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

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Judgment delivered on: 11.09.2017

+ ARB.A. 1/2017, I.A. Nos.8086/2017 (stay) & 9441/2017 (for waiver of cost)

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Appellant

versus

GAYATRI JHANSI ROADWAYS LIMITED Respondent.

Advocates who appeared in this case:

For the Petitioner : Mr. Kirti Uppal, Sr. Advocate with Mr. Shailendra Pratap Singh, Mr. Alok Singh, Mr. Nitendra Pratap Singh, Mr. Sidharth Chopra, Mr. Ashish Singh and Mr. Abhishek Raj, Advocates

For the Respondents : Mr. Arun Kathpalia, Sr. Advocate with Mr. Angad Mehta and Mr. Samaksh Goyal, Advocate

**CORAM:-
HON'BLE MR JUSTICE SANJEEV SACHDEVA**

**JUDGMENT
11.09.2017**

SANJEEV SACHDEVA, J. (ORAL)

ARB.A. 1/2017, I.A. Nos.8086/2017 (stay) & 9441/2017 (for waiver of cost)

1. The appellant by the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) impugns order of the Arbitral Tribunal dated 27.02.2017 fixing the fee schedule. A direction is sought to the arbitral tribunal to conduct the arbitral proceedings as per the fees stipulated by the

policy circular dated 27.05.2016 of National Highways Authority of India ('NHAI') read with clause vii of the supplementary agreement dated 22.12.2016 agreed to by the Respondent.

2. It is contended that the said fee schedule is at variance with the policy circular of NHAI dated 24.05.2016.

3. It is further contended that the said fee structure was specifically agreed to by the respondent by entering into supplementary agreement dated 22.12.2016. It is further submitted that the said fee structure was even communicated to the petitioner's nominee Arbitrator who had specifically consented to the same.

4. It is contended by the learned senior counsel for the appellant that fee fixed by the Arbitral Tribunal, is at a variance with the said policy circular of the appellant/NHAI.

5. Learned senior counsel for the respondent points out that the Arbitral Tribunal on an objection being raised by the appellant has modified the fee structure and has now fixed the same in accordance with Schedule-IV to the Act as amended by the Arbitration and Conciliation (Amendment) Act, 2015.

6. He submits that the appeal is not maintainable.

7. A reference may be had to the judgment of a Coordinate Bench in *National Highways Authority of India vs. D.S. Toll Road Ltd. & Ors.*, 2015 III AD (DELHI) 296, wherein the Coordinate Bench has

held that an order fixing the fees by the Arbitral Tribunal is not an appealable order under Section 37(2)(a) of the Act.

8. An appeal under Section 37 (2)(a) of the Act lie to a Court only from an order of an arbitral tribunal accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16 or granting or refusing to grant an interim measure under Section 17 of the Act. No appeal lies from any other order.

9. The order fixing the fee schedule does not qualify as an order under either of the two provisions and as such no appeal would lie.

10. Furthermore, Section 31 (8) of the Act as it stood prior to the amendment by the 2015 Act began with the expression “Unless otherwise agreed by the parties.....”.

11. The amended Section 31(8) has done away with the expression “Unless otherwise agreed by the parties.....” and reads as under:-

“(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.”

12. Section 31(8) of the Act does not stipulate that the agreement of the parties shall have an overriding effect. The effect of the amendment and specific deletion of the expression “Unless otherwise agreed by the parties.....” shows that the legislative intent that the power of the parties to enter into an agreement with regard to fixing of the fees has been specifically taken away.

13. The regime as contemplated by Section 31(8) read with Section 31(A) of the Act now holds the field.

14. Section 11 (14) of the Act empowers the High Court to frame rules for determination of fee of the arbitral tribunal and refers to as a guidance to the rates specified in Schedule IV of the Act. The explanation to Section 11(14) carves out an exception with regard to international commercial arbitration and arbitrations (other than international commercial arbitrations) where parties have agreed for determination of fees as per the rules of an arbitration institution.

15. The above clearly shows that the right of the parties to enter into an agreement with regard to determination of fee for the arbitral tribunal has been restricted to international commercial arbitrations and arbitrations (other than international commercial arbitrations) where parties have agreed for determination of fees as per the rules of an arbitration institution.

16. Thus the contention of learned senior counsel for the petitioner, that the petitioner's nominee arbitrator has consented to the fee schedule stipulated by the Policy Circular is also of no consequence.

17. It may be noted at this point that the arbitral tribunal, on the objection of the petitioner, has modified its earlier order dated 27.02.2017 and has now fixed the fees in terms of Schedule IV to the Act.

18. In view of the above, I find no merit in the appeal. Accordingly, the appeal is dismissed. No order as to costs.

19. Order *Dasti* under the signatures of the Court Master.

SANJEEV SACHDEVA, J

SEPTEMBER 11, 2017

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