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

Date of Decision: 14th March, 2023

\+ O.M.P.(T) (COMM.) 109/2022 & I.A. 18205/2022

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Ms. Maninder Acharya, Senior Advocate with Mr. Ashish Rana, Mr. Anurag Singh, Mr. Nilesh Mudgil, Mr. Gaurav Raj, Advocates.

versus

M/S AE TOLLWAY LTD .....Respondent

Through: Mr. Saurabh Kirpal, Senior Advocate with Mr. Saket Sikri, Mr. Anirudh Bakhru, Ms. Charu S. Singh, Mr. Sarthak Sachdeva, Ms. Teresa, Ms. Tejaswini, Mr. Nikhil Arora, Advocates.

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. By way of this petition under Section 14 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "the Act"], the petitioner- National Highways Authority of India [hereinafter referred

to as "NHAI"], seeks termination of the mandate of an Arbitral Tribunal [hereinafter referred to as "the Tribunal"], which is in *seisin* of disputes between the parties under a Concession Agreement dated 01.09.2015, for "*6 Laning of Agra to Etawah Bypass Section of NH-2 from KM 199.660 to KM 323.525 under NHDP Phase- V in the State of Uttar Pradesh*" [hereinafter referred to as "the Agreement"]. The only ground urged in support of the petition is that the Tribunal has fixed its fees contrary to the Agreement between the parties.

A. Facts

2. Article 44 of the Agreement contains the provision for dispute resolution. Article 44.3 thereof provides for arbitration, in the event conciliation proceedings between the parties have not been successful. The arbitration clause contemplates a three-member arbitral tribunal, comprising of one nominee of each of the parties, and a presiding arbitrator to be chosen by the two arbitrators so nominated.

3. Article 44.3.1(vii) of the Agreement provides for fees and expenses payable to the arbitrator. It reads as follows:-

> *"The fees and expenses payable to the Arbitrators shall be* ***as per the schedule of remuneration and expenses for Arbitrators notified by NHAI vide letter no. 11041/217/2007-Admin. DL 13th January 2010 reproduced herein below, or any amendment thereof****:*[1]
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> ***** ***** *****"

The circular for schedule of fees and expenses of the arbitrators of NHAI dated 13.01.2010 [hereinafter referred to as "the 2010 Circular"], has been reproduced in the Agreement. However, it is not necessary to set it out in full as the parties are *ad idem* that the present

[1] Emphasis supplied.

arbitral proceedings are governed by a subsequent circular of the NHAI dated 22.10.2020 [hereinafter referred to as "the 2020 Circular"].

4. As the case turns substantially on the 2020 Circular, it is reproduced in full below:-

NHAI/Policy Guidelines/Legal/2020
Policy Circular No. 2.1.44 dated 22.10.2020
{Decision taken on E-Office File Comp. NO. 5693}

Sub: Revision of Fee payable to the Arbitrators in terms of the Arbitration & Conciliation (Amendment) Act, 2015 in the Contractual Disputes.

Para 3 of Policy Circular/SoP dated 01.06.2017, regarding schedule of fee mentioned in the Annexure-3, has been modified/amended with the following schedule as per 437-Minutes of EC decision dated 11/09/2020:

Sum in dispute	*Model fee*
Up to Rs. 5,00,000 (Five Lakh)	*Rs. 45,000*
Above Rs. 5,00,000 (Five Lakh) and up to Rs. 20,00,000 (Twenty Lakh)	*Rs. 45,000 plus 3.5 per cent of the claim amount over and above Rs. 5,00,000 (Five Lakh)*
Above Rs. 20,00,000 (Twenty Lakh) and up to Rs. 1,00,00,000 (One Crore)	*Rs. 97,500 plus 3 per cent of the claim amount over and above Rs. 20,00,000 (Twenty Lakh)*
Above Rs. 1,00,00,000 (One Crore) and up to Rs. 10,00,00,000 (Ten Crore)	*Rs. 3,37,500 plus 1 per cent of the claim amount over and above Rs. 1,00,00,000 (One Crore)*
Above 10,00,00,000 (Ten crore) and up To Rs. 20,00,00,000 (Twenty Core)	*Rs. 12,37,500 plus 0.75 per cent of the claim amount over and above Rs. 10,00,00,000 (Ten Crore)*
Above Rs. 20,00,00,000 (Twenty Crore)	*Rs. 19,87,500 plus 0.5 per cent of the claim amount over and above Rs. 20,00,00,000 (Twenty Crore) with a ceiling of Rs. 30,00,000 (Thirty Lakh)*

Note:- In the event, the arbitral tribunal is a sole arbitrator, he shall be entitled to an additional amount of twenty-five per cent on the fee payable as per the table set out above.

2. ***The above fee is payable to each arbitrator, to be shared equally by both the parties to the arbitration and i.e. Claimant and Respondent, which is inclusive of fee of arbitrators for Claim & Counter Claims i.e. total "Sum in dispute",*** *reading charges, declaration/publishing of award. Further, the fee of AT was being regulated as per Policy Circular of 01.06.2017 and henceforth the fee shall be regulated as per ibid OM. Therefore, difference of fee in ongoing Arbitration matters shall be worked out by the respective Divs./PIUs and difference of amount shall be paid accordingly. In other words, fee already paid shall be adjusted from the prescribed fee shown in the chart and balance amount, if any, shall be paid to the Arbitrator(s).*

3. The expenses such as stay and travelling charges will be paid as per Policy Guidelines/ Circular No. 2.1.22/2017 dated 01.06.2017.

