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

% **Reserved on : 12th December, 2022**
Pronounced on: 24th February, 2023

\+ O.M.P.(MISC.)(COMM.) 362/2019

M/S IRCON INTERNATIONAL LIMITED ..... Petitioner

Through: Ms. Kanicka Miittal, Advocate

versus

UNION OF INDIA RAILWAY COACH FACTOR..... Respondent

Through: Mr. Rajan Sabharwal, Mr. Raghav Sabharwal and Mr. Hitesh Mehta, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. By way of filing the instant petition, under Section 39 (2) of the Arbitration and Conciliation Act, 1996 (hereinafter "Arbitration Act"), the following reliefs have been sought on behalf of the petitioner:-

> *"A) Pass an Order directing the Arbitral Tribunal to deliver and publish the Award in the arbitration matter of "IRCON International Limited Vs. Rail Coach Factory (RCF), Kapurthala" in respect of the disputes arising out of the Contract of Agreement no. RCF/Expansion Proj./556 dated 12.12.2006;*
>
> *B) Pass any further order/s as deemed fit and proper in the facts and circumstances of the case."*

FACTUAL MATRIX

2. The following course of events have led to the filing of the instant petition on behalf of the petitioner:-

a. The petitioner and the respondent came together by signing and executing an Agreement on 12th December 2006 for *'Enhancement of Coach Production Capacity to 1400 coaches at Rail Coach Factory, Kapurthala'* at an anticipated cost of Rs. 50,11,34,000/-. The Agreement was made subject to the terms and conditions of the General Conditions of Contract, 1999 (hereinafter "GCC").

b. According to the Contract, the date of completion was stipulated as 26th January 2008, however, the petitioner sought and was granted extensions on several occasions to complete the work. The work was finally completed on 30th March 2012.

c. During the course of the works to be carried out between the parties, several disputes arose amongst them.

d. In terms of the agreement, a Review Committee was constituted to look into the disputes. One of the primary disputes amongst the parties was regarding the Liquidated Damages (hereinafter "LD"). On this aspect, the Review Committee, after consideration of facts and circumstances before it, concluded that the delay in execution of work was not because of the petitioner, and also made recommendations that a competent authority may consider imposition of LD on the merit of the case, subject to the specific approval of Railway Board.

e. On 30th April 2015, the Rail Coach Factory (hereinafter "RCF") made a communication to the Railway Board stating therein that both the parties were at fault for the delay in the completion and therefore, recommending a token LD instead of the full amount. The respondent refused to implement the recommendations of the Review Committee and proceeded to deduct the amount of LD from the bill of the petitioner.

f. Aggrieved by the same, the petitioner vide letter dated 11th December 2015 invoked the Arbitration Clause of the Agreement between the parties, i.e. Clause 9.2, wherein it was decided that if any dispute arose between the parties, the General Manager, RCF was to appoint Arbitrators to decide the same in accordance with the GCC.

g. The General Manager, RCF, Kapurthala accordingly appointed an Arbitral Tribunal for adjudication of the disputes between the parties on payment basis vide appointment letter dated 8th July 2017.

h. It is the case of the petitioner that in terms of Clause 9.2 of the Agreement it was also decided under Clause 64(6) of the GCC, that the fees of the Arbitrators would be fixed by the Railway Board from time to time.

i. Thereafter, with the enactment of the Arbitration and Conciliation (Amendment) Act, 2015 the Railway Board modified Clause 64 of the GCC, whereby it was resolved that the fees under Clause 64(6) of the GCC, to be paid to Arbitrators as per the rates

fixed by the Railway Board from time to time, shall be borne by the parties equally.

j. On 22nd September 2017, the Arbitral Tribunal passed its first order, whereby it fixed the fees of the Arbitrators constituting the Tribunal as per Schedule IV of the Arbitration Act.

k. The petitioner, vide its communication dated 25th October 2017 and 30th October 2017, raised its objection *qua* the fixation of the fees of the Arbitrators, thereby requesting the Railway Board to clarify the ambiguity in the two different provisions invoked for fixation of the fees. He respondent also raised its objection to the fixation of fees by the Arbitral Tribunal as per Schedule IV of the Arbitration Act.

