2025:DHC:2110

$~J

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

Judgment pronounced on: 28.03.2025

\+ **W.P.(C) 2059/2025 & CM APPL. 9691/2025**

NATIONAL HIGHWAY AUTHORITY OF INDIA ..... Petitioner

Through: Mr. Ankur Mittal and Mr. Ashish Gajwani, Advocates.

versus

SSANGYONG ENGINEERING CONSTRUCTION CO LTD ..... Respondent

Through: Mr. Navin Kumar, Ms. Surbhi Agarwal, Ms. Rashmeet and Mr. Shantanu Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition has been filed by the petitioner assailing orders dated 21.10.2024 and 30.10.2023 passed by a three-member Arbitral Tribunal (hereinafter '*the Arbitral Tribunal*') currently seized of disputes between the petitioner and the respondent. The said disputes arise out of the Contract Agreement dated 12.04.2006 (Contract Agreement executed between the parties herein) for the 'four laning of Jhansi-Lakhanadon section KM 297 to KM 351 of National Highway-26 in the State of Madhya Pradesh' being Contract Package No. ADB-II/C8.

2. Disputes having arisen between the parties, the petitioner invoked the arbitration on 17.09.2022.

3. The petitioner is aggrieved by the fact that the Arbitral Tribunal *vide* order dated 30.10.2023 fixed fee/s of Rs.3,00,000/- per Arbitrator per sitting.

Feeling aggrieved by such fixation of fees, the petitioner preferred an application dated 16.05.2024 seeking modification of the said order dated 30.10.2023 to the extent of seeking that the Arbitral Tribunal may fix an upper limit of Rs.30,00,000/- on the fees of each Arbitrator as contemplated under IVth Schedule of the Arbitration and Conciliation Act, 1996 ("A&C Act").

4. The Arbitral Tribunal *vide* its order dated 21.10.2024 rejected the aforesaid modification application filed by the petitioner. While rejecting the said application, it was observed by the Arbitral Tribunal that the present arbitration, being an international commercial arbitration in terms of Section 2(1)(f)(ii) of the A&C Act, the IVth Schedule of the A&C Act was not applicable in terms of the explanation to Section 11(14) of the A&C Act.

5. It is submitted by the learned counsel for the petitioner that in passing the impugned order dated 21.10.2024, the Arbitral Tribunal has ignored the principles of 'party autonomy'.

6. Further, it is submitted that the Arbitral Tribunal has conducted thirteen hearings till now and the matter is at the stage of arguments on preliminary issues. Going by the alleged amount of fees fixed by the Arbitral Tribunal, total fees of Rs.1,17,00,000/- are to be paid to the Arbitral Tribunal by both the parties. Accordingly, the petitioner will be required to pay an amount of Rs.58,50,000/- to the Arbitral Tribunal for the hearings conducted till now. The aforesaid amount has surpassed way beyond the upper limit of Rs.30,00,000/- contemplated in terms of the IVth Schedule of the A&C Act. It is submitted that such fixation of fees by the Arbitral Tribunal is highly unreasonable and uncalled for.

7. It is further submitted that the decision of the Arbitral Tribunal to

unilaterally fix the fees is against the settled position of law as laid down by the Supreme Court in the judgment of ***ONGC Ltd. v. Afcons Gunanusa JV***, (2024) 4 SCC 481. Reliance in this regard is placed on the following paragraphs of the said judgment:-