4. Accordingly the Policy Circular dated 01.06.2017 on the mentioned subject is modified to the above extant.

5. This issue with the approval of Competent Authority."[2]

5. Disputes having arisen between the parties, the Tribunal was constituted, and made its first preliminary order on 10.06.2022. As far as fees of the Tribunal are concerned, the Tribunal directed as follows:-

"xxxx xxxx xxxx

12. ***ARBITRAL FEES AND EXPENSES :***
The Ld. Counsel for the Respondent submitted that as per Revised Circular dt. 22.10.2020, issued by Respondent, the Fees and Expenses of the members of the Tribunal, may be charged accordingly. Tribunal, at this juncture, wants to clarify that the Fee Structure, as projected by NHAI, shall not be acceptable to this Tribunal, for the reasons mentioned hereinbelow*:-*
i. Schedule amount of Fees payable per Arbitrator shall be as per Fourth Schedule of the said Act. *It is made clear that the aforesaid Arbitration Fee as per Fourth Schedule* ***shall be for first 15 (fifteen) hearings only.*** *In case the hearings are prolonged beyond 15, then the Arbitration fee shall be re-fixed @ per*

[2] Emphasis Supplied.

> *Arbitrator per hearing from the date of 16th Hearing. Each Session of hearing shall be for about 3 hours.*
> ***ii.*** *One time Secretarial Assistance and incidental charges payable by ii. Parties (including Telephone, FAX, postage etc.) per Arbitrator:-*
> *(a) For Presiding Arbitrator - Rs. One Lakh only*
> *(b) For each Co-Arbitrator - Rs. Fifty Thousand only*
> ***iii.*** *Parties are directed to make the following advance payments, in equal shares, to each Arbitrator by or before 4th July 2022, under intimation to all:-*
> *(a) Fees- Rs. Ten Lakhs only (TDS Permissible)*
> *(b) Secretarial Assistance-(I) Rs. 1 Lakh for Presiding Arbitrator*
> *(II) Rs. 50,000/- to each Co-Arbitrator*
> *As item (b) comes in the category of expenses, no TDS please.*
> ***iv.*** *All the above payments shall be shared equally by each party i.e. 50% by each of the Parties.*
> ***v. Fees for Counter Claim, if any, and Reading Fees shall be fixed on a later date, after completion of Pleadings."***[3]

6. NHAI made an application for recall of the order dated 10.06.2022, particularly with regard to the fees of the Tribunal. It was contended by NHAI that the Tribunal was bound to follow the fee schedule set out in the Agreement, relying upon certain judgments of the Supreme Court, and of this Court. In particular, it was contended that the Tribunal was bound to charge consolidated fees for claims and counter-claims. The Tribunal was also requested to render a reasoned decision as to why the 2020 Circular was inapplicable in the present case.

7. By an order dated 02.09.2022, the Tribunal *inter alia* directed as follows:-

> *"6. During the course of the hearing today, Ld. Counsel for Respondent has been strongly relying on the Concession Agreement executed between the Parties on 1.9.2015, especially*

[3] Emphasis supplied.

> *Article 44 dealing with Dispute Resolution and also Article 44.3 .(vii) of the same, to suggest that Parties are bound by the Circular, issued by Respondent on 22.10. 2020 which squarely deals with the Fee, payable to the members of the Tribunal.*
>
> *7. In the light of this, we hereby direct the Respondent to file an Affidavit of a responsible Officer of NHAI, to inform the Tribunal, as to in how many matters, there has been a deviation from the said Circular dt. 22.10.2020, for last 5 years from today, with the details of the Parties and other relevant facts dealing with that matter. This has been so directed, so as to decide the Respondent's application on merits.*
>
> *8. At this stage, it is pertinent to point out that a sum of Rs. 1317.98 Cr has been claimed by the Claimant in its Statement of Claim.*
>
> *9. Respondent has also made it clear that it is still working on its Counter Claim, which can be informed to the Tribunal only on the next date of hearing. Respondent has now to file its Statement of Defence along with Counter Claims, on or before 06.10.2022.*
>
> *10. In the light of the said discussion, both Parties are hereby directed to furnish the aforesaid details, together with Respondent's Affidavit, positively on or before the next date of hearing, in the manner as has been suggested hereinabove."*

8. After the filing of affidavits in terms of this order, the matter was taken up by the Tribunal on 24.09.2022, by which time the Supreme Court had considered the issue of arbitral fees in its judgment in *Oil and Natural Gas vs, Afcons Gunanusa JV*[4] [hereinafter referred to as "*ONGC*"]. The Tribunal relied upon the said judgment to hold that the arbitral fees were liable to be charged separately for claims and counter-claims in terms of *ONGC*. Paragraphs 13 to 17 of the order of the Tribunal dated 24.09.2022, read as follows:-