l. On 3rd November 2017, the Deputy General Manager, RCF, Kapurthala issued a Corrigendum to the appointment letter dated 8th July 2017 stating therein that the Arbitrators would be entitled to the fees fixed by the Railway board from time to time.

m. On 20th February, 2019, the Arbitral Tribunal passed Notification No. 9 stating therein that the Award in pursuance to the arbitration proceedings between the parties has been made and sealed, with the direction that both the parties shall pay the fees of the Arbitrators in accordance with Schedule IV of the Arbitration Act, which was added up to Rs. 18,80,794/- each, totaling to Rs. 56,42,382/-.

n. Aggrieved by the lien on Award by the Arbitral Tribunal, the petitioner has approached this Court seeking relief under

Section 39(2) of the Arbitration Act, since the Arbitral Tribunal has not published the Award till date.

SUBMISSIONS

3. Learned counsel appearing on behalf of the petitioner while arguing that the Arbitral Tribunal is liable to release the Award made submitted that the appointment letter of the Arbitral Tribunal clearly stipulated that the fees of the Arbitrators would be as per the rates fixed by the Railway Board from time to time, yet the Arbitral Tribunal passed the order dated 22nd September 2017 fixing the rate of the fees in accordance with the Schedule IV of the Arbitration Act. It is submitted that in terms of the GCC, the limit to the fees to be given to an Arbitrator is Rs. 75,000/-, however, the Arbitral Tribunal in blatant contradiction directed that the parties shall pay the fees to the Arbitrators amounting to Rs. 18,80,794/- each.

4. It is submitted that even the communication made by and on behalf of the Railway Board made it abundantly clear that the rate fixed by the Railway Board were to be adhered to for evaluating the fees of the Arbitrators, however, the Arbitral Tribunal in violation of the same arbitrarily decided to fix the rate as per the Schedule IV of the Arbitration Act.

5. It is further submitted that grave prejudice will be caused to the parties if the Arbitration Act is made applicable to the fees of the Arbitrators since the value of fees is significantly higher in that case.

6. Learned counsel also submitted that both the parties to the dispute, petitioner and respondent herein, objected to the fixation of fees as per

the Arbitration Act. The petitioner sent communications dated 25th October 2017 and 30th October 2017 to point out the ambiguity in the fee payable to the Arbitral Tribunal and also sought clarification from the RCF, Kapurthala. However, despite the objections by both the parties from the very beginning after passing of the order dated 22nd September 2017, the Arbitral Tribunal proceeded with the matter, reserved the matter on 1st November 2018, made the Award but kept it in a sealed cover for the want of the fees to be deposited in accordance with the Arbitration Act.

7. It is further submitted that the parties have requested the Arbitral Tribunal to publish the Award and accept the fee as per the GCC, however, the Arbitral Tribunal has not published the Award.

8. Learned counsel for the petitioner submitted that the parties are aggrieved by the withholding of the Award by the Arbitral Tribunal and hence, the only remedy which remains is before this Court.

9. *Per Contra*, learned counsel appearing on behalf of the respondent vehemently opposed the averments made on behalf of the petitioner pertaining to the merits of the proceedings before the Arbitral Tribunal and the decision of the Review Committee. It is submitted that the respondent has no role to be played in the publishing of the Award made by the Arbitral Tribunal and hence, the instant petition is not maintainable against the respondent herein.

10. It is submitted that the petitioner sought and was granted extensions of the due date for completion of work on five occasions as under:-

I. From original date, i.e. 26th January 2008 to 30th June 2009 vide letter dated 22nd December 2008, with LD purely in the interest of work with conditions

II. From extended date 30th June 2009 to 31st October 2009 vide letter dated 13th August 2009, without LD with normal condition of penalty as per GCC

III. From extended date 31st October 2009 to 15th March 2010 vide letter dated 2nd December 2009, specifying that further extension would be subject to imposition of LD as per GCC

IV. From extended date 15th March 2010 to 31st March 2011 vide letter dated 28th October 2010, with LD as per GCC

V. From extended date 31st March 2011 to 30th March 2012 vide letter dated 9th March 2012 with LD purely in the interest of work subject with no further booking of general charges beyond 30th March 2012 on establishment of the petitioner.

