prescribed in the Circular issued by the petitioner, the petitioner filed an application seeking review of the above mentioned order and fixation of the

fees of the Arbitral Tribunal. The said application was, however, dismissed by the Arbitral Tribunal vide its order dated 30.01.2018 observing as under:-

> *"3.8 The Respondent had filed an application for review of fees fixed by the AT and to modify the same in terms of the NHAI circular dated 01.06.2017.*
> *It was brought out that the Claimant had inadvertently informed the AT as per para 1.12.1(a) that there was no agreement between the parties regarding the fees of the AT. In fact, the agreement provides for a fixed rate of fee of the AT as agreed by the parties.*
> *Oral submissions on this matter were made by both the parties. The AT deliberated on the matter and has decided that in view of the latest provision in the amended Act, the AT is competent to fix the fees regardless of the agreement of the parties. This is as per judgment dated 11.09.2017 of the Hon'ble High Court in the matter of NHAI vs Gayatri Jhansi Roadways. The AT reiterated that the fees fixed in the 1st hearing shall be followed. Accordingly, fees shall be regulated as per provisions of 'the fourth schedule' of the amended Arbitration and Conciliation Act, 2015."*

9. Being aggrieved of the above mentioned order, the petitioner has filed the present application invoking Section 14 of the Act which is reproduced hereinbelow:-

> ***"14. Failure or impossibility to act**.–(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, 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*
> *(b) he withdraws from his office or the parties agree to the termination of his mandate.`*
> *(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.*

> *(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12."*

10. The learned senior counsel for the petitioner submits that as the Arbitral Tribunal has failed to abide by the conditions fixed by the parties in the Arbitration Agreement or by the petitioner in its Circular, it should be considered as *de jure* and *de facto* unwilling to perform its functions, thereby leading to the termination of its mandate. In this regard he places reliance on the Judgments of this Court in ***National Highways Authority of India vs. Mr.K.K. Sarin and Ors.***, MANU/DE/0798/2009; and ***Taxus Infrastructure and Power Projects Pvt. Ltd. vs. Schneider Electric India Pvt. Ltd.***, MANU/DE/2681/2016 and of the Madras High Court in ***Madras fertilizers Limited vs. SICGIL India Limited and Hon'ble Mr. Justice V.Ratnam (Retd.)***, MANU/TN/7900/2007 as also of the Supreme Court in ***Sanjeev Kumar Jain vs. Raghubir Saran Charitable Trust and Ors.***, (2012) 1 SCC 455 and ***Union of India vs. Singh Builders Syndicate***, (2009) 4 SCC 523.

11. On the other hand, the learned counsel for the respondent submits that as the Arbitral Tribunal has fixed its fees in accordance with the Fourth Schedule of the Act, the same cannot be termed as unreasonable. She further submits that in terms of Section 31A read with Section 31(8) of the Act, the Arbitral Tribunal is empowered to fix its own fee and in this regard has placed reliance on the Judgment of this Court in ***National Highways Authority of India vs. Gayatri Jhansi Roadways Limited***, 2017 SCC OnLine Del 10285.

12. I have considered the submissions made by the counsels for the parties. At the outset it is to be noted that arbitration is an Alternative Dispute Resolution mechanism adopted by the parties with informed consent. Section 7 of the Act mandates that an Arbitration Agreement between the parties must be in writing and therefore, cannot be a unilateral act of either party. The parties may for various reasons, including that of expeditious adjudication of their disputes, agree for an Alternative Dispute Resolution mechanism in form of arbitration and at the same time they may also in the same Agreement, provide the expenses that they are willing to bear for the same. In arbitration, party autonomy is therefore, the most vital ingredient.

13. The Arbitrators are appointed with the consent of the parties, failing which they are appointed by the Court in exercise of its power under Section 11 of the Act. Section 11 of the Act also mandates that while appointing an Arbitrator the Court shall take into account the qualifications required for the Arbitrator by the Agreement of the parties.

14. Whether the Arbitrators are appointed by the parties or by the Court, the parties or the Court may also stipulate various conditions for such appointment including fixation of fees. It is for the Arbitrators to then accept or reject such appointment, however, they cannot impose unilateral conditions on the parties while accepting such appointment. In ***Sanjeev Kumar Jain*** (Supra), the Supreme Court had held that the word "appoint" is wide enough to stipulate the terms of such appointment including the fees payable to the Arbitrators. In relation to Section 11 of the Act, the Supreme Court held as under:-

> ***"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 "appointing" an arbitrator. The word "appoint" 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 "appoint" 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."*
>
> *(emphasis supplied)*

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

> *"132. .....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."

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:-

> ***"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.*
>
> *xxxx xxxx*
>
> ***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."*

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:-

> *"**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 – 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:*
>
> > *"[T]he cost of arbitration can be high if the arbitral tribunal consists of retired Judges… 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."*
>
> *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."*

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:-

> *"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."

(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:-

"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.

xxxx xxxx

25. A perusal of the fees fixed by the Hon'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 Hon'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 Hon'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."*

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 "terms and conditions of the Arbitral Award". In the Award the Arbitral Tribunal can fix the "costs" that are payable by one party to another in the arbitration proceedings. Section 31A of the Act provides for various aspects of such "costs" 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:

> *"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 – which include arbitrator'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 parties' 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 furthers 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 "rules of the game" to the parties early in the litigation so as to avoid frivolous and meritless litigation/arbitration."*

25. A reading of the above would clearly show that the "costs" 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 "unless otherwise agreed by the parties" in Section 31A only signifies that the parties, by an agreement, cannot contract out of payment of 'costs' and denude the Arbitral Tribunal to award 'costs' 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

Law 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.

NAVIN CHAWLA, J.

JULY 20, 2018
Rv/sd