> *"13. Several paras of the said Judgment for instance 77, 79, 117, 139 and 140 have been read before us by both the Ld. Counsel for Parties to stress upon the arguments advanced in this regard.*
>
> *14. It cannot be disputed that under Article 141 of the Constitution of India, the Law declared by the Supreme Court shall be binding*

> *on all Courts within the territory of India, thus the same, is equally binding on the Tribunal.*
>
> ***15. Para 117 of the said Judgment in ONGC Supra fully covers the issue, which clearly stipulates that Claims and Counter Claims have to be treated separately, moreso if it is an adhoc Arbitration. It is not disputed, it is an adhoc Arbitration and certainly not an Institutional Arbitration.***
>
> *16.* ***In the light of the aforesaid discussion, we direct that the Order of the Tribunal dt. 10.06. 2022 stands modified, only to the extent that Claims and Counter Claims would be treated separately and Fees for the Counter Claims shall be fixed at the time, after the same is filed by the Respondent.*** *The date fixed for the said purposes is 6th of October 2022.*
>
> *17. With the aforesaid directions this I.A. filed by the Respondent dt. 30.07.2022 stands disposed of, with no order as to Costs."*[4]

9. It is in the light of this direction that NHAI has filed this petition for termination of the mandate of the Tribunal.

B. Submissions of Counsel

10. Ms. Maninder Acharya, learned Senior Counsel for NHAI, submitted that the aforesaid orders of the Tribunal reveal a position inconsistent with the agreement of the parties, read with the 2020 Circular. She argued that paragraph 2 thereof is directly contrary to the Tribunal's conclusion that it can treat the claims and counter-claims separately for the purpose of fees. She submitted that reliance upon *ONGC* in this connection is misconceived, as the said interpretation of the Fourth Schedule to the Act [hereinafter referred to as "Schedule IV"] would apply only if there is no agreement between the parties to the contrary. Learned Senior Counsel submitted that, Article 44.3.1(vii) of the Agreement, read with 2020 Circular, is unambiguous

[4] Emphasis supplied.

in providing that the fee schedule would apply to the total sum in dispute, computed by adding the claims and counter-claims together. Ms. Acharya drew my attention to various observations in *ONGC* itself, which emphasize the overarching principle of respect for party autonomy, as evidenced by the terms of the Agreement.

11. Ms. Acharya also cited an order of the Supreme Court in *NTPC Ltd. vs. M/s Era Infra Engineering Ltd. (EIEL)*[5], in which a judgment of this Court[6] was under challenge. This Court had taken the view that Section 14 of the Act was not available to challenge an order by which an arbitral tribunal had fixed its fees, allegedly in excess of the agreement between the parties. It held that the arbitrator's directions for payment of fees in accordance with Schedule IV did not lead to the conclusion that it was *de jure/de facto* unable to perform its functions. The Supreme Court, however, by the aforesaid order dated 21.10.2022, held that the arbitrator could not have determined his fees unilaterally. The Court, therefore, terminated the arbitral proceedings and appointed a substitute arbitrator.

12. Mr. Saurabh Kirpal, learned Senior Counsel for the respondent, on the other hand, firstly objected to the maintainability of the present petition under Section 14 of the Act, relying upon the judgment of the Supreme Court in *NHAI Vs. Gayatri Jhansi Roadways Limited*[7].

[5] Order dated 21.10.2022, in SLP (Civil) 5604/2022.

[6] Order dated 01.12.2021 in O.M.P.(T)(COMM) 123/2021 [*NTPC Ltd. vs. M/s Era Infra Engineering Limited*].

[7] (2020) 17 SCC 626 (refer paragraphs 11 to 13).

13. On the merits of the matter also, Mr. Kirpal submitted that, on a proper interpretation of the 2020 Circular, the view taken by the Tribunal ought to prevail. He referred to the subject heading of the 2020 Circular to argue that it was intended to implement the provisions of the Arbitration and Conciliation (Amendment) Act, 2015, by which Schedule IV was inserted into the Act. Schedule IV has now been conclusively interpreted by the Supreme Court in the manner adopted by the Tribunal. Mr. Kirpal, therefore, submitted that paragraph 2 of the 2020 Circular must be read consistently with the proper interpretation of Schedule IV, as laid down in *ONGC*. He pointed out that the interpretation urged by NHAI has been characterized by the Supreme Court as impractical and unworkable.

14. In this regard, Mr. Kirpal also referred to an order of the Supreme Court in *CG Tollway Limited Etc. vs. NHAI and Another*[8], which was concerned with arbitration under the Rules of the Society for Affordable Resolution of Disputes [hereinafter referred to as "SAROD"], established by the NHAI and the National Highways Builders Federation [hereinafter referred to as "NHBF"]. By virtue of a circular of SAROD dated 17.03.2021, the applicable fee schedule under the SAROD Rules was virtually identical to the 2020 Circular, in material particulars. In the order passed in *CG Tollway*[9], the Supreme Court noted the submission of learned counsel for SAROD that the fees payable in arbitrations under SAROD "*has been brought in conformity with the provisions*" of the Act.

[8] Order dated 04.03.2022 in MA No. 411-413/2022 in SLP (Civil) No. 18312-18314/2021.

[9] *Ibid*.