11. Learned counsel for the respondent has objected to the contentions made on behalf of the petitioner, however, has conceded to the averments *qua* fixation of the fees as per the GCC. It is submitted that the appointment letter of the Arbitral Tribunal stated that the remuneration will be on the payment basis (model fee as described in the amendment act). However, a letter dated 11th November 2016 was issued by the Railway Board stating therein that as per Clause 64(6) as per the rates fixed by the Railway Board to be borne equally by the parties.

12. It is submitted that the letter dated 11th November 2016 was sufficiently clear and unequivocal in stating that the fees of the Arbitrators would be in accordance with the rates fixed by the Railway Board, however, the Arbitral Tribunal passed the order dated 22nd September 2017 directing the parties to fix the fees in accordance with Schedule IV of the Arbitration Act.

13. Further, it is submitted that the respondent vide letter dated 1st February 2018 also supplied a copy of the letter by Railway Board dated 17th January 2018 which stipulated that the fees of a retired Railway Officer working as an Arbitrator shall be 1% of the total claims not exceeding Rs. 1,50,000/- per case. Hence, the Arbitrators in the instant dispute are not entitled to more than the fee fixed by the Railway Board.

14. Moreover, the respondent made several requests to the Arbitral Tribunal vide letters dated 8th September 2017, 30th October 2017, 3rd November 2017, 9th May 2018, 11th May 2018, 13th November 2018, 17th November 2018, 8th March 2019, 16th April 2019 and 1st July 2019, however, the Arbitral Tribunal did not publish the Award.

15. Learned counsel for the respondent submitted that the Arbitrators have heard the case and made the Award but have not published it for the want of fee amounting to Rs. 18,80,794/-, which is completely contrary to the letters dated 11th November 2016 and 17th November 2018 issued by the Railway Board. It is submitted that the fees as claimed by the Arbitrators is completely unjustified and in excess of what the Arbitrators are entitled to.

16. Hence, it is submitted that the Arbitral Tribunal is liable to publish the Award and the Arbitrators are only entitled to the fee as fixed by the Railway Board vide letter dated 17th January 2018.

17. Heard the learned counsel for the parties and perused the record. This Court has appreciated the arguments heard at length as well as the pleadings and documents on record.

FINDINGS AND ANALYSIS

18. The controversy before this Court pertains to an Arbitral Award which has been made after rigorous process of arbitration but the outcome and result of which remains to be under covers with the Arbitrators themselves, not reaping benefit to either of the parties to the dispute, for the want of the fees and other costs.

19. On one hand, it is the case of the petitioner that the appointment letter of the Arbitral Tribunal as well as the letters issued by the Railway Board fixed a rate for deciding the fees and costs to be paid to the Arbitrators. Upon perusal of the record, it is evident that the respondent is also in consensus with the averments made on behalf of the petitioner *qua* fixation of the fees of the Arbitrators in terms of the GCC and the communications/notifications of the Railway Board. On the other hand, the Arbitral Tribunal appointed to adjudicate the disputes between the parties, in its order dated 22nd September 2017, stipulated that the fees shall be fixed in accordance with the Schedule IV of the Arbitration Act.

20. The only issue which is to be adjudicated by this Court is whether the Arbitral Tribunal is liable to publish the Award.

21. To test whether the Arbitral Tribunal is liable to publish the Award, it is pertinent to evaluate as to whether the parties were liable to deposit the costs and fees of the Arbitrators as fixed by the Arbitral Tribunal itself vide order dated 22nd September 2017. The grievance of the parties began with the passing of the said order dated 22nd September 2017 wherein the following observations were made:-

> *"6.0 The Tribunal informed the parties that the Arbitration Costs, including fees and expenses for Arbitrators etc. will be fixed and payable as per the provisions of Arbitration and Conciliation (Amendment) Act, 2015 only and the same is agreed by both the parties.*
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> *In consultation with both the parties, Tribunal decided that Arbitrators' fee shall be charged in accordance with the scale/formula contained in the Fourth Schedule of the amended Act, 2015. The exact amount of fees shall be worked out based on same scale/formula after the Claim & Counter claims are filed. In principle it has been decided that the entire fee shall not be charged in one lump sum but in three tranches. All these fees shall be shared equally by both the parties & paid as per the schedule fixed by the Tribunal in due course.*
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> *In regards to the fee structure prescribed in Schedule IV of the Act, the Claimant interjected to state that their understanding was that the total fee amount worked out as per the claim slab in the IV Schedule Table would be for all the three Arbitrators combined.*
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> *In this regard, the Tribunal clarified to both the parties that worked out fee amount as per Schedule Four Table is payable individually to each Arbitrator of the Tribunal, not combined as understood by the Claimant. Attention is drawn in this regard to Section 31A of the Arbitration & Conciliation Act (Amended), 2015 whereby the Arbitral*

Tribunal shall have the discretion to determine the arbitration costs which include also the fees & expenses of the Arbitrators. This thus sets aside such doubt expresses by the Pleader of the Claimant.