> *"187.1. Arbitrators do not have the power to unilaterally issue binding and enforceable orders determining their own fees. A unilateral determination of fees violates the principles of party autonomy and the doctrine of the prohibition of in rem suam decisions i.e. the arbitrators cannot be a judge of their own private claim against the parties regarding their remuneration. However, the Arbitral Tribunal has the discretion to apportion the costs (including arbitrators' fee and expenses) between the parties in terms of Section 31(8) and Section 31-A of the Arbitration Act and also demand a deposit (advance on costs) in accordance with Section 38 of the Arbitration Act. If while fixing costs or deposits, the Arbitral Tribunal makes any finding relating to arbitrators' fees (in the absence of an agreement between the parties and arbitrators), it cannot be enforced in favour of the arbitrators. The Arbitral Tribunal can only exercise a lien over the delivery of arbitral award if the payment to it remains outstanding under Section 39(1). The party can approach the Court to review the fees demanded by the arbitrators if it believes the fees are unreasonable under Section 39(2);*
>
> *xxx xxx xxx*
>
> *187.4. The ceiling of Rs 30,00,000 in the entry at Sl. No. 6 of the Fourth Schedule is applicable to the sum of the base amount (of Rs 19,87,500) and the variable amount over and above it. Consequently, the highest fee payable shall be Rs 30,00,000; and*
>
> *187.5. This ceiling is applicable to each individual arbitrator, and not the Arbitral Tribunal as a whole, where it consists of three or more arbitrators. Of course, a sole arbitrator shall be paid 25% over and above this amount in accordance with the Note to the Fourth Schedule."*

8. Learned counsel for the petitioner submits that the present case being an exceptional case, this Court would exercise jurisdiction under Article 226 of the Constitution of India and pass appropriate orders, as contemplated in the judgment of ***Surender Kumar Singhal v. Arun Kumar Bhalotia and Others***, 2021 SCC OnLine Del 3708.

9. A perusal of the orders passed by the Arbitral Tribunal reveals that the very premise of the petition *viz.* that the Arbitral Tribunal has fixed its fees unilaterally, is non-existent. A perusal of various proceedings before the Arbitral Tribunal reveals that in the 1st sitting itself *i.e.*, on 05.12.2022, the Arbitral Tribunal directed as under :-

> *"8.0 The Tribunal has informed the parties that the sitting fee/reading fees/one-time arbitration-cum-reading fee, administrative expenses etc., will be fixed during the next sitting and on completion of pleadings. In the meanwhile and for the present, both the parties (Claimant on the one side and the Respondent on the other) shall pay, on account, to each member of the Arbitral Tribunal an amount of Rs. 5 lakhs each within four weeks from today, after deducting TDS."*

10. During the 2nd sitting held on 12.07.2023, issues were framed by the Arbitral Tribunal and it was further directed as under:-

> *"3. The next hearing shall take place on **12.08.2023** at **4:15 PM** through videoconferencing. On that date further directions would be given with regard to examination and cross-examination of witnesses. Directions would also be given with regard to the fees of the Arbitral Tribunal which is proposed at Rs 3 Lacs per arbitrator per sitting to be shared equally by the parties."*

11. Thus, it was clearly set out by the Arbitral Tribunal on 12.07.2023 itself that the fees proposed to be charged by the Arbitral Tribunal is Rs.3 Lakh per Arbitrator per sitting, which to be shared equally by both the parties.

12. During the 3rd sitting held on 12.08.2023, the Arbitral Tribunal, *inter alia*, directed as under :-

> *"4. The next hearing shall take place on **25.09.2023** at **11:00 A.M.** (through videoconferencing) for consideration of the said section 16 application and for other directions with regard to fees etc. In the meanwhile each party shall pay, on account, an amount of Rs. 5 lakh (in addition to the amount already directed as per the order dated 05.12.2022) to each member of the Arbitral Tribunal, on or before 15.09.2023."*

13. It was during the 4th sitting held on 30.10.2023 that the Arbitral Tribunal fixed its fees and issued the following directions :-

> *"3. The fees for the arbitration, which is an international commercial arbitration is fixed at Rs.3 lakh per arbitrator per sitting to be shared equally by the parties."*

14. Thereafter, during the 5th and 6th sittings of the Arbitral Tribunal held on 09.01.2024 and 10.01.2024, the Arbitral Tribunal directed the parties to clear the outstanding fees of the Arbitral Tribunal. It was directed as under :-