15. Mr. Kirpal argued that, applying the doctrine of *contra proferentem*, as laid down by the Supreme Court *inter alia* in *Bank of India and Another vs. K. Mohandas and Others*[10], any ambiguity in the provisions of the 2020 Circular should be resolved against the author, which in the present case is NHAI.

16. In rejoinder, Ms. Acharya defended the maintainability of the petition relying upon the judgment in *ONGC* itself, wherein the Court was concerned with several petitions under Section 14 of the Act. Ms. Acharya also relied upon the judgement of this Court in *NTPC Ltd. vs. Amar India Ltd.*[11], of the Madras Court in *Madras Fertilizers Limited vs. SICGIL India Limited and Others*[12], and of the Rajasthan High Court at Jodhpur in *Doshion Private Limited vs. Hindustan Zinc Limited*[13].

17. On merits, Ms. Acharya clarified that the intention of NHAI was not to apply Schedule IV in totality, and the fee schedule provided in the Schedule IV was incorporated subject to the position that claims and counter-claims would be combined for purposes of determination of fees.

C. Affidavits filed by NHAI

18. While issuing notice in this petition on 10.11.2022, this Court noted the aforesaid submissions, and, particularly, the fact that the subject heading of the 2020 Circular evidences an intention to apply

[10] (2009) 5 SCC 313.

[11] Judgment dated 03.11.2020 in O.M.P (T)(COMM) 13/2020.

[12] Judgement dated 12.09.2007 in O.P. No. 148/2006.

[13] Order dated 03.01.2019, in S.B. Civil Writ No. 6074/2018.

the 2015 Amendment to the Act. In view of this position, NHAI was directed to file an affidavit in the following terms:-

> *"6. In these circumstances, Mr. Rana is directed to place NHAI's stand on record as to whether the Circular was, in fact, intended to bring the NHAI's policy regarding fees payable to arbitrators in line with the Fourth Schedule of the Act and if so, whether the NHAI wishes to adopt the interpretation subsequently placed by the Supreme Court upon the Fourth Schedule. The affidavit in this regard be filed within two weeks."*

19. Two affidavits have since been filed by NHAI. In the first affidavit dated 07.12.2022, NHAI stated that the 2020 Circular was "*designed on the lines of the Fourth Schedule but it is different from it*"[14]. In the second affidavit dated 14.12.2022, it was further stated as follows:-

> *"4. That since fee of 2017 was considered to be less and considerable time elapsed from revision the circular, to address the issue of less fees, Applicant deemed it fit to revise the fee schedule. Thought the subject heading in the circular provides "Revision of Fee payable to the Arbitrators in terms of Arbitration and Conciliation (Amendment) Act, 2015 in the contractual disputes",* ***it is clarified that for the purposes of revision of fee schedule, guidance was taken from Schedule IV of the Arbitration and Conciliation (Amendment) Act 1996, however no adherence to schedule IV was considered.*** *Accordingly, the fee schedule was amended to incorporate the fee payable to arbitrators adding certain more heads, wherein payments are being given.*
> ***Since the intent was not to implement Schedule IV but to formulate separate and independent fee schedule which is affordable and bearable by the Applicant, it was additionally provided that the fees payable would be inclusive of claim and counter claim.*** *It is further clarified that the fee payable would be inclusive of reading fees, declaration/ publishing of award, which is not otherwise provided in the Schedule IV. The said modified fee circular of 2020, further provides for payment of stay and*

[14] Paragraph 3 of the additional affidavit of NHAI dated 07.12.2022.

> *travelling charges separately which is not provided by Schedule IV."*[15]

20. An opportunity was thus given to NHAI to clarify whether it intended to apply Schedule IV by the 2020 Circular, and, if so, whether it intends to bring its fee schedule in line with the interpretation thereof, given by the Supreme Court. In the aforesaid affidavit, NHAI has taken the unequivocal position that, although the 2020 Circular was designed on lines of Schedule IV, it took a conscious decision regarding treatment of claims and counter-claims in the manner reflected in the 2020 Circular, and that it is not inclined to make its position consistent with the interpretation of Schedule IV in *ONGC*.

***D. Judgment of the Supreme Court in ONGC*:-**

21. As the judgment in *ONGC* now governs the question of arbitral fees, it is necessary to consider the said judgment in some detail.

22. The Court's conclusions with regard to the general principles regarding fees of arbitrators are in the following terms:-

> *"**C.2 Statutory scheme on payment of fees to arbitrators in India***
>
> *xxxx xxxx xxxx*
>
> ***C.2.2 Fourth Schedule and regulation of arbitrators' fees***
>
> *xxxx xxxx xxxx*
>
> ***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***

[15] Emphasis supplied.

