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

+ **O.M.P. (COMM) 168/2018 & IA Nos. 5389-5391/2018**

NATIONAL HIGHWAYS AUTHORITY OF
INDIA

..... Petitioner

Through: Mr Manish K. Bishnoi and Ms
Ila Haldia, Advocates.

versus

MUMBAI NASIK EXPRESSWAY LTD. Respondent

Through

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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23.04.2018

VIBHU BAKHRU, J

1. The petitioner (hereafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the orders dated 09.12.2017 and 23.01.2018 (hereafter 'the impugned orders') passed by the Arbitral Tribunal (hereafter 'the Arbitral Tribunal'). By the impugned order dated 09.12.2017, the Arbitral Tribunal declined to reconsider its directions in relation to the arbitral fee as contained in its earlier order dated 28.05.2017, whereby the Arbitral Tribunal had directed the parties to deposit a sum of ₹10,00,000/- in favour of each of the arbitrators to be shared equally by the parties.

2. By the impugned order dated 23.01.2018, the Arbitral Tribunal has fixed the arbitral fee of ₹30,00,000/- for each of the arbitrators in respect of the counter claims to be shared equally between the parties.

3. NHAI challenges the decision of the Arbitral Tribunal in fixing the arbitral fees. It claims that the Arbitral Tribunal has erred in rejecting its request that the arbitral fee be fixed as per the circulars issued by the petitioner and not as per the fee schedule fixed by the petitioner. It is further contended that the Arbitral Tribunal has misinterpreted Schedule IV of the Act by assuming that the fee specified therein is payable to each of the arbitrators.

4. At the threshold, the principal question to be addressed is whether the present petition is maintainable and whether the impugned orders of the Arbitral Tribunal passed in relation to the arbitral fee can be construed as an arbitral award.

Factual Background

5. NHAI had invited a proposal for Improvement, Operation and Maintenance, Rehabilitation and strengthening of the existing two lane road and widening it to four lane divided highway of Vadape and Gonde Section of National Highway 3 (NH 3) from km 539.50 to km 440.00 in the State of Maharashtra on Build, Operate and Transfer (BOT) basis (hereafter 'the Project').

6. The consortium comprising of M/s Gammon India Limited, M/s Sadbhav Engineering Limited and M/s B.E. Billimoria and Company Limited submitted a proposal for the Project. NHAI accepted the proposal and issued a Letter of Acceptance (LOA) dated 16.06.2005. Thereafter, the consortium promoted and incorporated the respondent company as a Special Purpose Vehicle (SPV) to undertake and perform the obligations under the LOA. Thereafter, on 14.10.2005, a

Concession Agreement was entered into between NHAI and the respondent.

7. The respondent claimed that it had suffered certain additional expenditure/loss towards deployment of its resources during the extended period and accordingly, by a letter dated 19.11.2013, raised claims aggregating ₹410,15,00,008/-. Since the said claims were not settled, the respondent issued a letter dated 13.09.2016 for referring the said disputes to arbitration under provisions of Article 39.2 of the Concession Agreement.

8. In view of the above, the Arbitral Tribunal comprising of Chief Justice V.K. Bali (Retired), Presiding, Justice Raj Rahul Garg (Retired) and Mr V. Murahari Reddy Engineer-in-Chief (Retired) was constituted.

9. The Arbitral Tribunal by a procedural order dated 28.05.2017 noticed that the amount of claims were approximately ₹400 crores and directed that the fees shall be fixed as per Schedule IV of the Act. The Arbitral Tribunal further directed the parties to deposit ₹10,00,000/- in favour of each of the three arbitrators to be shared equally between the parties.

10. Thereafter, NHAI filed an application requesting the Arbitral Tribunal to fix the fees as per the fee circular / schedule specified by NHAI. In its application, NHAI contended that the Arbitral Tribunal had erred in proceeding on the basis that the provisions of the Schedule IV of the Act were applicable. NHAI claimed that Schedule IV of the Act only provided a model fee and, accordingly, requested

the Arbitral Tribunal to reconsider the order dated 28.05.2017.

11. The said application was considered by the Arbitral Tribunal and was rejected by the impugned order dated 09.12.2017.

12. NHAI also filed a counter claim aggregating ₹264.957 crores. The Arbitral Tribunal has fixed separate arbitral fees in relation to the said counter claim at ₹30,00,000/- for each of the arbitrator and had further directed to deposit ₹10,00,000/- for each of the arbitrators to be shared equally between the parties. NHAI has failed to deposit the arbitral fee as directed.

Submissions

13. Mr Manish K. Bishnoi, learned counsel appearing for NHAI contended that the impugned orders constitute interim awards and are, therefore, open for being assailed under Section 34 of the Act. He referred to the decision of the Supreme Court in ***Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products: (2018) 2 SCC 534*** and contended that any order passed by the Arbitral Tribunal deciding any contentious issue would amount to an arbitral award. He earnestly contended that the impugned orders passed by the Arbitral Tribunal in relation to the arbitral fee are interim awards.

14. This Court is not persuaded to accept the aforesaid contention. The term, 'arbitral award' is defined under Section 2(c) of the Act to include an interim award.

15. It is also relevant to refer to Section 31(6) of the Act which reads as under:-

“Section 31(6) - The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.”

16. It is apparent from the plain reading of Section 31(6) of the Act that an Arbitral Tribunal may make an interim arbitral award on any matter with respect to which it may make a final arbitral award. It is at once apparent that for a decision of an arbitral tribunal to constitute an interim award, it must relate to a matter in respect of which a final award can be made. A decision with regard to the arbitral fee does not constitute a decision in respect of any of the matters on which the parties are at issue. Such decision is neither a decision as to the merits of the dispute nor on the issue pertaining to any of the disputes between the parties that are referred for resolution by arbitration. Thus, plainly, an order of an arbitral tribunal relating to its fees cannot be construed as an interim award.

17. The scope of intervention by courts in an arbitral proceeding is very restricted and Section 5 of the Act expressly provides that *“notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provisions provided in this Part.”* Section 34 of the Act provides for setting aside of an arbitral award on the limited grounds as specified under Section 34(2) of the Act. Such provisions cannot be extended to other orders that may be passed by the arbitral tribunal.

18. The reliance placed by the learned counsel on the decision of

the Supreme Court in *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products* (*supra*) is misplaced. In that case, the court was called upon to consider the question whether the decision on the issue of limitation can be said to be an interim award. It is in the aforesaid context that the arbitral tribunal held that an award on the issue of limitation would constitute an interim award, which could be challenged under Section 34 of the Act. Clearly, the decision whether claims are barred by limitation is a matter on which the parties are at an issue and would be a decision required to settle the disputes between the parties. The said decision is also a matter in regard to which a final award can be made. In the present case, the decision as to the fees that an arbitral tribunal is entitled to charge does not constitute any part of the disputes between the parties, which have been referred to arbitration; thus, a decision on the same cannot be accepted as an arbitral award.

19. The petition is, accordingly, dismissed as not maintainable. It is clarified that all contentions of the parties with regard to the decision of the Arbitral Tribunal are reserved. All the pending applications are also disposed of.

VIBHU BAKHRU, J

APRIL 23, 2018
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