$~17

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

Date of Decision: 16.8.2018

\+ O.M.P.(MISC.)(COMM.) 164/2018

PASCHIMANCHAL VIDYUT VITRAN NIGAM LIMITED ..... Petitioner

Through: Mr. Vivek Narayan Sharma with Mr. Rajeev Kumar Jha, Mr. Pragyan V. Mishra and Ms. Monika Jain, Advs

versus

M/S IL & FS ENGINEERING & CONSTRUCTION COMPANY LIMITED ..... Respondent

Through: Mr. Abhishek Singh with Mr. A.N. Mahajan, Mr. Abhisit Mishra and Mr. Rohan Dhariwal, Advs

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. Notice in this petition was issued on 23.07.2018.

2. On return of notice, Mr. Abhishek Singh has entered appearance on behalf of the respondent.

3. The relevant part of the order dated 23.07.2018 is extracted herein:-

> *"2. Mr. Sharma says that the petitioner is a public sector undertaking and therefore, cannot pay the fee which has been fixed by the Arbitral Tribunal.*
>
> *3. It appears that an application for revision of fee was moved by the petitioner which was disposed of vide order dated 29.04.2018.*

4. By virtue of this order, the Arbitral Tribunal scaled down its fee despite which, the petitioner seems to be aggrieved and has, therefore, approached this court.

5. In order to ascertain the views of the respondent in the matter, I am issuing, for the moment, a notice for the limited purpose to examine as to whether under the Arbitration and Conciliation Act, 1996 (in short '1996 Act') any fetter can be put on fee fixed by the Arbitral Tribunal, especially when the Arbitral Tribunal has not been constituted with the intercession of the Court.

6. Accordingly, issue notice to the respondent.

7. It is made clear that the issuance of notice in the captioned petition will not come in the way of the Arbitral Tribunal proceeding in the matter fixed before it on 28.07.2018.

8. Furthermore, the petitioner will, in any case, make requisite deposits and pay the fee for the hearings held, hereafter, without prejudice to its rights and contentions."

4. Before I proceed further, I must indicate that in the previous order i.e. order dated 23.07.2018, a typographical error had crept in, inasmuch as, the petitioner and the respondent had been inadvertently described as decree holder and judgment debtor respectively.

4.1. The order dated 23.07.2018 shall stand corrected to that extent.

5. Going further, Mr. Abhishek Singh, who, appears for the respondent submits that he does not wish to file a reply and that he

would proceed to make oral submissions as the issue involves interpretation of the provisions of the Arbitration and Conciliation Act, 1996 (in short "the Act").

5.1 The said statement is taken on record.

6. Mr. Singh says that the provisions of the Fourth Schedule of the Act which sets out the suggestive fee to be paid to the arbitrators would not apply to domestic *ad hoc* arbitrations where parties have not approached the Court for constitution of an Arbitral Tribunal.

6.1. It is also the submission of the learned counsel that in any event, in terms of the Fourth Schedule of the Act, this Court has not framed any rules and therefore, the fee schedule prescribed therein does not bind the arbitral tribunal.

7. Mr. Sharma, on the other hand, contends to the contrary.

7.1. For this purpose, learned counsel has relied upon the extract from the 246th report of the Law Commission of India. In particular, Mr. Sharma has relied upon paras 10 to 12 of the said report. For the sake of convenience, the aforementioned paras are extracted hereafter:-

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

7.2. Based on the foregoing observations of the Law Commission, Mr. Sharma says that as a matter of fact, the recommendations of the Law Commission are applicable to domestic *ad hoc* arbitrations contrary to the submission advanced by Mr. Singh.

7.3. The argument being that the fee prescribed in the Fourth Schedule would, in fact, apply to domestic *ad hoc* arbitrations, contrary to what has been contended by counsel for the respondent.

8. Having heard learned counsel for the parties, in my opinion, the submissions advanced on behalf of the petitioner cannot be accepted for more than one reason, however noble the purpose of this petition may be, in view of the position in law which obtains for the present. The reason why I have reached this conclusion is set forth hereafter.