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.*** *This is discussed in* ***Section C.2.3*** *of this judgment. Hence, this Court would be issuing certain directives for fixing of fees in ad hoc arbitrations where arbitrators are appointed by courts in* ***Section C.2.4*** *of this judgment.*

xxx *xxx* *xxx*

C.2.4 Directives governing fees of arbitrators in ad hoc arbitrations

121. *Preliminary meetings in arbitration proceedings entail a meeting convened by the arbitral tribunal with the parties to arrive at a common understanding about how the arbitration is to be conducted. It generally takes place at an early stage of the dispute resolution process, prior to the "written phase of the proceedings". Rules of certain international arbitral institutions provide for convening a preliminary meeting or case-management conference. The fees and expenses are typically addressed at this stage.* ***We propose that this stage of having a preliminary hearing should be adopted in the process of conducting ad hoc arbitrations in India as it will provide much needed clarity on how arbitrators are to be paid and reduce conflicts and litigation on this issue.***

122. ***These preliminary hearings should also be conducted when the fees are specified in the arbitration agreement.*** *The arbitration agreement may have been entered into at an earlier point in time, even several years earlier. It is possible that at the time when the disputes between the parties arise, the fees stipulated*

in the arbitration agreement may have become an unrealistic estimate of the remuneration that is to be offered for the services of the arbitrator due to the passage of time. ***In the preliminary hearings, if all the parties and the arbitral tribunal agree to a revised fee, then that fee would be payable to the arbitrator(s). However, if any of the parties raises an objection to the fee being demanded by the arbitrator(s) and no consensus can be arrived at between such a party and the tribunal or a member of the tribunal, then the tribunal or the member of the tribunal should decline the assignment.*** *Since the relationship between the parties and arbitrator(s) is contractual in nature, specifically with respect to the payment of remuneration, there must be a consensus on the fees to be paid.*

123. *It is possible that during the preliminary hearings, the parties and the arbitral tribunal may be unsure about the extent of time that needs to be invested by the arbitrator(s) and the complexity of the dispute. It is also possible that the arbitral proceedings may continue for much longer time than was expected. In order to anticipate such contingencies, during the preliminary hearings, the parties and the arbitrator(s) should stipulate that after a certain number of sittings, the fee would stand revised at a specified rate. The number of sittings after which the revision would take place and the quantum of revision must be clearly discussed and determined during the preliminary hearings through the process of negotiation between the parties and the arbitrator(s). There is no unilateral power reserved to the arbitrator(s) to revise the fees on their own terms if they believe that an additional number of sittings would be required to settle the dispute.* ***The fees payable to the arbitral tribunal in an ad hoc arbitration must be settled between the arbitral tribunal and the parties at the threshold during the course of the preliminary hearings.*** *Resolution of the fees payable to the arbitral tribunal by mutual agreement during the preliminary hearings is necessary.* ***Failing such an agreement, the arbitrator(s) who decline to accept the fee suggested by the parties (or any of them) are at liberty to decline the assignment.*** *The fixation of arbitral fees at the threshold will obviate the grievance that the arbitrator(s) are arm-twisting parties at an advanced stage of the dispute resolution process. In such a situation, a party who is not agreeable to a unilateral revision of fees demanded by the arbitral tribunal in the midst of the proceedings has a real apprehension that its refusal may result in embarrassing consequences bearing on the substance of the dispute.*

124. *We believe that the directives proposed by the amicus curiae, with suitable modifications, would be useful in structuring how these preliminary hearings are to be conducted. Exercising our powers conferred under Article 142 of the Constitution, we direct the adoption of the following guidelines for the conduct of ad hoc arbitrations in India:*

*"1. Upon the constitution of the arbitral tribunal, the parties and the arbitral tribunal shall hold preliminary hearings with a maximum cap of four hearings amongst themselves to finalise the terms of reference (the "**Terms of Reference**") of the arbitral tribunal. The arbitral tribunal must set out the components of its fee in the Terms of Reference which would serve as a tripartite agreement between the parties and the arbitral tribunal.*

2. In cases where the arbitrator(s) are appointed by parties in the manner set out in the arbitration agreement, the fees payable to the arbitrators would be in accordance with the arbitration agreement. *However, if the arbitral tribunal considers that the fee stipulated in the arbitration agreement is unacceptable, the fee proposed by the arbitral tribunal must be indicated with clarity in the course of the preliminary hearings in accordance with these directives.* ***In the preliminary hearings, if all the parties and the arbitral tribunal agree to a revised fee, then that fee would be payable to the arbitrator(s). However, if any of the parties raises an objection to the fee proposed by the arbitrator(s) and no consensus can be arrived at between such a party and the tribunal or a member of the tribunal, then the tribunal or the member of the tribunal should decline the assignment.***

3. Once the Terms of Reference have been finalised and issued, it would not be open for the arbitral tribunal to vary either the fee fixed or the heads under which the fee may be charged.

4. The parties and the arbitral tribunal may make a carve out in the Terms of Reference during the preliminary hearings that the fee fixed therein may be revised upon completion of a specific number of sittings. The quantum of revision and the stage at which such revision would take place must be clearly specified. The parties and the arbitral tribunal may hold another meeting at the stage specified for revision to ascertain the additional number of sittings that may be required for the final adjudication of the dispute which number may then be incorporated in the Terms of Reference as an additional term.

5. In cases where the arbitrator(s) are appointed by the Court, the order of the Court should expressly stipulate the fee that arbitral tribunal would be entitled to charge. However, where the Court leaves this determination to the arbitral tribunal in its appointment

order, the arbitral tribunal and the parties should agree upon the Terms of Reference as specified in the manner set out in draft practice direction (1) above.

