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

Judgment reserved on: 31.05.2023
Judgment pronounced on: 10.07.2023

+ **O.M.P.(MISC.)(COMM.) 147/2023**

MR. ANAY KUMAR GUPTA Petitioner

Through: Mr. Shailen Bhatia, Mr. Amit Jain,
Mr. Arnav Chatterjee and Mr. Raghav
Bhalla, Advs.

versus

MR. JAGMEET SINGH BHATIA Respondent

Through: Mr. Manish Kaushik, Mr. Ajit Singh
Johar, Mr. Plarsh Vashishth, Ms.
Snigdha Sharma and Mr. Mishal
Johri, Advs.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

IA No. 9213/2023 (Exemption)

Allowed, subject to all just exceptions.

Application stands disposed of.

O.M.P.(MISC.)(COMM.) 147/2023

1. The present petition under Section 29A (4) and (5) of the Arbitration and Conciliation Act, 1996 [hereinafter referred as “the Act”] seeks extension of time for completion of arbitral proceedings and for making the

arbitral award.

2. The arbitration proceedings commenced pursuant to the order dated 20.09.2021 passed on an application under Section 8 of the Act filed in CS (COMM) 409/2021. The said order, *inter alia*, states as under:-

“IA No. 12200/2021 and 12230/2021

1. Issue notice.
2. Learned counsel for the plaintiff accepts notice.
3. IA No. 12200/2021 is filed by the defendant seeking an order referring the dispute between the parties to arbitration in view of Section 8 of the Arbitration and Conciliation Act, 1996 and in view of the arbitration clause in the Agreements dated 20.12.2018 and 08.01.2019. An order is also sought to vacate the interim order passed by this court on 03.09.2021. IA No. 12230/2021 also seeks somewhat similar reliefs.
4. Learned counsel for the plaintiff and learned counsel for the defendant submit that they have no objection in case this court were to refer the disputes between the parties to an arbitrator appointed by this court, preferably a retired judge of this court.
5. In view of the request of the learned counsel for the parties, Mr. Justice Manmohan Sarin (Retd.), (Mobile No. 9818000210) is appointed as an Arbitrator to adjudicate the dispute between the parties. The Ld. Arbitrator may fix his own fees.
6. The interim order passed by this court on 03.09.2021 shall continue to operate until the same is upheld/ modified/vacated by the learned Arbitrator as per law ”

3. The learned arbitrator entered upon the reference on 23.09.2021. Proceedings were held before the learned arbitrator on 25.09.2021 wherein certain directions were issued to the parties to make their respective initial deposit towards fees alongwith secretarial and administrative expenses.

4. Over several dates of hearing, the learned arbitrator considered the application seeking interim measures. Although the respondent paid the initial deposit of Rs. 5 lakhs as directed by the arbitrator vide order dated 25.09.2021, the respondent failed to comply with the subsequent direction of

the learned sole arbitrator, made vide order dated 11.10.2021, regarding payment of an additional amount of Rs. 2.5 lakhs. The said direction was reiterated by the learned arbitrator vide orders dated 27.11.2021 and 13.12.2021.

5. Subsequently, an application came to be filed by the respondent before the learned arbitrator raising a grievance with regard to the fees sought to be charged by the arbitrator which came to be dismissed on 31.01.2022. Since the controversy with regard to the fees persisted, vide order dated 16.02.2022, learned arbitrator, *inter alia*, directed as under:-

“

3. *The Arbitrator was to fix its own fee. Ld. Counsel for the Respondent submits that the Respondent has suffered losses but would like to pursue its Counterclaims which are in the range of Rs. 3.5 Crores. He prays that the Tribunal may fix the Arbitral fee as per the 4th Schedule or reasonable fee per hearing. This is a matter involving several contentious issues. Besides, it entails evidence with regard to marketing expenses, sales, Excise Duty liabilities and numerous accounting entries and record.- The matter has been discussed with both the Counsel, who have obtained instructions from the Respondent. Given the nature of the controversy, evidence involved as well as the financial constraints pleaded, the Arbitral fee per hearing is fixed at Rs. 75,000/- each for the Claimant and the Respondent exclusive of the Administrative and Secretarial expenses for session of 2 to 2.5 hours each. The above is acceptable to the Claimant and Respondent, after seeking instructions from their respective clients have confirm the same.*

4. *Claimant has already paid a total sum of Rs. 7.5 Lakhs which would account for 10 hearings. Respondent has paid Rs. Five Lakhs, it would remit within 10 days the sum of Rs. 2.5 Lakhs towards its share of Arbitral fee up to 10 hearings. Parties would also deposit on/ or before the 10th hearing the advance Arbitral fee as may be directed.”*

6. The directions contained in the aforesaid order having remained uncomplied, it was directed by the learned arbitrator vide order dated

08.03.2022 that the counter claims of the respondent shall remain suspended. Thereafter, the matter proceeded and the learned arbitrator completed the process of recording of the cross-examination of the concerned witnesses of the parties and fixed dates for hearing final arguments.

