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

+ **O.M.P. (T) (COMM.) 62/2016**

**TAXUS INFRASTRUCTURE AND POWER
PROJECTS PVT. LTD.**

..... Petitioner

Through : Mr Sachin Datta, Sr Adv with Mr
Dinesh Sharma, Ms Ritika Jhurani &
Mr Baldev Kumar Singh, Advs.

versus

SCHNEIDER ELECTRIC INDIA PVT. LTD.

..... Respondent

Through : Mr Sujoy Kumar, Adv

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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28.09.2016

VIBHU BAKHRU, J

IA No.12049/2016

1. Allowed, subject to all just exceptions.
2. The application is disposed of.

O.M.P. (T) (COMM.) 62/2016

3. The petitioner has filed the petition under Section 14 (2) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying as under:-

“a) Pass an appropriate order/direction under section 14(2) of the Arbitration and Conciliation Act, 1996, with regards to termination of the mandate of the Hon'ble Arbitral Tribunal;

b) Appoint a suitable person to act as Sole Arbitrator to adjudicate the disputes between the parties;

c) Pass an appropriate order/direction fixing the fees of the Hon'ble Arbitral Tribunal in accordance with the Fourth Schedule of the Arbitration and Conciliation Act, 1996, as amended;”

4. The parties had entered into an agreement dated 30.05.2011 for execution of Engineering, Procurement and Construction of a 5MW solar power plant at Kutch, Gujarat. Certain disputes arose between the parties in relation to the said agreement, which the respondent states were settled in terms of an agreement dated 29.08.2012 (hereafter ‘settlement agreement’). Certain disputes are stated to have arisen in connection with the settlement agreement as well. Both the agreements – agreement dated 30.05.2011 as well as the settlement agreement dated 29.08.2012 – contain an arbitration clause which are similarly worded.

5. The arbitration clause as contained in the agreement dated 30.05.2011 is set out below:-

“22. Arbitration and Governing Law

22.1 All disputes, differences, claims and counter claims between the Parties arising out of this Agreement shall be referred to Arbitration under the provisions of The Arbitration and Conciliation Act, 1996. Both Parties, the Contractor and the Owner shall nominate an Arbitrator representing them, and these two nominated Arbitrators shall, then appoint the Third Arbitrator who shall preside over the Arbitral Tribunal. The Award of the Arbitral Tribunal shall be final and binding on both the Parties. The Arbitration shall be conducted in English, and the venue of the arbitration will be New Delhi.

22.2 This Agreement shall be governed by, and shall be construed in accordance with the Laws of

India.”

6. In view of the disputes, the petitioner sent a letter dated 03.05.2013 seeking resolution of the disputes in respect of both the agreements by arbitration. In terms of the arbitration clause, the petitioner named its arbitrator, Mr Debasish Moitra, Advocate and called upon the respondent to nominate its arbitrator. The respondent in turn nominated Justice C M Nayar (Retd.), a former Judge of this Court as its arbitrator and, in terms of the aforementioned arbitration clause, both arbitrators appointed Justice R C Lahoti (Retd.), former Chief Justice of India, as the presiding arbitrator.

7. At the first procedural hearing held on 13.07.2013, the Arbitral Tribunal issued orders for completion of the pleadings and also fixed the fees of the Arbitral Tribunal in consultation with the parties. The relevant extract of the said order reads as under:-

“Fee and Expenses of the members of the Tribunal:-

1. In consultation with the Ld. Counsel of parties, the fee and expenses of the members of the Tribunal are appointed as under:-

- i. Fee of every member is appointed at Rs.1,00,000/- *per sitting*.
- ii. The reading fee is appointed at Rs.2,00,000/- for *each* member.
- iii. The Presiding Arbitrator shall be paid, in addition to the fee, an amount @ 10% of the fee for administrative expenses.

2. All the fee and expenses shall be shared in equal proportion by the two parties.

3. The parties shall stick to the schedule once appointed. Any prayer for cancellation of date of hearing if not made before at least 4 weeks in advance of time may not be entertained. Fee for any date of hearing shall not be liable to be adjusted or waived if the date has to be cancelled at less than 4 weeks notice.

4. The reading fee, and the fee and administrative expenses calculated for three sittings (including the one held today) shall be deposited with each of the members within two weeks, that is, on or before 29-07-2013.

5. Every remittance shall be accompanied by a covering letter clearly stating the amount sought to be remitted, the amount of TDS deducted along with the rate thereof, particulars of the head (such as reading fee, fee, expenses & c.) to which the remittance relates. This is very necessary for accounting purposes.”

8. As indicated in the above order, the fees schedule was fixed with the consent of both the learned counsels for parties.

9. Thereafter, the respondent filed its counter claim and the Arbitral Tribunal fixed additional fee of Rs. 80,000/- per sitting, per arbitrator in respect of the counter claims as well.