6. There can be no unilateral deviation from the Terms of Reference. The Terms of Reference being a tripartite agreement between the parties and the arbitral tribunal, any amendments, revisions, additions or modifications may only be made to them with the consent of the parties.

7. All High Courts shall frame the rules governing arbitrators' fees for the purposes of Section 11(14) of the Arbitration and Conciliation Act, 1996.

8. The Fourth Schedule was lastly revised in the year 2016. The fee structure contained in the Fourth Schedule cannot be static and deserves to be revised periodically. We, therefore, direct the Union of India to suitably modify the fee structure contained in the Fourth Schedule and continue to do so at least once in a period of three years."

125. Conscious and aware as we are that (i) Arbitration proceedings must be conducted expeditiously; (ii) Court interference should be minimal; and (iii) Some litigants would object to even a just and fair arbitration fee, we would like to effectuate the object and purpose behind enacting the model fee schedule. When one or both parties, or the parties and the arbitral tribunal are unable to reach a consensus, it is open to the arbitral tribunal to charge the fee as stipulated in the Fourth Schedule, which we would observe is the model fee schedule and can be treated as binding on all. *Consequently, when an arbitral tribunal fixes the fee in terms of the Fourth Schedule, the parties should not be permitted to object the fee fixation. It is the default fee, which can be changed by mutual consensus and not otherwise."*[16]

23. Schedule IV does not expressly clarify whether the "*sum in dispute*" is to be computed by adding claims and counter-claims, or the arbitrators' fees are to be determined separately for claims and counter-claims. The Supreme Court considered this question, and held as follows:-

[16] Emphasis supplied.

*"**D Interpretation of "sum in dispute" in the Fourth Schedule***

xxxx xxxx xxxx

D.3 Analysis

168. *On our analysis of the statutory framework of the Arbitration Act and the CPC, related academic discourse and judicial pronouncements, the following conclusions emerge:*

(i) Claims and counter-claims are independent and distinct proceedings;

(ii) A counter-claim is not a defence to a claim and its outcome is not contingent on the outcome of the claim;

(iii) Counter-claims are independent claims which could have been raised in separate proceedings but are permitted to be raised in the same proceeding as a claim to avoid a multiplicity of proceedings; and

(iv) The dismissal of proceedings in relation to the original claim does not affect the proceedings in relation to the counter-claim.

169. *We must now consider these principles in the context of the interconnection between Section 31(8), Section 31A and Section 38(1) and the Fourth Schedule of the Arbitration Act. On a combined reading of Section 31(8), Section 31A and Section 38(1), it is clear that : (i) separate deposits are to be made for a claim and counter-claim in an arbitration proceeding; and (ii) these deposits are in relation to the costs of arbitration, which includes the fee of the arbitrators.* ***Therefore, prima facie, the determination of the fee under the Fourth Schedule should also be calculated separately for a claim and counter-claim - i.e., the term "sum in dispute" refers to independent claim amounts for the claim and counter-claim.*** *Such an interpretation is also supported by the definition of claim and counter-claim, and by the fact that the latter constitutes proceedings independent and distinct from the former.*

170. ***If this interpretation were to be discarded in favor of construing "sum in dispute" as a cumulation of the claim amount for the claim and counter-claim, it would have far-reaching consequences in terms of procedural fairness.*** *First, under the proviso to Section 38(1), the arbitral tribunal can direct separate deposits for a claim and counter-claim. These are based on the cost of arbitration defined by a conjoint reading of Sections 31(8) and 31A, which includes the arbitrators' fee. Hence, if the arbitrators were to charge a common fee for both the claim and counter-claim, they would have to then equitably divide that fee while calculating individual deposits for the purpose of the proviso to Section*

> *38(1). Second, the second proviso to Section 38(2) provides that if the deposit is not made by both the parties, the arbitral tribunal can dismiss the claim and/or counter-claim, as the case may be. If the claim was to be dismissed in such a manner, it would lead to an absurd situation where the arbitrators' fee would have to be revised in the middle of the arbitration proceedings solely on the basis of the amount of the counter-claim. Third, under Section 23(2-A), the only requirement of a counter-claim is that it should arise out of the same arbitration agreement as the claim. However, the cause of action of a counter-claim may be entirely different from the claim and possibly far more complex. Therefore, determining the arbitrators' fee on a combined basis for both the claim and counter-claim would thus not match up to the separate effort they would have to put in for each individual dispute in the claim and counter-claim.*
>
> *xxx* *xxx* *xxx*
>
> ***173.*** *Chamber of Commerce and European Court of Arbitration. This will, however, have no bearing on our judgment. As noted earlier in this judgment, parties have the freedom to opt for institutional arbitration and be bound by the rules of the institution**. However, the judgment is currently dealing with instances of ad hoc arbitrations where the Fourth Schedule has been made applicable for the calculation of the arbitrators' fee. In such cases, we hold that the "sum in dispute" in the Fourth Schedule of the Arbitration Act shall be considered separately for the claim amount in dispute in the claim and counter-claim. Consequently, the arbitrators' fee will be calculated separately for the claim and counter-claim, and the ceiling on the fee will also be applicable separately to both."***[17]

E. Analysis

(a) ***Maintainability of the petition under Section 14 of the Act****:-*

24. As far as the maintainability of the present petition is concerned, I am of the view that the issue must be decided in favour of the petitioner by virtue of the Supreme Court's judgment in *ONGC* and the order in *Era Infra Engineering*[18].

