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IN THE HIGH COURT OF DELHI AT NEW DELHI

VIPIN SANGHI; AMIT BANSAL, JJ.

FAO (OS)(COMM) 70/2017; 8th March, 2022

JIVANLAL JOITARAM PATEL *Versus* **NATIONAL HIGHWAYS AUTHORITY OF INDIA**

Appellant Through: Mr. Ritin Rai, Senior Advocate with Ms. Aditi Rao, Advocate.

Respondent Through: Mr. Arun Kumar Verma, Senior Advocate with Mr.Sumit Gupta and Ms.Anchal Seth, Advocates.

J U D G E M E N T

CM No.14819/2021

1. This appeal was disposed of by a judgment dated 23rd January, 2018 passed by the Division Bench – with the consent of the parties. It was agreed that claims No.1 and 2 of the respondent, and counter claims No.2, 5, 7-10 and 15 of the appellant be adjudicated afresh, and that a sole Arbitrator may be appointed instead of a three-member Arbitral Tribunal, in order to save time and costs. The relevant extracts from the aforesaid judgment are set out below:

"10. Parties agree that they would rely upon pleadings urged earlier and some additional plea which may be necessary on account of change in circumstances and legal objections may be required to be taken. Accordingly, the present appeal is dismissed.

11. Justice Manmohan Sarin, Former Chief Justice of the J&K High Court, Mobile No. 9818000210 is appointed as the Sole Arbitrator, who would decide the claims and counter claims arising out of the Agreement dated 17.11.2004 between the parties. ***He shall fix his fee us per the 4th Schedule of the Act of 1996****. The legal objections of both parties are kept open.*

12. Accordingly the present appeal is disposed of."

(Emphasis Supplied)

2. Pursuant to the above judgment, the Arbitral Tribunal entered reference on 28th February, 2018. In the Procedural Order dated 29th April, 2019, it was noted the total amount of claim was Rs.33,53,27,205/- (inclusive of interest @ 18% per annum from 01st October, 2006 to 28th February, 2018), and the total amount of counter claim, including interest, was Rs.11,43,40,050/-.

3. Vide Procedural Order dated 21st August, 2020, the Arbitral Tribunal fixed the arbitral fees as Rs.40,44,795/- in terms of ratio of the judgment of this Court in ***Rail Vikas Nigam Vs. Simplex Infrastructure Ltd.***, MANU/DE/1367/2020, and both the parties consented to the fixation of the aforesaid arbitral fees. At the hearing before the Arbitral Tribunal on 26th November, 2020, the counsels were requested to address the Arbitral Tribunal on the issue whether counter claim(s) is/are to be included in the expression "*sum in dispute*" appearing in the 4th Schedule of the Arbitration and Conciliation Act, 1996 (hereinafter *„Act"*), or the amount thereof is to be separately

considered in terms of proviso to Section 38(1) of the Act.

4. After hearing both parties, the Arbitral Tribunal passed the order dated 27th January, 2021 holding that the applicable arbitral fee, in the present case has to be assessed separately for the claim, and counter claim. While arriving at this conclusion, the Arbitral Tribunal noted the following:

(i) Initially it was agreed between the parties that they do not need to file fresh pleadings or lead evidence, but as the arbitration progressed need for further evidence arose and parties filed fresh documents and directions for production of records were given by the Arbitral Tribunal.

(ii) Proviso to Section 38(1) of the Act carves out a specific exception providing for Arbitral Tribunal to fix a separate fee for claims and counter claims.

(iii) Counter claim would mostly be founded upon an independent cause of action, and can continue even if the main suit fails, or is withdrawn.

(iv) Separate court fee is required to be paid on the amount of counter claim.

(v) Adjudication of claims and counter claims mostly require additional or separate evidence and arguments.

(vi) Claims in a particular case may cross the ceiling provided under the 4th Schedule to the Act and if counter claims are filed thereafter, and they are taken together with a claim, the Arbitral Tribunal would have to decide the counter claims as well as the claims without any additional fee and this could not be the intention of the Statute.

