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

% ***Date of Decision: 07.10.2024***

\+ **O.M.P.(MISC.)(COMM.) 788/2024**

ICRI CORPORATES PRIVATE LIMITED .....Petitioner
Through: Mr. Sunil Choudhary, Adv.
versus

SHOOGLO NETWORK PRIVATE LIMITED (PREVIOUSLY OMG NETWORK PRIVATE LIMITED) .....Respondent
Through: Mr. Mayank Arora and Mr. Abhnav Agrawal, Advs.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (*ORAL*)

1. The present petition has been filed under Section 39(2) of the Arbitration and Conciliation Act, 1996 (hereafter the *A&C Act*) assailing an order dated 12.08.2024, passed by the learned Arbitrator, disposing of an application filed by the claimant/respondent under Section 31A read with Section 38 of the A&C Act.

2. The respondent/claimant instituted the present arbitral proceedings seeking a claim amounting to Rs.44,69,864/-,along with interest @ 24% p.a.

3. The claimant filed its statement of claims dated 10.07.2019, and the respondent filed its statement of defence dated 29.08.2019. Along with its statement of defence, the respondent also filed a counter-claim seeking recovery of Rs.2 crores along with *pendent lite* and future interest.

4. By order dated 29.08.2019, the arbitral tribunal determined the arbitral fees to be Rs.6,02,747/-. It is notable that the minutes of the second

hearing before the learned arbitrator held on 10.07.2019 records as follows:

> "*The Fee of the Arbitrator shall be as per the Fourth Schedule of the Arbitration and Conciliation Act 1996, and the same shall be shared by both the parties equally. The administrative expenses towards arbitration shall be shared in equal proportion by both parties, subject to further directions in the matter.*"
>
> [Emphasis supplied]

5. *Vide* minutes of the proceedings held on 29.08.2019, it was recorded as follows:

> "*As per the statement of claims, the claimant has raised a claim of Rs.44,69,864/- and in the counterclaims, the Respondent has raised a claim of Rs.2,00,00,000/- thus aggregating to Rs.2,44,69,864/- (Rupees Two Crore Forty-Four Lacs Sixty Nine Thousand Eight hundred and Sixty Four only).*
> *As agreed, the Fee of the Arbitrator shall be as per the Fourth Schedule of the Arbitration and Conciliation Act 1996 and the same shall be shared by both the parties equally. As per the Fourth Schedule, the Fee of the Arbitrator comes to Rs.6,02,747/- which has been calculated while considering the aggregate of the claims and the counter claims. Let the above Fee of the Arbitrator be paid by the parties before the next date of hearing to be shared equally. Share of each of the parties comes to Rs.3,01,373/-. The account details of the Arbitrator are as under:*
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> *PAN No.AHLPB3274D*
> *A/c No.15530100009320 in the name of Paritosh Budhiraja*
> *UCO Bank, Delhi High Court Branch,*
> *RTGS/NEFT IFS Code: UCBA 0001553*"
>
> [Emphasis supplied]

6. The aforesaid proceedings reveal that the fees was intended to be fixed by adopting the IVth Schedule of the A&C Act, 1996, and it was on that basis that the fee payable to the arbitrator was calculated. The parties were consequently directed to pay 50% each of the said fees i.e. Rs.3,01,373/- each.

7. The application under Section 31A read with Section 38 of the A&C Act came to be filed by the respondent claimant before the learned Sole Arbitrator on the basis that in terms of the judgment of Supreme Court in ***Oil***

and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV 2024 4 SCC 481, in terms of the IVth Schedule of A&C Act, 1996, the calculation of arbitral fees ought to have been made separately for claims and counter-claims. In this regard, reliance is placed on para-187 (iii) and 142 (iii) of the judgment of Supreme Court (supra) which reads as under:

