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

Date of decision: 15th May, 2018

+ O.M.P.(MISC) 5/2018

DELHI STATE INDUSTRIAL INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD. (DSIIDC) Petitioner

Through Ms.Deepali Gupta, Adv.
Mr.Nakul Dewan, Amicus Curiae
with Mr.Zain Maqbool, Adv.

versus

BAWANA INFRA DEVELOPMENT (P) LTD. Respondent

Through Mr.Prashant Neal, Adv.
Mr.Anurag Jain, Adv. for Arbitrator.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 39(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) has been filed by the petitioner primarily seeking an interpretation of the fee schedule that is provided in the Fourth Schedule to the Act, introduced in the Act by way of the Arbitration and Conciliation (Amendment) Act, 2015. The Fourth Schedule is reproduced hereinunder:-

“ THE FOURTH SCHEDULE

[See section 11(14)]

<i>Sum in dispute</i>	<i>Model fee</i>
<i>Upto Rs. 5,00,000</i>	<i>Rs. 45,000</i>
<i>Above Rs. 5,00,000 and upto Rs.20,00,000</i>	<i>Rs. 45,000 plus 3.5 per cent. of the claim amount over and above Rs.5,00,000</i>
<i>Above Rs. 20,00,000 and upto Rs.1,00,00,000</i>	<i>Rs. 97,500 plus 3 per cent, of the claim amount over and above Rs. 20,00,000</i>
<i>Above Rs. 1,00,00,000 and upto Rs.10,00,00,000</i>	<i>Rs. 3,37,500 plus 1 per cent. of the claim amount over and above Rs. 1,00,00,000</i>
<i>Above Rs. 10,00,00,000 and upto Rs. 20,00,00,000</i>	<i>Rs. 12,37,500 plus 0.75 per cent. of the claim amount over and above Rs.1,00,00,000</i>
<i>Above Rs. 20,00,00,000</i>	<i>Rs. 19,87,500 plus 0.5 per cent. of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000</i>

***Note:**–In the event, the arbitral tribunal is a sole arbitrator, he shall be entitled to an additional amount of twenty-five per cent. on the fee payable as per the table set out above.”*

2. The petitioner submits that in the Fourth Schedule to the Act, the fee prescribed is on basis of “Sum in dispute”. She submits that the “Sum in dispute” has to necessarily include the amount of claim as also the counter claim raised by the respondent(s).

3. The above question has arisen for consideration as this Court vide its order dated 24.08.2016 passed in Arb.P.420/2016, while appointing a Sole Arbitrator, had also directed that the fee of the Arbitrator shall be fixed in

accordance with the Fourth Schedule to the Act. The Arbitrator so appointed was of the opinion that the “Sum in dispute” mentioned in the Fourth Schedule would be the amount of the claim and the counter claim separately, rather than cumulatively.

4. Learned counsel for the petitioner submits that the legislature has intentionally not prescribed separate fee for the claim amount and counter claim and has used the phrase “Sum in dispute”. She further submits that the Delhi International Arbitration Centre (DIAC) uses the same phrase in its Delhi International Arbitration Centre (DAC) (Administrative Cost Arbitrators’ Fees) Rules and clarifies that “Sum in dispute” shall include any counter claim made by a party. She further submits that the same is the position under the Rules framed by the Arbitration and Conciliation Centre, Bengaluru as it uses the phrase “value of the claims/disputes”. The Rules clearly mention that fee shall be calculated on the aggregate of claim and counter-claim.

5. On the other hand, learned counsel appearing for the learned Arbitrator has drawn my attention to the Proviso to Section 38 (1) of the Act and submits that the Arbitral Tribunal has been empowered under the Act to fix separate amount of deposit for the claim and counter claim. He submits that the phrase “Sum in dispute” used in the Fourth Schedule to the Act would therefore, take its colour from the said Proviso to Section 38 (1) of the Act.

6. Mr.Nakul Dewan, Amicus appointed by this Court vide its order dated 19.03.2018, has drawn the attention of this Court to the 246th Report of the Law Commission of India which had made recommendations on the basis of which the amendment to the Act was carried out in 2015. He further draws

attention of this Court to the Rules framed by the various institutions conducting arbitration in India and across the world and submits that the universal method adopted by all these institutions is to charge a fee/deposit on the basis of cumulative values of the claim and counter claim. He further submits that keeping in view the object behind the amendment to the Act, the Fourth schedule has to be read as prescribing a cumulative value of the “Sum in dispute” rather than separate values where a separate fee can be charged exceeding the ceiling limit on the basis of claim and counter claim individually.

7. I have considered the submissions made by the counsels and the learned Amicus. The Fourth Schedule to the Act has been added in the Act by way of amendment carried out in 2015. The object behind such amendment can be gathered from the 246th Law Commission Report, relevant portion whereof is quoted hereinbelow:

“FEES OF ARBITRATORS

10. One of the main complaints against arbitration in India, especially ad hoc arbitration, is the high costs associated with the same – including the arbitrary, unilateral and disproportionate fixation of fees by several arbitrators. The Commission believes that if arbitration is really to become a cost effective solution for dispute resolution in the domestic context, there should be some mechanism to rationalise the fee structure for arbitrations. The subject of fees of arbitrators has been the subject of the lament of the Supreme Court in Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523 where it was observed:

“[T]he cost of arbitration can be high if the arbitral tribunal consists of retired Judges... There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judges are arbitrators. The large number of sittings and

charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee.”