8.1 First and foremost, to my mind, the provision with regard to fees which is contained in Section 11(14) of the Act is only an enabling provision. The concerned High Court has been given the leeway to frame rules, if it chooses to do so. There is interestingly no reference to the Supreme Court in Section 11(14), though, in cases

involving International Commercial Arbitration, the power to appoint a sole arbitrator or the third arbitrator has been vested in the Supreme Court or in the person or institution designated by that Court. This is plainly evident upon perusal of Section 11(9) of the Act.

8.2 Second, section 11, broadly, applies to circumstances where a party approaches the Court for the appointment of an Arbitrator or Presiding Arbitrator.

8.3 In this case, the admitted position is that none of the parties had approached the Court for appointment of an Arbitrator in terms of the Arbitration Agreement obtaining between them. Parties had, it appears, agreed on the constitution of the Arbitral Tribunal. In these circumstances, in my view, the Court would have no role to play in fixing the fees of an Arbitral Tribunal as no such power is vested in the Court at present.

8.4 This is so as the provisions of sub-section (14) of Section 11 clearly indicate, as alluded to above, that the fees prescribed in the Fourth Schedule of the Act is only suggestive. The legislature's intent is evident upon perusal of the provisions of Section 11(14), in particular, those parts which have been duly emphasised by me.

> *"(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"*

8.5 The fact that the fees prescribed in the Fourth Schedule is suggestive, is clearly, evident on account of use of the expression "determination of fees of the Arbitral Tribunal" and "the manner of

its payment". The argument advanced by Mr. Sharma that fees which is to be paid to the Arbitral Tribunal is fixed by virtue of the provision made in that behalf in the Fourth Schedule is untenable as, if this was the legislative intent then there was no need for the legislature to provide that the concerned High Courts should frame rules as may be necessary for determination of fees and the manner of its payment, *albeit*, after taking into account the rates specified in the Fourth Schedule.

8.6 The Legislature was, perhaps, conscious of the fact that one model may not work for all domestic *ad hoc* arbitrations. The fees scale could vary depending on the territory over which the concerned High Court exercises jurisdiction. The cost of living index and the nature and the value of claims that are lodged, would be factors that the concerned High Court may like to bear in mind while framing rules in respect of the fees that ought to be charged by an Arbitral Tribunal.

8.7 One can take judicial notice of the fact that the fees charged by Arbitral Tribunals in Delhi and Mumbai are not the same as those which are charged qua claims that emanate from other parts of the country such as Chhattisgarh, Sikkim and other North-Eastern States. As a matter of fact a metropolitan city like Chennai has a fee structure which is much lower than that of Delhi and Mumbai.

9. Therefore, given the fact that this High Court has not framed rules in consonance with the suggestive fee scale prescribed in the Fourth Schedule of the Act, the same cannot be applied to the instant arbitration proceedings.

10. I may also indicate that Mr. Sharma has fairly conceded that

even though in the prayer clause, a direction is sought that the fee schedule of the Delhi International Arbitration Centre should be made applicable, the same would not apply to the instant arbitration proceedings.

10.1 Further, at the fag end, Mr. Sharma submitted that Section 11(14) of the Act, would also apply to the cases where parties have not approached the Court for appointment of an Arbitrator.

10.2 For this purpose, Mr. Sharma has drawn my attention to sub-section (2) of the Section 11. No doubt sub-section (2) of the Section 11 of the Act adverts to the fact that parties are free to agree on a procedure for appointment of an Arbitrator or Arbitrators, the said sub-section is followed by sub-section (3) and other sub-sections which encapsulate a scenario where despite an agreement, parties fail to abide by the procedure prescribed under the Arbitration Agreement. Therefore, what can be said at the highest in favour of the petitioner is that, if the High Court chooses to frame rules in consonance with Section 11(14) of the Act, it could, perhaps, provide therein that the Rules so framed would apply even in cases where parties do not approach the Court for constituting of an Arbitral Tribunal.

11. Having regard to the foregoing discussion, I am not inclined to grant the relief, as prayed. The petition is, accordingly, dismissed.

RAJIV SHAKDHER
(JUDGE)

AUGUST 16, 2018/c