> ***"142.*** *Consequently, on the basis of the above analysis, the following principles emerge:*
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> *…*
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> *(iii) The Arbitration Act considers claims and counterclaims to be independent proceedings since the latter is not contingent upon the former. Rather, it protects the right of any respondent to raise a counterclaim in an arbitration proceeding, provided it arises from the arbitration agreement under dispute. Further, in the event of a default in the payment of a deposit either for the claim or counterclaim, it specifically notes that the proceedings will be terminated only in respect of the claim, or as the case may be, the counterclaim in respect of which the default has occurred;*
>
> *...*
>
> ***187.3.*** *The term "sum in dispute" in the Fourth Schedule to the Arbitration Act refers to the sum in dispute in a claim and counterclaim separately, and not cumulatively. Consequently, arbitrators shall be entitled to charge a separate fee for the claim and the counterclaim in an ad hoc arbitration proceeding, and the fee ceiling contained in the Fourth Schedule will separately apply to both, when the fee structure of the Fourth Schedule has been made applicable to the ad hoc arbitration"*

8. Reliance was also placed on the judgment of this Court on ***NTPC Limited v. Afcons R.N. Shetty & Co. Pvt. Ltd. JV*** 2021 SCC OnLine Del 5588.

9. The aforesaid application was opposed by the petitioner herein. Essentially, it was urged by the petitioner that fees having been already fixed based on the mutual agreement between the parties, it was not open to the arbitral tribunal to revise the same on an application of the respondent.

10. The impugned order, relying upon the judgment of Supreme Court in

Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV(supra) and, taking note of the fact that the same is binding and has retrospective effect, worked out the fees payable as per the IVth Schedule by calculating the amount payable by the respective parties separately on the claims and counter-claims.

> "*10.To my mind, the Hon'ble Supreme Court in the ONGC Judgment Supra has interpreted the impact of the term "Sum in dispute" used in the Fourth Schedule of the Arbitration and Conciliation Act and such interpretation has the effect of Declaration of law and therefore it has the retrospective effect. Since the said ONGC judgment has been rendered by the Hon'ble Supreme Court only in August 2022 whereby it has been held that the Arbitral Fee is to be assessed separately for the purposes of claims and the counter claims, therefore there was no occasion for the Claimant to have taken the said stance earlier."*

11. It was further directed that the claimant shall pay the arbitral fees on its claims and respondent shall pay the arbitral fee on its counter-claims. It was accordingly directed as under:

> "*17. As detailed above, the Arbitral Fee payable on the Claim amount comes to Rs.2,14,495/- (Rupees Two Lac Fourteen Thousand Four Hundred and Ninety Five only) and Arbitral Fee payable on Counterclaim comes to Rs.5,46,875/-(Rupees Five Lac Forty Six Thousand Eight Hundred and Seventy Five only) respectively.*
>
> *18. The Arbitral Fee payable on the Counterclaim amount comes to Rs.5,46,875/- (Rupees Five Lac Forty Six Thousand Eight Hundred and Seventy Five only) out of which the Counter Claimant has already paid Rs.3,01,373/-(Rupees Three Lac One Thousand Three Hundred and Seventy Three Only). Therefore, the Counter Claimant is liable to pay a further sum of Rs.2,45,502/- (Rupees Two Lac Forty Five Thousand Five Hundred and Two Only) towards balance Arbitral Fee.*
>
> *19. The claimant has paid the Arbitral Fee to the tune of Rs.3,01,373/- (Rupees Three Lac One Thousand Three Hundred and Seventy Three Only). In view of what has been held above, the claimant is liable to pay a sum of Rs.2,14,495/- (Rupees Two Lac Fourteen Thousand Four Hundred and Ninety Five Only). Therefore, the Claimant entitled to a refund of Rs.86,878/- (Rupees Eighty Six Thousand Eight Hundred and Seventy Eight Only) from*

the Counter Claimant."

12. There is no controversy that the fee calculated by the impugned order is in terms of the IV[th] Schedule as applied by this Court in a number of cases, holding that the fees is to be assessed separately on claims and counter-claims. This is consistent with the judgment in ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*** (supra). A Coordinate bench of this court in ***Ahluwalia Contracts India Limited v. Union of India through Executive Engineer, CPWD & Anr.***2024 SCC OnLine Del 5080, has expressly held as under :-