11. In order to provide a workable solution to this problem, the Commission has recommended a model schedule of fees and has empowered the High Court to frame appropriate rules for fixation of fees for arbitrators and for which purpose it may take the said model schedule of fees into account. The model schedule of fees are based on the fee schedule set by the Delhi High Court International Arbitration Centre, which are over 5 years old, and which have been suitably revised. The schedule of fees would require regular updating, and must be reviewed every 3-4 years to ensure that they continue to stay realistic.

12. The Commission notes that International Commercial arbitrations involve foreign parties who might have different values and standards for fees for arbitrators; similarly, institutional rules might have their own schedule of fees; and in both cases greater deference must be accorded to party autonomy. The Commission has, therefore, expressly

restricted its recommendations in the context of purely domestic, ad hoc, arbitrations.”

8. As would be evident from a bare reading of the above report, the object behind the introduction of the Fourth Schedule to the Act was the belief of the Commission that if arbitration is to really become a cost effective solution for dispute resolution in the domestic context, there should be some mechanism to rationalise fee structure for arbitration. The Law Commission states that the model schedule of fee recommended by it is based on the fee set by the DIAC. As noted above, the fee schedule set by the DIAC specifically provides that the “Sum in dispute” shall include the counter claim made by any party. Therefore, the intent of the legislature and the purpose sought to be achieved clearly points to the conclusion that “Sum in dispute” would be a cumulative value of the claim and counter claim.

9. In ***Mithilesh Kumari & Anr. v. Prem Behari Khare***, (1989) 2 SCC 95, the Supreme Court observed as under:

“15.....It is permissible to refer to the Law Commission’s Report to ascertain the legislative intent behind the provision? We are of the view that where a particular enactment or amendment is the result of the recommendation of the Law Commission of India, it may be permissible to refer to the relevant law report as in this case. What importance can be given to it will depend on the facts and circumstances of each case.”

10. Learned Amicus in his note has also drawn reference to the Rules of various institutions which conduct arbitration proceedings in India and in other countries. The rules as to fee charged by them are summarised in form of the chart as under:-

INDIAN ARBITRAL INSTITUTIONS

<i>Institute</i>	<i>Provision</i>	<i>Relevant Clause/Term</i>
<i>Indian Council of Arbitration Rules of Domestic Commercial Arbitration</i>	<i>Rule 31(2)</i>	<i>“Amount of Claim & Counter Claim”</i>
<i>Mumbai Centre for International Arbitration</i>	<i>Schedule of Fees</i>	<i>“*Amounts in dispute refers to total claim and counter claim.”</i>
<i>Construction Industry Arbitration Council</i>	<i>Schedule of Fees</i>	<i>“Sum in Dispute (Claim + Counter Claim)”</i>
<i>Delhi International Arbitration Centre (Administrative Cost Arbitrators’ Fees) Rules (“DAC Rules”)</i>	<i>Schedule C</i>	<i>“*Sums in dispute mentioned in the Schedule B and C above shall include any counter-claim made by a party.”</i>

NON-INDIAN ARBITRAL INSTITUTIONS

<i>Institute</i>	<i>Provision</i>	<i>Relevant Clause/Term</i>
<i>Singapore International Arbitration Centre</i>	<i>Estimate Your Fees, 2016</i>	<i>“Amount in Dispute refers to Total Claim and CounterClaim amount.”</i>
<i>Hong Kong International Arbitration Centre, 2013</i>	<i>Schedule 3, Article 6.3</i>	<i>“Claims and counterclaims are added for the determination of the amount in disputes.”</i>

<i>Administered Arbitration Rules</i>		
<i>Stockholm Chamber of Commerce Arbitration Rules</i>	<i>Appendix IV, Article 2(3)</i>	<i>“The amount in dispute shall be the aggregate value of all claims, counterclaims and set-offs.”</i>
<i>European Court of Arbitration, Arbitration Rules-2015 Edition</i>	<i>Appendix 3</i>	<i>“For the purposes of the application of the scale range the amount to be taken into account to apply this scale will be the total of the claims made by the parties, i.e. of the claims and counterclaims.”</i>

11. A reading of the above would show that the concept prevailing around the world is that the fee of the Arbitral Tribunal is fixed on the cumulative value of the claim and counter claim.

12. As noted in *Union of India v. Singh Builders Syndicate* (2009) 4 SCC 523 and reiterated in *Sanjeev Kumar Jain v. Raghbir Saran Charitable Trust and Ors.*, (2012) 1 SCC 455, high costs are seriously hampering the growth of arbitration as an effective dispute resolution process. Sometimes arbitration becomes disproportionately expensive. Reasonableness and certainty about total costs are the key to the development of arbitration.

13. If India is to emerge as a preferred place of arbitration and the arbitration culture is to grow in India, it is imperative that such fee structure be rationalised so as to make it cost effective. This, as noted, was the intent of the legislature for bringing about the amendment to the Act. Therefore,

there is no reason for the Fourth Schedule to the Act to be given a meaning which is different from usage by various institutions conducting arbitration proceedings in India and abroad.

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.

17. In view of the above, the Sole Arbitrator is requested to withdraw his order claiming separate fee for the amounts claimed in the Statement of Claim and the counter claim. The amount of Rs.13,15,250/- deposited by the petitioner with the Registry of this Court in compliance with the order dated 22.02.2018 passed in I.A. No.2549/2018 in Arb. P.420/2016 shall be refunded by the Registry of this Court to the petitioner along with any interest accrued thereon.

18. I express my sincere gratitude to the assistance rendered by the learned Amicus.

19. The petition is disposed of in the above terms, with no order as to cost.

NAVIN CHAWLA, J

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