7. It was at that stage, that the respondent filed a petition before this Court being O.M.P. (T) (COMM.) 120/2022 wherein the respondent sought that the arbitrator be directed to fix his fee as per the Schedule IV of the Act in the light of the judgment of the Supreme Court in *Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*, 2022 SCC OnLine SC 1122. The said petition was dismissed as withdrawn by this Court vide order dated 30.11.2022 which, *inter-alia*, reads as under:-

“After some hearing, Mr. Manish Kaushik, learned counsel for the petitioner, seeks permission to withdraw the present petition with liberty to approach the learned arbitrator afresh in view of the judgment of the Supreme Court dated 30.08.2022 in Arbitration Petition (Civil) No. 5/2022 [Oil and Natural Gas Corporation Ltd. vs. Afcons Gunanusa JV.

The petition, alongwith the pending application, is dismissed as withdrawn, with liberty as aforesaid.”

8. Thereafter, the petitioner filed an application requesting the learned arbitrator to fix his fee in accordance with the Schedule IV of the Act. The said application was dismissed by the learned arbitrator vide order dated 24.01.2023.

9. In this backdrop, the respondent filed O.M.P. (MISC.) (COMM.) 118/2023 in which it was *inter alia* prayed as under:-

“b. Appoint a new Arbitrator in the Arbitration proceedings titled as "Anay Kumar Gupta vs. Jagmeet Singh Bhatia" and pass directions for fixing arbitral fee as per Schedule IV of the Act;

c. Transfer the arbitral fees paid by the parties before the Arbitral

*Tribunal in the name of newly appointed Arbitrator;
d. Counter claim filed by the Petitioner may be allowed to be admitted.”*

10. The aforesaid petition was disposed of by this Court vide judgment/order dated 21.04.2023. In the said judgment/order, this Court has extensively dealt with the respondent's grievance regarding arbitral fee. Taking note of the judgment in **ONGC** (supra), it was held as under:-

*“16. The order dated 20.09.2021 passed in CS (COMM) 409/2021, while appointing the learned Arbitrator, had also left it to the learned Arbitrator to fix his own fee. Such fee was determined by the learned Arbitrator with the consent of the parties, as is recorded in the order dated 16.02.2022. Once the fee has been fixed with the consent of the parties, even in terms of the judgment of the Supreme Court in **Oil and Natural Gas Corporation** (supra), the parties are bound to pay the same. In **Oil and Natural Gas Corporation** (supra), the Supreme Court has observed*

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 finalized 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 rides governing arbitrators' fees or 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."

(Emphasis supplied)

17. In the present case, the fee has been fixed by the learned Arbitrator with the consent of the parties, at the initial stages of the arbitral proceedings itself. One of the parties cannot now insist on modification thereof and/or pray for change of the Arbitrator for the reason that he does not agree to such modification of the fee. The consequences of non-deposit of the requisite fee are prescribed in Section 38(2) of the Act, which is reproduced as under:

"38. Deposits,

xxx

(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:

PROVIDED that where one party fails to pay his share of the deposit, the other party may pay that share:

PROVIDED FURTHER that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral Tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counterclaim, as the case may be."

18. The learned Arbitrator has followed this course and no fault can be found in the same.

19. I also find that the learned Arbitrator has acted with expedition in the proceedings. Therefore, even otherwise, there is no reason to substitute the learned Arbitrator.

20. As the petitioner submits that he is not seeking an extension of date of the learned Arbitral Tribunal, it is made clear that this Court has dealt with only the contention of the petitioner for change of the learned Arbitrator for his counter-claim."

11. In the above background, the petitioner has filed the present petition u/s 29 A of the Act, praying, *inter alia*, as under:-

“a) Pass an order extending the mandate of the Hon 'ble Arbitral Tribunal in the Arbitral Proceedings titled “Mr. Anay Kumar Gupta versus Mr. Jagmeet Singh Bhatia ” by 6 months w.e.f. 06.05.2023;”

12. Learned counsel for the petitioner contends that the arbitral proceedings are at their fag end, and even final arguments have been concluded. It is, therefore, urged that an appropriate extension of time may be granted to enable the learned arbitrator to make the arbitral award.

13. Per contra, learned counsel for the respondent seeks to re-agitate the issue of the fees fixed by the learned sole arbitrator and reiterates that a new/substitute arbitrator be appointed.

14. Having heard the respective counsel for the parties, I find no merit in the contentions raised by the learned counsel for the respondent.

15. The grievance of the respondent with regard to the fee charged by the arbitrator stands foreclosed by the judgment/order dated 21.04.2023 passed by a Coordinate Bench of this Court in OMP (COMM) 118/2023 (supra).

16. Learned counsel for the respondent submits that the respondent is in the process of taking steps to challenge the said judgment/order before the Hon'ble Supreme Court of India. However, that by itself is no ground for this Court to disregard the said judgment or to take a different view in the matter. If and when the aforesaid judgement is challenged before the Supreme Court, the order of the Supreme Court will be necessarily binding on the parties and/or the Arbitral Tribunal.