> *"7. In ONGC Ltd. (supra), the Hon'ble Supreme Court has observed as under:—*
>
> *"G. Conclusion*
>
> *G.1. Findings*
>
> *187. We answer the issues raised in this batch of cases in the following terms:*
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> *187.1. Arbitrators do not have the power to unilaterally issue binding and enforceable orders determining their own fees. A unilateral determination of fees violates the principles of party autonomy and the doctrine of the prohibition of in rem suam decisions i.e. the arbitrators cannot be a judge of their own private claim against the parties regarding their remuneration. However, the Arbitral Tribunal has the discretion to apportion the costs (including arbitrators' fee and expenses) between the parties in terms of Section 31(8) and Section 31-A of the Arbitration Act and also demand a deposit (advance on costs) in accordance with Section 38 of the Arbitration Act. If while fixing costs or deposits, the Arbitral Tribunal makes any finding relating to arbitrators' fees (in the absence of an agreement between the parties and arbitrators), it cannot be enforced in favour of the arbitrators. The Arbitral Tribunal can only exercise a lien over the delivery of arbitral award if the payment to it remains outstanding under Section 39(1). The party can approach the Court to review the fees demanded by the arbitrators if it believes the fees are unreasonable under Section 39(2);*
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> *187.2. 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 (see paras 125 to 129);

187.3. The term "sum in dispute" in the Fourth Schedule to the Arbitration Act refers to the sum in dispute in a claim and counterclaim separately, and not cumulatively. Consequently, arbitrators shall be entitled to charge a separate fee for the claim and the counterclaim in an ad hoc arbitration proceeding, and the fee ceiling contained in the Fourth Schedule will separately apply to both, when the fee structure of the Fourth Schedule has been made applicable to the ad hoc arbitration;

187.4. The ceiling of Rs. 30,00,000 in the entry at Sl. No. 6 of the Fourth Schedule is applicable to the sum of the base amount (of Rs. 19,87,500) and the variable amount over and above it. Consequently, the highest fee payable shall be Rs. 30,00,000; and

187.5. This ceiling is applicable to each individual arbitrator, and not the Arbitral Tribunal as a whole, where it consists of three or more arbitrators. of course, a sole arbitrator shall be paid 25% over and above this amount in accordance with the Note to the Fourth Schedule."

(emphasis added)

8. ***On perusal of the above paras, it is evident that Arbitrator has to calculate his fees separately for claims and counter claims in ad hoc arbitration and the ceiling limit in the fourth schedule shall also be separately applicable****."*

(emphasis supplied)

13. In the above backdrop, the learned counsel for the petitioner has made the following submissions:

(i) The fees payable to the arbitrator was agreed upon and duly recorded in the proceedings dated 29.08.2019, issued by the arbitrator and there was no occasion to revise/re-visit the same.

(ii) Reliance is placed on the judgment rendered by a Coordinate Bench of this Court in ***Jivanlal Joitram Patel v. National Highways Authority of India*** 2022:DHC:846-DB, wherein it has been held that the arbitral fees has to be determined on the basis of aggregate amount of claim and counter-claim. Reliance is also placed on the said judgment to assert that where fees of the arbitral tribunal has been fixed

by agreement between the parties, there is no basis or rationale for the arbitral tribunal to re-determine the same at the request of one of the parties to the arbitration.

(iii) Reliance is also placed on the judgment of the Supreme Court in ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*** (supra) to contend that once the terms of the reference has been finalized, it would not be open for the arbitral tribunal to vary the arbitral fees and that subsequent revision/increase of fee can be resorted to only with the agreement of the parties; in the event of disagreement, the tribunal has to continue with the previous arrangement or decline to act as arbitrator. Strong reliance is placed on para-33 and 34 of the said judgment.

14. On the other hand, learned counsel for the respondent strongly refutes both the maintainability and the merits of the present petition. It is contended that the present petition is not maintainable inasmuch as it is impermissible for the petitioner to take recourse to Section 39 (2) of A&C Act, 1996 in the absence of any award having been made by the tribunal. It is also contended that the impugned order cannot be faulted for determining the fees as to the IVth Schedule of the A&C Act inasmuch as even when the fees was fixed initially by the learned arbitrator, as recorded in the proceedings dated 29.08.2019, it was clearly recorded that the basis for the same was the IVth Schedule of the A&C Act. It is submitted that the impugned order merely applies the IVth Schedule in the light of the judgment of the Supreme Court in ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*** (supra) to work out the amount payable by the parties.