> *"2. The parties are directed to clear the fees of the Arbitral Tribunal for the hearings upto and including the hearing to be held on 10.02.2024. This be done by 31.01.2024."*

15. It is notable that no objection whatsoever was raised by the petitioner in the immediate aftermath of the order dated 30.10.2023 as regards fixation of fees by the Arbitral Tribunal. Also, as noticed, as far back as on 12.07.2023, the Arbitral Tribunal has recorded in the proceedings of the 2nd sitting that the fees proposed to be charged is Rs.3 Lakhs per Arbitrator per sitting to be shared equally by the parties. No reservation was expressed by the petitioner in the aftermath of the order dated 12.07.2023, nor in the aftermath of the proceedings dated 30.10.2023.

16. Fees having been fixed, in the proceedings held on 09.01.2024 and 10.01.2024, the Arbitral Tribunal directed the parties to clear the outstanding fees.

17. Again, in the 7th sitting held on 22.01.2024, the Arbitral Tribunal directed the parties to clear the arrears of fees.

18. In the 8th sitting held on 10.02.2024, once again, the Arbitral Tribunal directed as under :-

> *"2. The parties are directed to clear the fees of the Arbitral Tribunal for the hearing upto and including the hearing to be held on 05.03.2024.*

This be done, latest by 29.02.2024."

19. Importantly, during the proceedings held on 05.03.2024, the Arbitral Tribunal recorded the assurance of respective counsel for the parties that the arrears of fees would be paid. It was, *inter alia*, recorded as under:-

> *"1. The parties have not paid the fees of the Tribunal as directed in the previous order. The learned counsel assure that the fees of the Arbitral Tribunal for the hearing upto and including the next hearing shall be paid latest by 10.04.2024."*

By this time, more than 4 months had passed since the fees was fixed on 30.10.2023.

20. It was only on 16.05.2024 that an application came to be filed by the petitioner/claimant for modification of the order dated 30.10.2023. Even the said application does not specifically allege that the fixation of fees by the Arbitral Tribunal was "unilateral"; it only sought modification of the order dated 30.10.2023, whereby the fees was fixed by the Arbitral Tribunal, to the extent that an upper limit of Rs. 30,00,000/- be placed on the fees of the arbitrators. The said application also does not controvert the fact that during the 9th sitting of the Arbitral Tribunal held on 05.03.2024, it was assured by respective counsel for the parties that the arrears of the Arbitrators' fees as fixed *vide* order dated 30.10.2023 would be paid latest by 10.04.2024.

21. Thus, the assertion by the petitioner in the present proceedings that the fees has been unilaterally fixed by the Arbitral Tribunal is not borne out from the record. Further, reliance placed on paragraph 187.1 of ***ONGC Ltd. v. Afcons Gunanusa JV*** (supra) in which it has been observed that unilateral determination of fees violates the principle of party autonomy and the doctrine of the prohibition of *in rem suam* decisions is wholly inapplicable in the context of the facts of the present case.

22. In these circumstances, the application seeking modification of the order dated 30.10.2023 was rightly dismissed by the Arbitral Tribunal. The Arbitral Tribunal also rightly notes that in terms of Section 2(1)(f)(ii) of the A&C Act read with explanation to Section 11(14) of the A&C Act, the IVth Schedule of the A&C Act is not mandatorily applicable in the present case.

23. The circumstances of the present case do not reveal the existence of any exceptional circumstances or bad faith warranting exercise of jurisdiction under Article 226 of the Constitution of India. On the contrary, the conduct of the petitioner in acceding to the fixation of fees, and seeking to belatedly resile from the same, leaves much to be desired.

24. In the circumstances, this Court is not inclined to entertain the present petition; the same is, accordingly, dismissed. Pending application also stands disposed of.

SACHIN DATTA, J

MARCH 28, 2025/*r, dn*