(vii) Dictum of combining claims and counter claims for the purposes of determining fee under the 4th Schedule could result in inequitable situations contrary to the express language of Section 38(1) of the Act.

(viii) The aforesaid contentions were neither raised, nor considered by this Court in ***Delhi State Industrial Infrastructure Development Corporation Ltd. Vs. Bawana Infra Development Pvt. Ltd.***, 2018 SCC OnLine Del 9241.

(ix) A conjoint reading of Sections 38(1) and 31A of the Act leaves no doubt that arbitral fees and expenses can be fixed by the Arbitral Tribunal separately for claims and counter claims.

(x) Even in terms of Rule 3 of Delhi International Arbitration Centre (hereinafter *„DIAC Rules"*) and Rule 30 of Indian Council of Arbitration's Rules of Domestic and Commercial Arbitration and Conciliation (hereinafter *„ICA"s Rules"*), claims and counter claims are assessed separately for calculation of arbitral fee.

5. After making the above said observations and fixing the arbitral fee separately for claims and counter claims, the Arbitral Tribunal gave liberty to the parties to approach this Court for seeking clarification in the matter of fixation of arbitral fees.

6. Accordingly, the present application has been filed on behalf of the applicant/appellant seeking clarification with regard to the fixation of arbitral fee.

7. Reply to the application was filed on behalf of the respondent, opposing the fixation

of arbitral fee by the Arbitral Tribunal by taking the claims and counter claims separately.

8. We have heard the senior counsels on behalf of the parties. It is the common submission on behalf of both the sides that the judgment of the Single Judge of this Court in ***DSIIDC*** (supra) lays down the correct law with regard to fixation of arbitral fees under the 4th Schedule to the Act, when the Arbitral Tribunal is adjudicating a claim as well as counter claim. It is further submitted by the senior counsels that Sections 38(1) and 31A of the Act would come into play, only when the Arbitral Tribunal is itself fixing the fees, and not when the fees of the Arbitral Tribunal has been fixed by the Court in terms of 4th Schedule to the Act.

9. It is contended by the senior counsels that the reliance placed by the Arbitral Tribunal on the proviso to Rule 3 of DIAC Rules is misplaced, as the said proviso fixes the fee only when a party fails to pay its share of the fees.

10. We have considered that aspects taken note of by the Ld. Sole Arbitrator in his order dated 27.01.2021, and the submissions of Ld. Senior Counsels, and also examined the decision above referred to. At the outset, we may refer to the judgment in ***DSIIDC*** (supra). In the said case also, the Arbitral Tribunal was appointed by this Court and while appointing the Arbitral Tribunal, this Court had directed that the fee of the Arbitral Tribunal shall be fixed in accordance with 4th Schedule to the Act. The Arbitral Tribunal so appointed was of the view that "*sum in dispute*" mentioned in the 4th Schedule would be the amount of claim and counter claim taken separately, and not cumulatively. It was in that context that the petition was filed before this Court under Section 39(2) of the Act, seeking interpretation of the fee schedule provided in 4th Schedule to the Act, which came up for consideration before this Court. The Ld. Single Judge in ***DSIIDC*** (supra) came to the conclusion that "*sum in dispute*" would include both – the claim and counter claim amounts taken cumulatively. In arriving at this conclusion, the Single Judge relied upon:

(i) 246th Law Commission Report giving the rationale behind fixing of a model schedule of fees, so that arbitration becomes a cost effective solution for dispute resolution in the domestic context.

(ii) Rules of various Indian as well as international arbitral institutions with regard to fixation of arbitral fees.

(iii) the fee schedule set by DIAC where "*sum in dispute*" is the cumulative value of claim and counter claim.