The Claimant stated before us that the amount of Claim in this case should be in or around Rs. 16 Crores. The Tribunal decided & accordingly directs that the first tranche of the fee as an advance deposit in terms of Section 38 of the Act amounting to Rs 6 lakh to each Arbitrator, in equal share (Rs 3 lakh by each party) shall be remitted by both the parties to all the Arbitrators latest by Oct 31, 2017. The Bank account & PAN particulars of each Arbitrator will be advised separately to both the parties."

22. A perusal of the order reveals that the Arbitral Tribunal had made a specific observation that for the purposes of deciding the rate of the fees of the Arbitrators, Schedule IV of the Arbitration Act would be the guiding provision. The Arbitrators further issued directions to the parties to deposit the first tranche of the fees, as per the said Schedule, to the Arbitrators, amounting to Rs. 6 lakhs to each Arbitrator.

23. The order states that the parties were informed that the arbitration costs shall be payable as per the Arbitration Act. There is no observation regarding the consensus of the parties while deciding the guiding provision for fixing the rate of fees. Nor any reference has been made in the order by the Arbitral Tribunal to any notification or even the appointment letter by the Railway Board or RCF. The order notes that the decision for fixing the rate of the fees was made in consultation with both the parties, however, before this Court both the parties have advanced their objections to the fixation of the fees by the Arbitrators. It is also

found that the observations made by the Arbitral Tribunal pertaining to the fixation of fees as per the Arbitration Act were not supported by any reasons.

24. This Court has perused the documents relied upon by the parties, especially, the communications/notifications dated 11th November 2016, 17th January 2018 and 30th October 2017. The same are considered and appreciated as under while making reference to the relevant portion of the said communications.

25. The Agreement for work between the parties and the arbitration proceedings arising from the same were subject to the GCC. For the limited dispute before this Court pertaining to the fees of the Arbitrators, the relevant provision is Clause 64 (6), which is reproduced hereunder:-

> *"**64.(6)** The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s), as per the rates fixed by Railway Board from time to time and the fee shall be borne equally by both the parties. Further, the fee payable to the arbitrator(s) would be governed by the instructions issued on the subject by Railway Board from time to time irrespective of the fact whether the arbitrator(s) is/are appointed by the Railway Administration or by the court of law unless specifically directed by Hon'ble court otherwise on the matter."*

26. The said Clause unequivocally stipulated that the cost, including fee of the Arbitrators, shall be as per the rates fixed by the Railway Board from time to time and which shall be borne by the parties equally. It is undisputed that the GCC were enforced much prior to even the initiation of the arbitration proceedings between the parties, that is, in July 2014. It

is pertinent to refer to the communication/notification dated 11th November 2016 which was issued by the Railway Board highlighting the modification to Clause 64 of the General Conditions of Contract, 2014 for implementation of the Arbitration and Conciliation (Amendment) Act, 2015. Even as per the modified Clause 64(6) it was stipulated that the fee of the Arbitrators shall be as per the rates fixed by the Railway Board from time to time. The modified Clause 64(6) is reproduced hereunder:-

> *"(a) The cost of arbitration shall be borne by the respective parties. The cost shall inter alia include fee of the arbitrator(s), as per the rates fixed by Railway Board from time to time and the fee shall be borne equally by both the parties, provided parties sign an agreement in the format given Annexure II to these condition after/ while referring these disputes to Arbitration. Further, the fee payable to the arbitrator(s) would be governed by the instructions issued on the subject by Railway Board from time to time irrespective of the fact whether the arbitrators(s) is/are appointed by the Railway Administration or by the court of law unless specifically directed by Hon'ble court otherwise of the matter.*
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> *(b) (I) Sole Arbitrator shall be entitled for 25% extra fee over the fee prescribed by the Railway Board from time to time.*
>
> *(II) Arbitrator tribunal shall be entitled to 50% extra fee if Award is decided within six months."*

