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

\+ O.M.P. (T) (COMM.) 81/2018 & IA 10051/2018

NHPC LTD. ..... Petitioner

Through: Mr.Bijender Singh, Adv.

versus

LARSEN & TOUBRO LTD. ..... Respondent

Through: Mr.Gopal Jain, Sr. Adv. with Mr.Manu Seshadri, Ms.Chinmayee Chandra, Mr.Samarth Chowdhary, Ms.Tanvi Rana, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

O R D E R

% **04.09.2018**

This petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Order dated 30th May, 2018 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Civil works of Lot SSL-2 for "Construction of Intake Structures, Head Race Tunnels, Surge Chamber, Pressure Shafts, Tailrace Channel, Adits and Surface Power House" and Lot SSL-5 for "Construction of Surge Tunnel, Surge Shafts and associated construction Adits".

Disputes having arisen between the parties, both the parties appointed their nominee Arbitrators who in turn appointed the Presiding Arbitrator, thereby constituting the Arbitral Tribunal.

In the first meeting held on 30th May, 2018, the Arbitral Tribunal rejected the prayer of the petitioner for charging the fee in accordance with the Fourth Schedule to the Act and instead fixed its own fee schedule mentioned therein. It is this order that is being challenged by the petitioner before this Court.

The first question that could arise for consideration is whether this petition is at all maintainable. Sub-section 1 of Section 14 of the Act is reproduced hereinbelow:

> *"**14. Failure or impossibility to act.**—(1) [The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if --]*
>
> > *(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and*
> >
> > *(b) he withdraws from his office or the parties agree to the termination of his mandate."*

A reading of the above provision would show that it is only where the Arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay or withdraws from his office or the parties agree to the termination of his mandate, that a petition under Section 14 of the Act would be maintainable for declaring that the mandate of the Arbitrator has terminated and for seeking appointment of a substitute Arbitrator. This provision cannot be invoked for challenging a procedural order passed by the Arbitrator.

In the present case, admittedly, the parties have nominated their own Arbitrator(s) without prescribing any fee schedule in the letter of appointment or in the contracts on which the disputes have arisen between them. The Arbitral Tribunal was therefore, entitled to fix its own fee.

Counsel for the petitioner submits that the fee fixed by the Arbitral Tribunal is unreasonable as it does not conform to the Fourth Schedule of the Act. I am unable to agree with the said submission. Section 11(14) of the Act relates to the Fourth Schedule of the Act and reads as under:

> *"**11. Appointment of arbitrators.-***
> *xxxxx*
> *(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule."*

This Court has not framed any rules in exercise of its powers under the above provision in so far as the fee schedule is concerned. The Fourth Schedule of the Act, therefore, cannot be said to be mandatorily to be followed by the Arbitral Tribunal.

Counsel for the petitioner relying upon the judgment of the Supreme Court in ***Mohan Singh and others vs. International Airport Authority of India & Ors.*** (1997) 9 SCC 132 has submitted that keeping in view the object of the Act, the said Schedule should be held mandatorily to be followed by the Arbitral Tribunal. I am unable to agree with the said submission.

A reading of Section 11(14) of the Act leaves no manner of doubt that the provisions of the Fourth Schedule are not mandatorily to be followed by the Arbitral Tribunal and are merely to act as a guiding principal till such time that they are incorporated in the rules framed by the High Court. No such rules having been framed; the appointment letter not obliging the Arbitrators to charge fee in accordance with the Fourth Schedule of the Act, the Arbitrators were not bound by the provisions thereof and were free to fix their own fee. This Court in ***Paschimanchal Vidyut Vitran Nigam Limited v. IL & FS Engineering & Construction Company Limited***, 2018 SCC OnLine Del 10831, has held that:-

> *"**15.** First and foremost, to my mind, the provision with regard to fees which is contained in Section 11(14) of the Act is only an enabling provision. The concerned High Court has been given the leeway to frame rules, if it chooses to do so......*
> ***16.** Second, section 11, broadly, applies to circumstances where a party approaches the Court for the appointment of an Arbitrator or Presiding Arbitrator.*
> ***17.** In this case, the admitted position is that none of the parties had approached the Court for appointment of an Arbitrator in terms of the Arbitration Agreement obtaining between them. Parties had, it appears, agreed on the constitution of the Arbitral Tribunal. In these circumstances, in my view, the Court would have no role to play in fixing the fees of an Arbitral Tribunal as no such power is vested in the Court at present.*
> ***18.** This is so as the provisions of sub-section (14) of Section 11 clearly indicate, as alluded to above, that the fees prescribed in the Fourth Schedule of the Act is only suggestive.....*
> ***19.** The fact that the fees prescribed in the Fourth Schedule is suggestive, is clearly, evident on account of use of the expression "determination of fees of the Arbitral Tribunal" and "the manner of its payment". The argument advanced by Mr.Sharma that fees which is to be paid to the Arbitral Tribunal is fixed by virtue of the provision made in that behalf in the Fourth Schedule is untenable as, if this was the legislative intent then there was no need for the legislature to provide that the concerned High Courts should frame rules as may be necessary for determination of fees and the manner of its payment, albeit, after taking into account the rates specified*

in the Fourth Schedule.
***20.** The Legislature was, perhaps, conscious of the fact that one model may not work for all domestic ad hoc arbitrations. The fees scale could vary depending on the territory over which the concerned High Court exercises jurisdiction. The cost of living index and the nature and the value of claims that are lodged, would be factors that the concerned High Court may like to bear in mind while framing rules in respect of the fees that ought to be charged by an Arbitral Tribunal.*
***21.** One can take judicial notice of the fact that the fees charged by Arbitral Tribunals in Delhi and Mumbai are not the same as those which are charged qua claims that emanate from other parts of the country such as Chhattisgarh, Sikkim and other North-Eastern States. As a matter of fact a metropolitan city like Chennai has a fee structure which is much lower than that of Delhi and Mumbai,*
***22.** Therefore, given the fact that this High Court has not framed rules in consonance with the suggestive fees scale prescribed in the Fourth Schedule of the Act, the same cannot be applied to the instant arbitration proceedings."*

In view of the above, the present petition is not maintainable and the same is dismissed with no order as to costs.

NAVIN CHAWLA, J

SEPTEMBER 04, 2018
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