15. I have heard learned counsel for the parties at some length. I find the present appeal to be wholly devoid of merit.

16. The present appeal has been filed by the petitioner taking recourse to Section 39(2) of the A&C Act, 1996. A bare perusal of Section 39 reveals that the same is applicable only in the event of a lien being exercised on an arbitral award and/or in a situation where an arbitral tribunal refuses to deliver its award except on payment of costs (including fees) demanded by it). It is notable that the proviso to Section 38 (2) of the A&C Act, 1996 deals with the situation where one of the parties fails to pay its share of fees in respect of the claim/counter-claim at the pre-award stage. The same reads as under:

> *"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 counter-claim, as the case may be."*

17. In the present case, it appears that the arbitral tribunal is yet to take a call as to whether any direction in terms of the aforesaid provisions is to be issued or not.

18. Clearly also, the arbitral proceedings have not yet progressed to the stage of making of the arbitral award and exercise of lien thereon and/or refused to deliver the same except on payment of costs (fees).

19. In these circumstances, it is *ex-facie* untenable for the petitioner to take recourse to Section 39(2) of A&C Act, 1996 and approach this Court at the present stage.

20. Reliance placed by the learned counsel for the petitioner on ***McNally***

Bharat Engineering Company Limited v. Steel Authority of India Limited & Anr. 2022:DHC:1683 is misconceived for the reason that:

(i) In the said case, the Court was construing the relevant provisions of the Indian Council of Arbitration (ICA Rules) and the peculiar provisions thereof.

(ii) The court was not concerned as to how the fees is to be calculated in terms of IVth Schedule and as mandated in terms of judgment of ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*** (supra) inasmuch as the fee payable was governed by the extant ICA Rules.

(iii) In view of the applicability of the ICA Rules, this Court had no occasion to consider the applicability and binding nature of the dicta laid down in ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*** (supra).

(iv) The Court was concerned with the peculiar nature of the relevant ICA Rules which impelled the Court to conclude that for all intents and purposes, the order of arbitral tribunal in that case finally determined the question of deposit fees which justified the invocation of Section 39 (2) of the A&C Act, 1996.

21. As noticed, in the present case, both the factual circumstances and the relevant stage of arbitration do not mandate or permit invocation of Section 39 (2) of A&C Act, 1996. This Court in ***M/s Janapriya Engineers Syndicate v. Union of India*** 270 2020 DLT 419 has subscribed to a similar view and has held as under –

> *"53. I am not in agreement with the submissions made by Mr. Nandrajog, for the simple reason, the stand of the learned arbitrator that drafting of the*

Award shall commence on payment of the fee, does not suggest, that the Award has been made and is ready to be delivered. Perusal of Section 39 (2) of the Act clearly contemplates that the application is maintainable when the Award is made, but not delivered to the parties as a party has not paid the fee demanded by the learned arbitrator. The said situation has not arisen in the case in hand and the same is clear from perusal of the proceedings dated February 7, 2019; February 8, 2019 in both the petitions respectively, as there is no indication that the proceedings have been reserved for Award. Even it is not the case of the petitioner or the learned Arbitrator that the Awards have been prepared/pronounced in both the cases and are ready for delivery. There is a purpose for delivery of the Award as the delivery of Award shall entitle a party to either challenge the Award or seek execution of the same. It is in such a situation a party can invoke the provision of Section 39(2) of the Act. As the aforesaid facts clearly demonstrate that since the position as contemplated in Section 39 has not arisen, the present petitions are not maintainable. In this regard, I may refer to the judgment as relied by the counsels for respondent No.1/UOI, of the Calcutta High Court in Assam State Weaving & Manufacturing Co. Ltd. v. Vinny Engineering Enterprises (P) Ltd. and Anr., 2010 (4) R.A.J. 609 (Cal) wherein the following observations have been made in paragraphs 20 and 21. The said observations are in terms of Section 39, more particularly 39(2) of the Act.