27. The very existence of the contractual relation between the parties before this Court was borne out of the GCC. Amongst the several technicalities of the Agreement and the work arising thereof, the provision and procedure of the arbitration proceedings were also elaborated in the GCC. Upon a perusal of the modified Clause, it is evident that the Arbitrators were to be bound by the terms of the GCC

while fixing the fees or making an observation regarding the intervening provisions deciding the rate of the fees. It is also significant to see that the GCC as well as the modifications in GCC were brought about much prior to the passing of the order dated 22nd September 2017, whereby the Arbitral Tribunal fixed the rate of the fees as per the Arbitration Act. Hence, there was no occasion for the Arbitrators to lay down another method for calculating the fees of the Tribunal or even refer to another piece of legislation for the purpose of fixing the amount of the fees to be deposited by the parties.

28. The learned counsel for the respondent has referred to a communication/notification dated 17th January 2018, the relevant portion of which is reproduced hereunder:-

> *"Sub: Fee and Emoluments to Retired Railway Officer(s) working as Arbitrator(s) - reg;*
> *****
> *In partial modification to Railway Board's letter under reference (i) to (iii), the matter of fee and emoluments payable to retired railway officer(s) working as Arbitrator, has been reviewed and the competent authority has now revised the fee and emoluments payable to them as under:*
> *(i) Retired Railway officer while working as an arbitrator will be entitled for a fee not exceeding 1% of total claims, including the counter claims subject to maximum of ₹1,50,000/- per case. In cases, when the award is made within six months from the date the arbitration tribunal enters into reference, arbitrator will be entitled for 50% extra fee subject to maximum of ₹2,25,000/- per case. The extra fee is in consonance with Board's letter dated 16.11.16, under reference (v) above."*

29. The aforesaid communication leaves no scope for interpretation or contravention and fixing a fee beyond what was specified by the Railway Board. There was a cap and limitation on the fees/cost to the Arbitrators, especially where the said Arbitrators were Railway Officers, which was also the case in the arbitration between the parties. The record shows that all three Arbitrators, constituting the Arbitral Tribunal, appointed by the RCF were retired Railway Officers. In such a case, the limitation was Rs. 1,50,000/- per case for each arbitrator. In complete contradiction, the Arbitral Tribunal decided that only the first instalment of the fees/costs would add up to Rs. 6,00,000/- for each Arbitrator, that is, Rs. 3,00,000/- by each party. In any case, the upper limit, even after an extra payment of fees for expedient disposal which was not the case in the instant arbitration proceedings, did not reach even Rs. 3 lakhs. Hence, a value beyond Rs. 3 lakhs fixed by the Arbitrators and directed to be paid by the parties was not only in contravention of the notification/communication but also unreasonable and irrationally high.

30. Another important document referred to by the parties is the communication dated 30th October 2017, issued by the RCF, Kapurthala, to the Arbitrators concerned. The relevant portion of the letter is as follows:-

> *"In continuation to this office letter of appointment of the Arbitral Tribunal referred at #1 above, it is reiterated that the settlement of the dispute between these parties shall be as per arbitration clause of G.C.C. 2016. According to that '"The cost of arbitration including fee of the arbitrator(s) should be as per the rates fixed by Railway Board from time to time and the fee shall be borne equally by both the*

parties", vide Railway Board's letter dated 11.11.16 & 16.11.16 and its copies had already been sent with the appointment order of the Arbitral Tribunal (copies enclosed again).

As per Railway Board's orders the retired railway officers while working as an arbitrator (appointed by railways) will be entitled or a fee not exceeding 1% of the total claims including the counter-claims subject to a maximum of Rs.75,000/- per case, vide letters under reference at # 2, 3, & 4 above (copies enclosed for ready reference).

As per item no 6 of minutes issued by the Presiding Arbitrator (ref. 5 above), It is decided by the Tribunal in the 1st sitting/hearing dated 22.9.17 and directed to both parties that the first tranche of the arbitral fee as an advance deposit amounting to Rs.6 lakh to each arbitrator, in equal share (Rs.3 Lakh to each arbitrator by each party) is not in order."