[17] Emphasis supplied.

[18] Supra (note 5).

25. As pointed out by Ms. Acharya, the judgment of three learned Judges in *ONGC* itself was concerned with several proceedings arising under of Section 14 of the Act, including *Civil Appeal No. 5880/2022*[19] and *Civil Appeal No. 5879/2022*[20]. The Court has not held those petitions to be incompetent. The order of the Supreme Court in *M/s Era Infra Engineering Ltd.*[21], puts the issue beyond doubt, as the contrary view taken by this Court on maintainability was directly before the Supreme Court. Although the order of the Supreme Court does not expressly address the question of maintainability, the mandate of learned arbitrator therein was terminated by the Supreme Court, and a substitute arbitrator was appointed, which are the very reliefs contemplated by Sections 14 and 15 of the Act.

26. The judgments of various High Courts, cited by Ms. Acharya, including this Court's judgment in *Amar India Ltd.*[22], also support this position, and I see no reason to take a view to the contrary.

27. The judgment of a two-judge Bench of the Supreme Court in *Gayatri Jhansi Roadways Limited*[23], cited by Mr. Kirpal, is, in my view, distinguishable. Paragraphs 11 to 13 of the said judgment read as follows:-

> "*11. We have heard the learned counsel for the both the sides. In our view, Shri Narasimha, learned Senior Counsel, is right in stating that in the facts of this case, the fee schedule was, in fact, fixed by the agreement between the parties. This fee schedule,*

[19] Arising out of S.L.P(Civil) No. 13426/ 2021.

[20] Arising out of S.L.P(Civil) No. 10358/2020.

[21] Supra (note 5).

[22] Supra (note 11)

[23] Supra (note 7).

> *being based on an earlier circular of 2004, was now liable to be amended from time to time in view of the long passage of time that has ensued between the date of the agreement and the date of the disputes that have arisen under the agreement. We, therefore, hold that the fee schedule that is contained in the Circular dated 1-6-2017, substituting the earlier fee schedule, will now operate and the arbitrators will be entitled to charge their fees in accordance with this schedule and not in accordance with the Fourth Schedule to the Arbitration Act.*
>
> *12. We may, however, indicate that the application that was filed before the High Court to remove the arbitrators stating that their mandate must terminate, is wholly disingenuous and would not lie for the simple reason that* ***an arbitrator does not become de jure unable to perform his functions if, by an order passed by such arbitrator(s), all that they have done is to state that, in point of fact, the agreement does govern the arbitral fees to be charged, but that they were bound to follow the Delhi High Court in Gayatri Jhansi Roadways Ltd. case [NHAI v. Gayatri Jhansi Roadways Ltd., 2017 SCC OnLine Del 10285] which clearly mandated that the Fourth Schedule and not the agreement would govern.***
>
> *13.* ***The arbitrators merely followed the law laid down by the Delhi High Court and cannot, on that count, be said to have done anything wrong so that their mandate may be terminated as if they have now become de jure unable to perform their functions.*** *The learned Single Judge, in allowing the Section 14 application, therefore, was in error and we set aside the judgment [NHAI v. Gammon Engineers & Contractor (P) Ltd., 2018 SCC OnLine Del 10183] of the learned Single Judge on this count.*"[24]

28. It is clear therefrom that the reasoning of the Supreme Court was based upon the fact that the arbitral tribunal therein had followed a judgment of this Court, and its mandate could not be terminated for so doing. In the present case, in contrast, we are faced with an argument that a binding judgment of the Supreme Court had not been followed by the Tribunal. The judgment in *Gayatri Jhansi Roadways*

[24] Emphasis supplied.

Limited[25] is, therefore, inapplicable to the present case, on the question of maintainability of the present petition.

(b) ***Merits of the dispute****:-*

29. Turning now to the merits of the case at hand, I am of the view that *ONGC* clearly requires party autonomy to be given paramount importance. To the extent that the first procedural order of the Tribunal dated 10.06.2022 [rendered before the judgment in *ONGC*], expresses that the fee structure projected by NHAI is not acceptable to the Tribunal, the Tribunal is in error.

30. It may be noted that the Tribunal had, in addition to the controversy with regard to the claim and counter-claim, also held that the fees under Schedule IV will only cover the first fifteen hearings. This position has been clarified by the Tribunal in a communication dated 13.12.2022 to the parties, which was handed up in Court during the course of arguments. The said communication reads as follows:-

> "*Dear Ms. Daulat, Namaskar*
>
> *Thanks for your mail. Tribunal's last Order dt. 24.09.2022 is clear and leaves no amount of doubt, atleast in the minds of the Members of the Tribunal that the earlier Order dt. 10.06.2022 stands modified to the extent that fee & Expenses payable to the each Member of the Tribunal would be governed by the Circular of NHAI, which is equivalent to Schedule IV of the Act and would not be confined to only 15 Sessions.*
> *It is further clarified that under the Constitutional mandate, Tribunal is bound to abide by the directions issued by it in the matter of Oil & Natural Gas vs. Afcons Gunanusa JV, reported in 2022 SCC Online SC 112, wherein it has been categorically held that despite payment of Fee & Expenses to the members of the Tribunal, under Schedule IV of the Act incase of a CounterClaim, it shall not be governed by the same but Fee & Expenses payable to*

[25] Supra (note 7).

