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

Date of Decision: 04.10.2018

+ O.M.P. (T) (COMM.) 104/2018

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Petitioner

Through Mr. Balendu Shekhar, Mr. Sumit
Tetorwal, Mr. Ravi Gopal and Mr.
Sriansh Prahish, Advs.

versus

NORTH BIHAR HIGHWAY LIMITED Respondent

Through Mr. Ranjit Prakash and Ms. Mahima
Sareen, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

I.A. 13662-64/2018

1. Allowed, subject to just exceptions.

O.M.P. (T) (COMM.) 104/2018 & I.A. 13661/2018

2. This is a petition filed under Section 14 of the Arbitration and Conciliation Act, 1996 (in short '1996 Act').

3. In effect, the prayer made in the petition is to terminate the mandate of the Arbitral Tribunal. The Arbitral Tribunal comprises three persons.

4. The Tribunal is presided over by a retired Judge of the Patna High Court.

5. The main thrust of the petition is that the Arbitral Tribunal needs to be re-constituted in view of the fees that it has decided to charge for

adjudicating the disputes between the parties herein.

6. The Arbitral Tribunal, it appears, was moved in this behalf which led to an order dated 8.8.2018 being passed by it.

7. The Arbitral Tribunal via the aforesaid order rejected the petitioner's application, which was filed to review/modify an earlier order dated 12.6.2018 passed by it.

7.1. The order dated 12.6.2018, I am told, was the first procedural order in which the Arbitral Tribunal, *inter alia*, issued directions with regard to the fee and expenses to be paid by the parties.

8. The Arbitral Tribunal, both, in the order dated 12.6.2018 and 8.8.2018, indicated that insofar as the fees is concerned, each Arbitrator would be paid a sum of Rs.49,87,500/-.

9. In coming to this conclusion, the Arbitral Tribunal took notice of the fact that the arbitration proceedings were governed by the rules of the International Centre for Alternative Dispute Resolution (in short 'ICADR Rules').

9.1 In this behalf, the Arbitral Tribunal took note of Clause 44.3 of the agreement obtaining between the parties as also Rule 28 and Schedule-I of the ICADR Rules.

9.2 Reference was also made by the Arbitral Tribunal to the judgment of a Single Judge of this Court rendered in *National Highways Authority of India vs. Gayatri Jhansi Roadways*, 2017 SCC OnLine Del 10285.

10. Mr. Shekhar, who, appears for the petitioner, says that before the Arbitral Tribunal was constituted, on 18.5.2018, while issuing a mandate to its Nominee-Arbitrator, it was made clear that fees would be paid as per the petitioner's policy circulars issued from time to time.

10.1 In this behalf, Mr. Shekhar drew my attention to the letter dated 18.05.2018 which is appended at page 429 of the documents file. The learned counsel, in particular, referred to paragraphs no.3 and 4 of the said letter.

11. Mr. Ranjit Prakash, who, appears on advance notice, on the other hand, drew my attention to clause 44.3.1 of the agreement obtaining between the parties.

11.1 It is the learned counsel's submission that the instant arbitration proceedings was an institutional arbitration and, hence, would necessarily have to be governed by the rules framed by the concerned institution which, as indicated above, in this case was ICADR. The argument was that since ICADR Rules provided a basis for calculating the fees and parties had agreed to abide by the said rules, no interference was called for by this court at the behest of the petitioner.

12 Before I proceed further, I must also advert on more fact, which is, that Mr. Shekhar had placed reliance on the judgment of another coordinate bench of this Court rendered in *National Highways Authority of India v. Gammon Engineers and Contractor Pvt. Ltd.*, passed in O.M.P.(T) (COMM.) 39/2018 dated 20.7.2018.

13. I have heard the learned counsel for the parties and perused the record.

14 According to me, what is crucial qua the issue raised in this petition is the arbitration agreement which obtains between the parties.

14.1 The arbitration agreement in this case is encapsulated in paragraph 44.3.1 of the agreement executed between the parties. The said clause reads as follows:

“44. 3 Arbitration

44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be the subject to the provisions of the Arbitration Act. The venue of such Arbitration shall be Delhi, and the language of arbitration proceedings shall be in English.”

(emphasis is mine)

14.2 A close perusal of the aforesaid clause would show that the parties have agreed that the arbitration proceedings between them will be governed by the ICADR Rules.

14.3 Rule 28 of the ICADR Rules clearly provides that the fee and the charges to be included in the costs shall be those as are specified in Schedule-I. Schedule-I sets out the fees to be paid to the Arbitrators.

14.4 Broadly, Schedule I of the ICADR Rules is in line with the Fourth Schedule appended to the 1996 Act. Therefore, to my mind, since the parties had agreed to be governed by the ICADR Rules, they cannot at this stage deviate from the said rules.

14.5 Mr. Shekhar’s submission that since, while appointing its Nominee-Arbitrator, the petitioner had indicated that the fee will be paid as per the policy circulars of the petitioner and, therefore, ICADR Rules will not bind the parties, in my view, is a submission which cannot be sustained.

14.6 The petitioner, to my mind, cannot unilaterally change, in a manner of the speech, the rules of the game once the game has commenced.

14.7 If the respondent had agreed to such a change, it is only then that the petitioner could have insisted that the Arbitral Tribunal could not have charged fees more than that which parties had mutually agreed in derogation to what was prescribed in the ICADR Rules.

14.8 Clearly, no such agreement has been arrived at between the parties. The respondent insists that the fee should be paid as stipulated under the ICADR Rules. The Arbitral Tribunal has concluded likewise and, in my opinion, correctly so.

14.9 The judgments relied upon by both counsel do not deal with fact situation obtaining in the present case.

15 I must, however, indicate that an argument was advanced by Mr. Shekhar, which was, that even if Schedule-I of the ICADR Rules is applied, then, the maximum fees that is required to be paid, since, the value of the claims lodged by the respondent, admittedly, are more than Rs.20 crores cannot exceed be Rs.30 lacs, being the prescribed ceiling.

15.1 The Arbitral Tribunal, it appears, vide order dated 8.8.2018 has given its interpretation of the provision of Schedule-I whereby it has arrived at a ceiling figure of Rs.49,87,500/-.

15.2 In my view, there is something to be said in favour of the petitioner in this behalf.

15.3 Since, the petitioner has not challenged the said order of the Arbitral Tribunal and instead has sought termination of its mandate this aspect cannot be decided by the Court in these proceedings.

15.4 However, the Arbitral Tribunal can, in my opinion, if moved, revisit the issue as to what should be the ceiling with respect to the fees given the fact that it is only a procedural order.

16 Thus, for the foregoing reasons I find no merit in the petition, the petition is, accordingly, dismissed.

RAJIV SHAKDHER, J

OCTOBER 04, 2018

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