31. The aforesaid communication flowed from the RCF, Kapurthala to the Arbitrators reiterating the fact that the Arbitrators were bound by the provisions under the GCC and that the fees fixed by them was not in consonance with the terms laid out by the Railway Board. After this communication, there remained no doubt that the Arbitrators were bound by the rates as fixed by the Railway Board, especially in an arbitration proceeding where the RCF is a party and retired Railway Officers were Arbitrators. This communication was duly sent to the Arbitral Tribunal after the contravening order dated 22nd September 2017 was passed by the Tribunal. However, after the proceedings were concluded and the Award was made and put in a sealed cover, the Arbitral Tribunal, despite the clear directions and communication, demanded the fee in accordance with the Schedule IV of the Arbitration Act.

32. At this juncture, it is pertinent to refer to the judgment passed in ***ONGC vs. Afcons Gunanusa JV*, 2022 SCC OnLine SC 1122** wherein the Hon'ble Supreme Court while extensively deciding the issue of remuneration in cases of arbitration proceedings held as under:-

> *"**C.2 Statutory scheme on payment of fees to arbitrators in India***
> ***C.2.1 Party autonomy***
> ***70.** Party autonomy is a cardinal principle of arbitration. The arbitration agreement constitutes the foundation of the arbitral process. The arbitral tribunal is required to conduct the arbitration according to the procedure agreed by the parties. The procedure may stipulate adherence to institutional rules or ad hoc rules or a combination of both. Redfern and Hunter on International Commercial Arbitration (supra) compares arbitration to a ship, highlighting the extent of control parties exercise over arbitral proceedings:*
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> > *"In some respects, an international arbitration is like a ship. An arbitration may be said to be 'owned' by the parties, just as a ship is owned by shipowners. But the ship is under the day-to-day command of the captain, to whom the owners hand control. The owners may dismiss the captain if they wish and hire a replacement, but there will always be someone on board who is in command (5) —and, behind the captain, there will always be someone with ultimate control."*
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> ***71.** The leading treatise on international commercial arbitration further notes that the principle of party autonomy is entrenched in the international and national regimes on arbitration:*
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> > *"Party autonomy is the guiding principle in determining the procedure to be followed in an international arbitration. It is a principle that is*

> *endorsed not only in national laws, but also by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law. The legislative history of the Model Law shows that the principle was adopted without opposition, (7) and Article 19(1) of the Model Law itself provides that:'Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.' This principle follows Article 2 of the 1923 Geneva Protocol, which provides that '[t]he arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties ...', and Article V(1)(d) of the New York Convention, under which recognition and enforcement of a foreign arbitral award may be refused if 'the arbitral procedure was not in accordance with the agreement of the parties'."*

72. *The Arbitration Act recognises the principle of party autonomy in various provisions. It allows the parties to derogate from the provisions of the Act on certain matters. Several provisions of the Arbitration Act explicitly embody the principle of party autonomy. Section 2(6) of the Arbitration Act provides that parties have the freedom to authorise any person, including an arbitral institution, to determine the issue between them. Section 19(2) provides that the parties are free to choose the procedure to be followed for the conduct of arbitral proceedings. Section 11(2)─provides that parties are free to decide on the procedure for the appointment of arbitrators. In Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, this Court observed that party autonomy is the "brooding and guiding spirit" of arbitration. In Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., this Court referred to party autonomy as the backbone of arbitration.*

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C.2.2 Fourth Schedule and regulation of arbitrators' fees

74. *Appointment of arbitrator(s) in India may take place either through an agreement between parties or by taking recourse to courts under Sections 11(3) and 11(6) of the Arbitration Act. Prior to the amendment of the Arbitration Act by the Arbitration Amendment Act 2015, a practice emerged, especially in cases of ad hoc arbitrations, where arbitrators would unilaterally, and in some cases arbitrarily, fix excessive fees for themselves. In Singh Builders (supra), this Court noted that such arbitrary fixation of fees by the arbitrators, specifically court-appointed arbitrators, has made arbitration an expensive proposition, bringing it into disrepute. The Court suggested some possible solutions. This Court observed:*

> *"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.*
>
> *23. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the arbitrators' fees is not fixed by the arbitrators themselves on case-to-case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the arbitration is held. Another solution is for the court to fix the fees at the time of appointing the*

arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned. Third is for the retired Judges offering to serve as arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an arbitrator whose fees are in their "range" having regard to the stakes involved.