17. The law is also well settled that the Court while considering an application under Section 29A of the Act, is only concerned with the issue

as to whether the Arbitrator has acted with expedition in the matter; issues relating to the conduct of the Arbitration and/or arbitral fees are not relevant for the purpose of Section 29A.

18. In this regard, reference may be made to the order of this Court in the case of ***Orissa Concrete & Allied Industries Ltd. Vs. Union of India & Anr.***, Order dated 05.03.2018 in OMP (MISC) (COMM) 10/2018, wherein it has been held as follows:-

“In my view, any issue with respect to the conduct of the Arbitration Proceedings, except the one relating to the expeditious disposal of the Arbitration Proceedings, cannot be raised by the respondent at this stage. These contentions can be raised by the respondent before the Arbitrator himself or in an application under Section 34 of the Act while challenging the award passed by the Arbitrator, if the respondent is aggrieved of the same. In exercise of power under Section 29A(5) of the Act, the Court is only to see if there is sufficient cause shown to extend the time for making of the award.”

19. Again, in ***NCC Ltd. Vs. Union of India***, 2018 SCC OnLine Del 12699, it has been held by this Court as under:-

“11. Section 29A of the Act is intended to sensitize the parties as also the Arbitral Tribunal to aim for culmination of the arbitration proceedings expeditiously. It is with this legislative intent, Section 29A was introduced in the Act by way of the Arbitration and Conciliation (Amendment) Act, 2015. This provision is not intended for a party to seek substitution of an Arbitrator only because the party has apprehension about the conduct of the arbitration proceedings by the said Arbitrator. The only ground for removal of the Arbitrator under Section 29A of the Act can be the failure of the Arbitrator to proceed expeditiously in the adjudication process.

12. In the present case, the Arbitrator in the first notice itself, issued on 01.09.2017 had stated that he would like to publish the Award within six months from the date of entering upon the reference. By subsequent notice dated 14.03.2018, he fixed the schedule for hearing and called upon the parties to produce all the documents in support of their respective case. In fact, it is the respondents who were seeking postponement of the hearing by filing applications before the Arbitrator.

13. Surely the respondent cannot now make a complaint against the Arbitrator for him having not concluded the arbitration proceedings within the stipulated period of one year as prescribed under Section 29A of the Act.

14. As far as the grievance of the respondents that the conduct of the arbitration proceedings are biased is concerned, the same cannot be the subject matter of the present proceedings. The respondents have also filed an application under Section 13 of the Act before the Arbitrator, which is pending adjudication. This Court, therefore, refrains from making any observation on the said application. Even otherwise, in term of Section 13(4) of the Act, in case the said application is decided against the respondents, the remedy provided to the respondents would be to challenge the same alongwith the ultimate Award passed by the Arbitrator.”

20. In **Wadia Techno–Engineering Services Limited. Vs. Director General of Married Accommodation Project & Anr.**, (2023) SCC OnLine Del 2990, following the aforesaid judgments in the case of **Orissa Concrete** (supra) and **NCC Limited** (supra), it was reiterated that the grievance of one of the parties with regard to the conduct of the arbitral proceedings, and a party’s substantive challenge with regard thereto, are beyond the scope of adjudication in proceedings under Section 29(A) of the Act. It was reiterated that it is always open to the party aggrieved (with the manner of conduct of arbitral proceedings) to take appropriate remedies as available to it, however, such grievances cannot be ventilated in proceedings before the Court under Section 29 (A) of the Act. The relevant observations in the said case are as under:-

“28. The grievance of the respondent is with regard to the conduct of the arbitral proceedings. They have articulated their grievances in the petitions filed under Article 227 of the Constitution, which remain pending. These considerations are entirely beyond the scope of adjudication in the present proceedings, as held in **Orissa Concrete and NCC Ltd.** The respondent’s contention that those petitions would be rendered infructuous by an extension of the learned arbitrator’s mandate in these petitions also does not commend to me. The manner in which the

proceedings are being conducted, and the respondent's substantive challenge in that regard are not questions which can be agitated in these petitions. It is always open to the respondent to take a remedies as available to it in this regard.

29. The respondent's request for substitution of learned Arbitrator is also untenable. Such an order can be passed under Section 29A (6) of the Act only if the learned arbitrator has not acted expeditiously. This has been clearly held in NCC Ltd., to which the respondent agency itself is party "

21. I also find from the record that the arbitrator has acted with sufficient expedition and despatch in the matter. As noticed hereinabove, the hearing before the learned arbitrator already stands concluded and only the arbitral award remains to be pronounced. In the circumstances, it would be appropriate to grant a suitable extension of time for completion of arbitral proceedings and making of the arbitral award.

22. Accordingly, the present petition is allowed; the time period for completion of arbitral proceedings and making of the arbitral award is extended by a period of six months from today i.e. till 10.01.2024.

23. The present petition stands disposed of.

JULY 10, 2023/rohit

SACHIN DATTA, J

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