11. The relevant observations of the Single Judge in ***DSIIDC*** (supra) are set out below:

"14. Even in the general parlance, ***"Sum in dispute" shall include both claim and counter claim amounts. If the legislature intended to have the Arbitral Tribunal exceed the ceiling limit by charging separate fee for claim and counter claim amounts, it would have provided so in the Fourth Schedule.***

15. ***Proviso to Section 38(1) of the Act can only apply when the Arbitral Tribunal is not to fix its fee in terms of the Fourth Schedule to the Act. It would not have any bearing on the interpretation to be put to the Fourth Schedule****. It is noted that as regards fee even under the Amended Act, the Arbitral Tribunal is free to fix its schedule of fee in an ad-hoc arbitration which is conducted without the intervention of the Court. Even where the Arbitral Tribunal is appointed by the Court under Section 11 of the Act, in absence of rules framed under Section 11 (14) of the Act, it is not in every case that the Arbitral Tribunal has to fix its fee in accordance with the Fourth Schedule to the Act.* ***Therefore, the proviso to Section 38(1) of the Act would have no bearing on the interpretation being put to the Fourth Schedule and the phrase "Sum in dispute" therein.***

16. *An argument was made that the adjudication of counter claim would require extra effort from the Arbitrator and therefore, the Arbitrator should be entitled to charge a separate fee for the same. I cannot agree with this argument****. The object of providing for counter claim is to avoid multiplicity of proceedings and to avoid divergent findings. Keeping the object of the amendment in view, the ceiling on fee as prescribed in the Fourth Schedule of the Act cannot be allowed to be breached****."***

(emphasis supplied)

12. We are in complete agreement with the aforesaid observations of the Single Judge in ***DSIIDC*** (supra). The term "*sum in dispute*", would take in its ambit claims as well as counter claims. The said expression "*sum in dispute*" used in the 4th Schedule to the Act has to be given its ordinary meaning, to include the total amount of claim made by the claimant, and the total amount of counter claim made by the respondent. We concur with the finding of the Single Judge that the proviso to Section 38(1) of the Act can only apply when the Arbitral Tribunal fixes its own fees, as in the case of most *ad hoc* arbitrations. The said proviso cannot apply when the fees of the Arbitral Tribunal has been fixed in terms of 4th Schedule to the Act. Therefore, Section 38(1) of the Act and its proviso cannot be resorted to while interpreting the term "*sum in dispute*", as occurring in the 4th Schedule to the Act.

13. Rule 3 of the DIAC Rules, relied upon by the Arbitral Tribunal in its order dated 27th January, 2021, is set out below:

"3. Arbitrators' Fees

(i)The fees payable to the Arbitrators shall be determined in accordance with the scales specified in Schedules „B, C, D & E" to these rules.

(ii)The fee shall be determined and assessed on the aggregate amount of the claim(s) and counter claims(s).

PROVIDED that in the event of failure of party to arbitration to pay its share as determined by the centre, on the aggregation of claim(s) and counter claim(s), the Centre may assess the claim(s) and counter claim(s) separately and demand the same from the parties concerned."

Schedule B provides for Arbitrator's fee in Domestic Arbitrations and Schedule C provides for Arbitrator's fee in Summary Arbitrations. It is provided therein, that "***Sums in dispute mentioned in the Schedule B and C above shall include any counter-claim made by a party***".