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."

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86. *Based on the above discussion, we summarise the position as follows:*

(i) In terms of the decision of this Court in Gayatri Jhansi Roadways Ltd. (supra) and the cardinal principle of party autonomy, the Fourth Schedule is not mandatory and it is open to parties by their agreement to specify the fees payable to the arbitrator(s) or the modalities for determination of arbitrators' fees; and

(ii) Since most High Courts have not framed rules for determining arbitrators' fees, taking into consideration Fourth Schedule of the Arbitration Act, the Fourth Schedule is by itself not mandatory on court-appointed arbitrators in the absence of rules framed by the concerned High Court. Moreover, the Fourth Schedule is not applicable to international commercial arbitrations and arbitrations where the parties have agreed that the fees are to be determined in

accordance with rules of arbitral institutions. The failure of many High Courts to notify the rules has led to a situation where the purpose of introducing the Fourth Schedule and sub-Section (14) to Section 11 has been rendered nugatory, and the court-appointed arbitrator(s) are continuing to impose unilateral and arbitrary fees on parties. As we have discussed in Section C.2.1, such a unilateral fixation of fees goes against the principle of party autonomy which is central to the resolution of disputes through arbitration. Further, there is no enabling provision under the Arbitration Act empowering the arbitrator(s) to unilaterally issue a binding or enforceable order regarding their fees.

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112. *While the arbitral tribunal can exercise a lien over the arbitral award for any unpaid costs of arbitration under Section 39(1) of the Arbitration Act, a party can also approach the court for the release of the award and the court on inquiry can assess whether the costs demanded are reasonable under Section 39(2). These costs would include the arbitrators' fees that have been previously agreed upon. However, even if there is no agreement between the parties and the arbitrator(s) regarding the fees payable to the arbitrator(s), any determination of costs relating to arbitrators' fees by the tribunal is a non-binding demand that has been raised by the tribunal. As has been discussed above, while costs, in general, are to be decided at the discretion of the tribunal or the court because they involve a claim that one party has against the another relating to resolution of a dispute arising from the arbitration agreement, fees of the arbitrators are not a claim to be decided between the parties. Rather, it is an independent claim that the arbitrator(s) have against the parties. It will be for the court to decide whether the claim of the arbitrator(s) regarding their remuneration is reasonable...*

113. *Sub-Section (2) provides that an application can be made to the court if the arbitral tribunal is refusing to deliver the award, except on payment of costs demanded by it. The court can then order the arbitral tribunal to deliver the award to the applicant on payment of the costs demanded by the tribunal to the court. Crucially, the court can conduct an inquiry to determine if the costs are reasonable and out of the money paid to the court, it can direct the payment of reasonable costs to the tribunal and the balance (if any) to be refunded to the applicant. Sub-Section (3) provides that an application under sub-Section (2) for the delivery of an award withheld by the arbitral tribunal exercising a lien over it, can only be made if the fees demanded have not been fixed by a written agreement by the party and the arbitral tribunal. Section 39 of the Arbitration Act is similar to Section 38 of the now repealed Arbitration Act 1940…*

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115. *This interpretation of costs under Section 39 as only limited to the costs owed to the arbitral tribunal is also in consonance with the purpose of Section 39, which is that it enables the arbitral tribunal to exercise a lien over the arbitral award. In Triveni Shankar Saxena v. State of UP, this Court defined lien as follows:*

> *"17…The word 'lien' originally means "binding" from the Latin ligamen. Its lexical meaning is "right to retain". The word 'lien' is now variously described and used under different contexts such as 'contractual lien', 'equitable lien', 'specific lien', 'general lien', 'partners lien', etc. etc. in Halsbury's Laws of England, Fourth Edition, Volume 28 at page 221, para 502 it is stated:*
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> *"In its primary or legal sense "lien" means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims are satisfied."*