> *"20. Section 39 of the 1996 Act, much like Section 38 of the old Act, recognises an arbitral tribunal's lien over the award. The section conceives of a situation where there may be a dispute between the arbitral tribunal and one or more parties to the reference as to the costs of the arbitration. Upon an arbitral tribunal refusing to deliver its award unless its demand for payment of costs were met by a party, an application may be carried to court for directing the tribunal to deliver the award to the applicant. Sub-section (2) contemplates an applicant thereunder to put into court the costs demanded by the arbitral tribunal. Upon such costs being deposited the court may order the tribunal to deliver the award to the applicant. The court can thereafter inquire into the propriety of the costs demanded and deal with the matter following the inquiry.*
>
> *21. Sub-section (3) of Section 39 permits an application under sub-section (2) to be carried by any party to the reference only on condition that the fees demanded were not as fixed by written agreement between the applicant and the arbitral tribunal. The sub-section does not limit an application to be made under sub-section (2) only by a party who has been refused the delivery of the award. The delivery that Section 39 speaks of is the physical delivery of the document embodying the award and not merely the pronouncement of the award. For, it is the*

physical receipt of the document that would entitle a party to apply for setting aside the award or for implementing it."

54. In view of my aforesaid conclusion, without going into the other submissions made by the counsels, the petitions being premature are not maintainable and are dismissed.

(emphasis supplied)

22. Even on merits, I find no merit whatsoever in the contentions of learned counsel for the petitioner. The initial fixation of fees, as recorded in the proceedings dated 29.08.2019, was based on adoption of the IVth Schedule of the A&C Act, 1996. It is not as if the parties arrived at an agreement independent of the IVth Schedule of the A&C Act, 1996. The calculation of the arbitral fees, was clearly intended to be based on the IVth Schedule. The manner in which the IVth Schedule is to be applied and the fees is to be calculated has now been clarified by the Supreme Court in ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*** (supra).The impugned order merely applies the correct methodology for working out the fees payable by the respective parties as per the IVth Schedule. No fault can be found with the same.

23. Indeed, learned counsel for the petitioner does not dispute that the calculation of the fees in the impugned order is in accord with the IVth Schedule as interpreted by the Supreme Court in ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*** (supra).What is sought to be contended is that it is no longer open for the arbitral tribunal to re-visit the issue of fixation of fees since the fees has already been fixed with the consent of the parties.

24. As noticed, this argument is fallacious for the simple reason that the initial fixation of fees was not on account of an agreement between the

parties independent of the IVth Schedule. On the contrary, while fixing the fees, the arbitrator expressly purported to apply the IVth Schedule and make the same applicable for the purpose of determination of fees. Therefore, it is not as if the impugned order seeks to disregard an agreement between the parties as regards which the arbitral fees would be payable.

25. The observations in para-34 of ***Chennai Metro Rail Limited Administrative Building v. M/s. Transtonnelstroy Afcons (JV) & Anr.***2023 INSC 932 are wholly inapplicable in the facts of the present case. In that case, it was held by the Supreme Court that a pre-existing arrangement regarding arbitral fees can be novated only with the agreement of the parties; in the event of disagreement, the tribunal has to continue with the previous arrangement, or decline to act as an arbitrator. It was, inter-alia observed as under:

> "*34. The ruling in ONGC (supra) is undoubtedly clear that fee increase can be resorted to only with the agreement of parties; in the event of disagreement by one party, the tribunal has to continue with the previous arrangement, or decline to act as arbitrator. …"*

26. In the present case, however, the pre-existing arrangement/agreement is itself predicated on the IVth Schedule. The impugned order merely works out the amount to be borne by respective parties in terms thereof.

27. Likewise, reliance of the judgment of this Court in ***Jivanlal Joitram Patel v. National Highways Authority of India*** (supra) is misconceived for the reason that:

(i) the said judgment was rendered prior to the judgment in ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*** (supra).

(ii) the Court was concerned with the issue as to how the expression "sum in dispute" is to be construed. The position in this

regard has now been unambiguously laid down by the Supreme Court in ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*** (supra).

28. In the circumstances, I find no merit in the present petition. The same is consequently dismissed.

SACHIN DATTA, J

OCTOBER 7, 2024/cl