10. The presiding arbitrator - Justice R C Lahoti (Retd.) has since resigned. On his resignation, both the arbitrators named by the respective parties have jointly appointed Justice Anil Dev Singh (Retd.), former Chief Justice of Rajasthan High Court, as the presiding arbitrator.

11. The petitioner claims that the mandate of the Arbitral Tribunal

stands *de jure* terminated principally for the reason that, according to the petitioner, the fee fixed by the Arbitral Tribunal is excessive and beyond the means of the petitioner.

12. The petitioner further contends that appointment of Justice Anil Dev Singh (Retd.) as the presiding arbitrator is also without jurisdiction as the arbitrators nominated by the parties have no power to appoint presiding arbitrator, once the earlier presiding arbitrator had resigned.

13. Mr. Datta, learned counsel for the petitioner, submits that the petitioner is agreeable for a maximum fees of ₹50,000/- per arbitrator, per sitting and it is submitted that the fees of ₹1,00,000/- per member, per sitting is excessive.

14. Admittedly, the fee schedule of the Arbitral Tribunal was fixed with the consent of the learned counsels for the parties. Thus, in my view, it is not open to the petitioner to raise this contention. Furthermore, the petitioner has not paid the fees fixed for the counter claim and accordingly, the respondent is required to pay the same in terms of Section 38(2) of the Act. The petitioner was only required to pay half of the fees fixed in support of its claims and as stated earlier, no objection in this regard can be raised by the petitioner.

15. Mr Datta relied upon the decision of the Madras High Court in the case of **Madras Fertilizers Limited v. SICGIL India Limited: 2010 (2) CTC 357** as well as the decision of the Supreme Court in the case of **Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust**

and Others: (2012) 1 SCC 455 in support of his contention that fixing excessive fee, which a party cannot pay, would render the Arbitral Tribunal *de jure* to perform its functions.

16. In ***Sanjeev Kumar Jain*** (*supra*), the Supreme Court had highlighted that excess Arbitral fees could be highly disadvantageous to both or either of the parties.

17. It is undoubtedly true that excessive arbitration fees would be a deterrent for the parties to refer their disputes to arbitration and may further frustrate the viability of the alternative dispute resolution mechanism. However, in the present case, since the fees in question has been fixed in consultation with the learned counsels for the parties, the objection regarding the fees being excessive cannot be raised at this stage by the petitioner. I am unable to accept the view that the mandate of the Arbitral Tribunal stands *de jure* terminated in the facts of the present case.

18. In ***Madras Fertilizers Limited*** (*supra*), the petitioner was a sick company within the meaning of Section 3 (1) (o) of the Sick Industrial Companies (Special Provisions) Act, 1985; which means that the net worth of the company had eroded and its liabilities had exceeded its net worth. In the aforesaid context, the Court came to the conclusion that the petitioner was not capable of paying the fees fixed. Further, the Court also accepted the contention that the arbitral fees fixed was exorbitant. The facts in that case were materially different from the facts of the present case.

19. The contention of the petitioner that the arbitrators nominated by the parties had lost the power to appoint the presiding arbitrator once the presiding arbitrator had resigned, is in my view, wholly without any merit.

20. Section 15(2) of the Act provides for appointment of the arbitrator where vacancy arises on account of the contingency as indicated under Section 15 (1) (a) of the Act, that is, “*where he withdraws from the office for any reason*”. In such circumstances, Section 15 (2) of the Act enacts that a substitute arbitrator shall be appointed in accordance with the rules that are applicable to the appointment of the arbitrator being replaced.

21. The Supreme Court in the case of **Yashwith Construction Private Limited v M/s Simplex Concrete Piles Limited & Anr** : AIR 2006 SC 2798 had explained that the expression ‘rules’ under Section 15(2) of the Act obviously refers to the provision of appointment contained in the arbitration agreement itself. The relevant extract of the said decision is reproduced as under:-

“The term “rules” in Section 15 (2) obviously referred to the provision for appointment, contained in the arbitration appointment, contained in the arbitration agreement or any Rules of any Institution under which the disputes were referred to arbitration. There was no failure on the part of the concerned party as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a

substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the concerned person had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute arbitrator can be appointed accordingly to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the Scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts.”

22. In the circumstances, the mechanism agreed to by the parties for appointment of presiding arbitrator was required to be resorted to so as to fill the vacancy caused by resignation of Justice Lahoti (Retd.) as the presiding arbitrator. And, admittedly, this was done as the arbitrators nominated by both the parties have concurred with the appointment of Justice Anil Dev Singh as the presiding arbitrator.

23. In view of the above, the petition is dismissed. However, it is clarified that if the petitioner pays the fees as fixed by the Arbitral Tribunal for the claims preferred by the petitioner, the Arbitral Tribunal shall take up the claims. It is also open for the petitioner to approach the Arbitral Tribunal for reduction of fees, which the Arbitral Tribunal may consider in their discretion.

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24. In view of the order passed in the main petition itself, no further order is required to be passed and the application stands dismissed.

VIBHU BAKHRU, J

SEPTEMBER 28, 2016

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