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118. *Hence, sub-Section (2) and (3) of Section 39, read together, govern a situation where the fees and other expenses payable to the arbitrators have not been decided through a written agreement between the party and the arbitral tribunal. While ideally, the parties and the arbitrators should arrive at an arrangement regarding the remuneration of arbitrators, the arbitral tribunal may raise a non-binding invoice regarding the arbitration costs (i.e., fees and expenses payable to arbitrator(s)) and may refuse to deliver the award unless the outstanding payments have been made. The parties are not obligated to pay such costs if they believe that such costs are unreasonable. In such a case, it is the court that determines whether the fees and other expenses demanded by the tribunal are reasonable in terms of Section 39(2).*

119. *To conclude, the arbitral tribunal while deciding the allocation of costs under Sections 31(8) read with 31A or advance of costs under Section 38 cannot issue any binding or enforceable orders regarding their own remuneration. This would violate the principle of party autonomy and the doctrine of prohibition of in rem suam decisions, which postulates that the arbitrators cannot be the judge of their own claim against parties' regarding their remuneration. The principles of party autonomy and the doctrine of prohibition of in rem suam decisions do not restrict the arbitral tribunal from apportioning costs between the parties (including the arbitrator(s) remuneration) since this is merely a reimbursement of the expenses that the successful party has incurred in participating in the arbitral proceedings. Likewise, the arbitral tribunal can also demand deposits and supplementary deposits since these advances on costs are merely provisional in nature. If while fixing costs or deposits, the arbitral tribunal makes any finding relating to arbitrators' fees (in the absence of an agreement), it cannot be enforced in favour of the arbitrators. The party can approach the court to review the fees demanded by the arbitrators.*

xxxxx

G.1 Findings

200. *We answer the issues raised in this batch of cases in the following terms:*

> *(i) 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 31A 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);*
>
> *(ii) Since this judgment holds that the fees of the arbitrators must be fixed at the inception to avoid unnecessary litigation and conflicts between the parties and the arbitrators at a later stage, this Court has issued certain directives to govern proceedings in ad hoc arbitrations in* ***Section C.2.4****…"*

33. The said observations are relevant to be referred to while adjudicating the claims of the parties before this Court. The essential principle to be seen is that even under the Arbitration Act, there is no

binding provision obligating the parties or the arbitrators to follow and abide by one fixed rule or procedure to decide the fees. Moreover, party autonomy plays a crucial role in deciding the procedure of an arbitration proceeding. Power, right and entitlement are given to the parties involved in a dispute when it comes to Alternate Dispute Resolution. Therefore, it is essential that where the parties decide a course of action or procedure in arbitration proceedings, which is also supported by the governing entity, the said course of action or procedure is to given due recognition and observation. The Arbitrators shall not pass and issue any directions *qua* the fees that may be made binding on the parties when the same are in complete violation of the agreement between the parties as well as the specific and explicit directions of the Railway Board and RCF in their communications/notifications.

CONCLUSION

34. Party autonomy is a cardinal principle of arbitration. The intention of legislature while enacting the Arbitration Act is that the parties need not undergo the rigours of a formal litigation and may have an expeditious disposal of their disputes. The intention is also to lessen the burden of the Courts by introducing a mechanism which is reliable, efficient and effective. The very purpose of an arbitration proceeding or any other mode of Alternate Dispute Resolution is to ensure that the parties, with their own will, volition and consensus, decide the course of proceedings, including procedural technicalities. An intervention to the extent that the process is rendered infructuous cannot be allowed to vitiate the intent of the Arbitration Act and the mode of dispute resolution

preferred by the parties. Hence, in cases like the instant, if the parties are entangled in the procedural formalities and technicalities, where the Arbitral Tribunal is attempting to impose its will and wishes without reason or cause, the entire spirit and purpose of the Act would be defeated.

35. Keeping in view the aforesaid facts, circumstances, the pleadings, submissions on behalf of the parties and the discussion in the foregoing paragraphs, this Court is of the opinion that the Arbitral Tribunal is liable to publish the Award.

36. It is made clear that the mandate as laid down under Clause 64(6) of the GCC, 1999 and its amended version, as well as the communications/notifications issued by the RCF and Railway Board on 11th November 2016, 17th January 2018 and 30th October 2017 shall be followed while calculating the fees of the Arbitrators.

37. Accordingly, the instant petition is allowed. The Arbitral Tribunal is directed to publish the Award forthwith.

38. Pending applications, if any, also stand disposed of.

39. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

FEBRUARY 24, 2023
gs/ms

Click here to check corrigendum, if any