14. There is no ambiguity in the aforesaid Rule. The arbitral fee has to be determined on the basis of **aggregate amount of claim and counter claim**. The proviso to Rule 3 of the DIAC Rules kicks in only when the party fails to pay its share of the aggregate amount of claim and counter claim. Thus, in such cases, DIAC has the discretion to assess the claim and counter claim separately and demand the same from the parties. The proviso does not deal with the aspect of computation of the arbitral fee. To read rule 3(ii) as "The fee shall be determined and assessed on the amount of the claim(s) and counter claim(s) and aggregated", would do violence to the plain and ordinary grammatical meaning of the said Rule. The parties agreed to appointment of the Sole Arbitrator and to his fee being fixed in accordance with the Fourth Schedule of the Act on the clear understanding of inter alia, Rule 3(ii) to mean that the fee of the Sole Arbitrator shall be fixed on the aggregate of the claim(s) and counter claim(s). To now call upon them to pay separate fee for the claim(s) and counter claim(s) would not be fair to them, and is bound to cause them embarrassment. If the interpretation proposed by the Ld. Sole Arbitrator was known to them, they – or one of them, may not have agreed to the appointment of the Sole Arbitrator. Similarly, the Tribunal was conscious, when it accepted and embarked upon the reference of the intent of fee that would be payable, and the limitations on it. Having chosen to accept the assignment, the fee cannot be enhanced by a process of interpretation of the Rules, not in consonance with the interpretation already adopted.

15. As regards the observations made in the order dated 27th January, 2021 of the Arbitral Tribunal with regard to counter claim being an independent action requiring separate adjudication, this aspect has also been considered by the Single Judge in ***DSIIDC*** (supra) in paragraph 16 set out above. We fully concur with the findings of the Single Judge in this regard. Here, it may also be relevant to note that unlike a civil suit, where a counter claim could be in respect of a totally different transaction, in the context of arbitral proceedings, the counter claim has to necessarily be in relation to the arbitration agreement. Therefore, in the context of arbitration proceedings it may not be correct to say that counter claim would be an "independent" cause of action. It seems from the same subject matter/transation.

16. The judgment of the Single Judge of this Court in ***M/s Chandok Machineries Vs. M/s. S.N. Sunderson & Co.***, 2018 SCC OnLine Del 11000 relied upon by the Arbitral Tribunal, was in a different context. In that case, this Court, while appointing the Arbitral Tribunal had directed that the fee shall be fixed by the Arbitral Tribunal itself. In this regard, reference may be made to paragraph 36 of the judgment:

"36. ***It may further be noted that this Court, while appointing the Presiding Arbitrator, vide its order dated 27 November, 2015 in Arbitration Petition No. 365/2015, had directed that the fee shall be fixed by the learned Arbitrator***

himself. Therefore, it was for the Arbitral Tribunal to fix its own fee and merely because it gives a reference to the Fourth Schedule of the Act while fixing its fee, it cannot be said that it had bound itself to the said Fourth Schedule."

Therefore, in that case, the Arbitral Tribunal was not bound to fix the fee in terms of the 4th Schedule to the Act. It was in that context that this Court, while relying upon Section 38 of the Act, observed in paragraph 39 that Arbitral Tribunal may fix separate amount of deposit for the claims and counter claims and upheld the decision of the Arbitral Tribunal fixing separate fee in respect of claim and counter claim. Therefore, in our view, there is no conflict between the judgments in ***DSIIDC*** (supra) and ***M/s Chandok Machineries*** (supra).

17. Our attention was also drawn to the judgment of another Single Judge of this Court in ***NTPC Limited Vs. Afcons RN Shetty & Co Private Limited,*** MANU / DE / 1574 / 2021. In the said case also, the Arbitral Tribunal had fixed its own fee separately for claim as well as counter claim. This was not a case where the fees of the Arbitral Tribunal was fixed by the Court. It was in this context that the Single Judge examined whether the Arbitral Tribunal was correct in holding that separate fees could be charged on the amount of claim and counter claim. The relevant observations of the Single Judge in ***NTPC*** (supra) are set out below:

"43. In my view, the scheme of 1996 Act is such that the provisions of Section 38(1), 31(8) and 31A are inextricably interlinked. These provisions cannot be read in isolation. The proviso to Section 38(1) clearly states that, where there are claims and counter-claims before the arbitral tribunal, the Arbitral Tribunal may fix separate amount of deposits for the claim and counter-claim. Section 38(1) clarifies that the "amount of deposit" is to be directed "as an advance for the costs referred to in sub-section (8) of Section 31". Sub-section (8) of Section 31 requires the Arbitral Tribunal to fix the costs of arbitration in accordance with Section 31A. The explanation to Section 31A(1) clearly states that, for the purposes of Section 31A(1) the expression "costs" means reasonable costs relating to, inter alia, "the fees and expenses of the arbitrators".