> *the Members of the Tribunal would be worked out separately and independently, looking to the amount of the CounterClaim.*
> *Kindly feel free to discuss further, should there be any more queries, with anyone of you.*
> *With kind regards and best of wishes"*

It is for this reason that the controversy is now confined to the question of claims and counter-claims.

31. *ONGC* makes it clear that the determination of arbitral fees is contractual in nature, and requires a tripartite consensus between both parties and the arbitrator(s). To the extent that parties have made provision in this regard in their agreement, that governs the proceedings, although it may be modified, if parties agree. In the absence of such a consensus, it is open to the arbitrators to decline the assignment, but they cannot take a position contrary to the agreement of the parties.

32. Paragraph 125 of *ONGC* characterises Schedule IV as a model fee schedule, to which the parties cannot object. However, it was conceded by Mr. Kirpal that this would not apply in the face of a contrary contractual arrangement.

33. On an interpretation of the 2020 Circular, and, particularly in view of affidavits dated 07.12.2022 and 14.12.2022, filed by NHAI, I am inclined to agree with Ms. Acharya's submission that the fees of the Tribunal need not be computed separately for claims and counter-claims. Paragraph 2 of the 2020 Circular clearly defines "*sum in dispute"* as the claims and the counter-claims, and makes it clear that the fee in paragraph 1 thereof is inclusive of the fees of the arbitrators for the same. As the 2020 Circular reveals a clear intention to define

the sum in dispute as inclusive of the claim and the counter-claim, the interpretation does not present any ambiguity, calling for application of the doctrine of *contra proferentem*.

34. In *ONGC*, the Supreme Court has given an interpretation of Schedule IV on this point, which resolves an ambiguity in the Schedule, but cannot be applied to a contractual arrangement which does not present similar ambiguity. As stated in paragraph 173 of *ONGC*, the interpretation therein would be applicable to arbitrations to which Schedule IV applies. However, that does not extend to a case such as the present one in view of the principles of party autonomy, acknowledged in *ONGC* itself. Put differently, it may be said that the Agreement between the parties was not to apply Schedule IV in totality, but to apply the 2020 Circular, which incorporates some (but not all) vital elements of Schedule IV.

35. Particularly keeping in mind the observations of the Supreme Court in paragraphs 168 to 170 of *ONGC*, with regard to impracticality and procedural fairness, Mr. Kirpal suggested that NHAI's reluctance to bring its 2020 Circular in line with Schedule IV as interpreted by Supreme Court, is unfortunate and unreasonable. However, I am unable to hold that it is *per se* illegal in a commercial context. Parties are entitled to come to an agreement as to the terms upon which they would arbitrate, and *ONGC* itself makes it clear that their autonomy must be respected. In any event, there is no challenge to the 2020 Circular in these proceedings.

36. I am also not persuaded to a contrary conclusion by Mr. Kirpal's reliance upon the observations of the Supreme Court in *CG*

Tollway[26]. Although SAROD is an initiative of NHAI and NHBF, and clause 2 of its circular dated 17.03.2021 is virtually identical to the 2020 Circular, as far as the point in dispute is concerned, the arbitration in the present case is not one governed by the SAROD Rules. There is, in my view, no occasion to extrapolate the submission of learned counsel for SAROD, as recorded in the order of the Supreme Court, to NHAI. It may be noted that, although NHAI was a party to the case, the submission with regard to conformity with the Act has been attributed to learned counsel for SAROD, and not to learned counsel for NHAI.

F. Conclusion

37. In view of the above, the determination of the Tribunal in its order dated 24.09.2022, is not the correct position in law. For the purposes of the present arbitration, the renumeration of the Tribunal must be computed on the basis of total sum in dispute, inclusive of the claims and counter-claims, as provided in 2020 Circular.

38. The parties are directed to place this judgment before the Tribunal, within the next two weeks. In the event any of the learned Arbitrator(s) is not inclined to proceed with the arbitration on this basis, it may be so indicated, and the mandate of the said Arbitrator(s) shall stand terminated. Such a course is consistent with the procedure laid down in paragraph 122 of the judgment in *ONGC*. In such a situation, if the concerned Arbitrator is the nominee of either of the parties, he may be substituted by another nominee of the same party within 30 days thereafter, and if the said Arbitrator is the presiding

[26] Supra (note 8).

Arbitrator, he may be substituted by another Arbitrator to be appointed by the two nominee Arbitrators jointly within the same period.[27]

39. The petition, alongwith the pending application, is disposed of with these directions, with no order as to costs.

PRATEEK JALAN, J

MARCH 14, 2023
'vp/Faisal'/

[27] Learned counsel for the parties were informed during the course of hearing that, in the event the petition succeeds on merits, I intend to give the learned Arbitrators an opportunity to decide whether they wish to continue with the arbitration, and they had no objection to this course.