44. Mr. Upadhyay also sought to contend that the word "fees" has to be segregated from the concept of "costs" in the 1996 Act. Empirically stated, this may be correct; however, for the purposes of application of Section 31A(1), it is not possible to dichotomise "fees" and "costs". This submission, in my view, would be in the teeth of Section 31(8) read with Section 31A and cannot, therefore, be accepted.

45. Section 31(8) requires the arbitral tribunal to fix the costs of the arbitration, and the explanation to Section 31A(1) clearly holds that the words "costs" means reasonable costs relating to, inter alia, "the fees and expenses of the arbitrators". Apart from this, the expression "costs", statutorily, also means reasonable costs relating to (i) the fees and expenses of the Courts and witnesses, (ii) legal fees and expenses, (iii) any administration fees of the institution supervising the arbitration (which does not apply in the present case) and (iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award."

18. While arriving at the aforesaid finding, the Single Judge in ***NTPC*** (supra) concurred with the view expressed in ***M/s Chandok Machineries*** (supra), without going into the issue if there is an inconsistency between ***DSIIDC*** (supra) and ***M/s Chandok Machineries*** (supra).

19. Judgments in ***M/s Chandok Machineries*** (supra) and ***NTPC*** (supra) were in the context of interpreting Sections 38(1) and 31A of the Act where the Arbitral Tribunal was free to fix its own fees and the fee was not fixed by the Court in terms of 4th Schedule to the Act. In ***DSIIDC*** (supra), the fees of the Arbitral Tribunal was specifically fixed by this Court in terms of 4th Schedule to the Act. Therefore, there is no inconsistency between the judgments of this Court in ***DSIIDC*** (supra) on one hand and ***M/s Chandok Machineries*** (supra) and ***NTPC*** (supra) on the other hand. The judgments in ***M/s Chandok Machineries*** (supra) and ***NTPC*** (supra) cannot be resorted to for interpretation of the words "*sum in dispute*" as occurring in 4th Schedule to the Act. Therefore, in our view the said judgments are not applicable to the facts and circumstances of the present case.

20. Our attention was also drawn to the judgement of the Supreme Court in ***National Highways Authority of India Vs. Gayatri Jhansi Roadways Limited*** 2019 SCC OnLine SC 906. The issue before the Supreme Court in the aforesaid case was whether the fee of the Arbitral Tribunal was to be fixed in terms of the agreement between the parties, or the 4th Schedule to the Act. In the facts of that case, the Supreme Court held that the fees was to be fixed in terms of the agreement between the parties and not the 4th Schedule to the Act. It was in that context that the Supreme Court made the following observations:-

"14. However, the learned Single Judge's conclusion that the change in language of Section 31(8) read with Section 31-A which deals only with the costs generally and not with arbitrator's fees is correct in law. It is true that the arbitrator's fees may be a component of costs to be paid but it is a far cry thereafter to state that Sections 31(8) and 31-A would directly govern contracts in which a fee structure has already been laid down. To this extent, the learned Single Judge is correct. We may also state that the declaration of law by the learned Single Judge in Gayatri Jhansi Roadways Ltd. is not a correct view of the law."

21. Thus, Sections 31(8) and Section 31A would have no application where the fees of the arbitral tribunal has been fixed by agreement between the parties, as in the case before the Supreme Court. Similarly, where the fees has been fixed by the Court in terms of 4th Schedule to the Act, as in the case at hand, Sections 38(1), 31(8) and Section 31A would have no application. The term "*sum in dispute*" provided in the 4th Schedule to the Act has to be interpreted so as to include the aggregate value of the claims as well as counter claims.

22. The application stands disposed of in the above terms.