

\$~9

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 19.12.2018

+ O.M.P.(MISC.)(COMM.) 362/2018

SWEKA POWER-TECH ENGINEERS PVT. LTD..... Petitioner

Through Mr. Gaurav Sarin, Ms.Charul Sarin
and Mr.Harish Kuma, Advs.

versus

NORTH DELHI MUNICIPAL CORPORATION..... Respondent

Through Mr. Akhil Mittal, Addl. Standing
Counsel with Mr. Roop Chand, E.E.
(Elect.) IV, Karol Bagh Zone,
NDMC.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.: (ORAL)

1. On the previous date, I had issued notice in the captioned petition and recorded the following:

“O.M.P.(MISC.)(COMM.) 362/2018

2. *I am told by Mr. Gaurav Sarin, who, appears for the petitioner, that the award was reserved by the learned Arbitrator as far as back on 03.01.2018.*

3. *Mr. Sarin says that the learned Arbitrator has not been able to pronounce the award as the respondent has not paid its share of fee.*

4. *Learned counsel says that insofar as the petitioner is concerned, it has already deposited its share of the fee with the learned Arbitrator.*

5. *I am informed that the respondent has requested the learned*

Arbitrator to accept lump sum fee of Rs. 1,00,000/- as a substantial part of the work had been carried out by the previous Arbitrator.

6. The learned Arbitrator, it appears has declined this request vide proceedings/communication dated 24.09.2018.

7. The learned Arbitrator, it appears, has calculated his fee on the basis of provisions of Fourth Schedule appended to the Arbitration and Conciliation Act, 1996.

8. Issue notice.

9. Mr. Akhil Mittal accepts notice on behalf of the respondent.

10. Learned counsel will inform the Court on the next date of hearing apart from anything else as to why the Arbitrator's fee is not being paid.

11. The concerned officer shall remain present in the Court on the next date of hearing.

12. Renotify the matter on 19.12.2018.”

2. Mr. Mittal, who, appears for the respondent, has obtained instructions.

2.1 Learned counsel confirms that no agreement could be reached with regard to the extension of time for concluding the arbitration proceedings only on account of the fee and costs demanded by the learned Arbitrator.

3. Insofar as the objection, according to the learned counsel for the respondent, qua fee (and not costs) is concerned, it is based on the following grounds:

(i) The learned Arbitrator while calculating the fee as per the Fourth Schedule appended to the Arbitration and Conciliation Act, 1996 (for short ‘1996 Act’) has factored in the pre-reference interest as well.

(ii) If fee is calculated as per the Fourth Schedule, by taking into account the value of claims and counter claims (excluding pre-reference interest) and the sum so attained is divided by 3, with a mark up of 25 per cent on that figure, it would work out to Rs.1,68,234/- and Rs.3,07,728/- calculated by the learned Arbitrator.

(iii) Since, part of the work was done by an earlier Arbitrator appointed in the matter, the sum of Rs.1,81,000/- paid to him should have been adjusted by the incumbent Arbitrator.

4. Having heard the learned counsel for the respondent, according to me, the objections taken with regard to the fee are untenable in the facts and circumstances of the instant case.

5. It is not disputed before me that this Court vide order dated 2.4.2013 had appointed Hon'ble Mr. Justice R.C. Chopra, former Judge of this Court as an Arbitrator.

5.1 It is also not disputed that Hon'ble Mr. Justice R.C. Chopra recused from the matter on 14.3.2017.

5.2 However, in respect of the work undertaken by Hon'ble Mr. Justice R.C. Chopra, the respondent it appears, in the meanwhile, had paid to him fee in the sum of Rs.1,81,000/-.

5.3 Concededly, upon recusal of Hon'ble Mr. Justice R.C. Chopra, the respondent appointed the incumbent Arbitrator, i.e. Mr. O.P. Gupta, on 26.5.2017.

5.4 On being queried, learned counsel for the respondent informed me that in the appointment letter, the respondent had not indicated to Mr. O.P. Gupta that the fee paid to Hon'ble Mr. Justice R.C. Chopra would be adjusted against his fee as pleadings in the matter stood completed and only arguments had to be heard since parties had decided to proceed on the basis of documentary evidence.

6. The record also shows that in the proceeding held on 29.11.2017 before Mr. O.P. Gupta the issue with respect to inclusion of interest for the pre-reference period for the purposes of calculation of the Arbitrator's fee

came up for consideration. The Arbitrator, *inter alia*, indicated in the subject proceeding that the claim qua interest for the pre-reference period would be factored in while calculating the Arbitrator's fee.

7. Therefore, insofar as the objection of adjustment of fee paid to Hon'ble Mr. Justice R.C. Chopra and the inclusion of pre-reference interest in the calculation of Arbitrator's fee is concerned, the same, to my mind are not tenable. I may only add that pre-reference interest even otherwise, if parties agree to adhere to the provisions of the Fourth Schedule appended to the 1996 Act would stand included in the claim and counter claims lodged before an Arbitrator, as long as relief qua the same is pressed by a party.

8. As regards the third aspect which is that the calculation of the fee as per the Fourth Schedule is incorrect, the respondent has furnished the following calculation to demonstrate the error:

<i>“ Sum in dispute</i>	<i>: Amount of Claim + Amount of Counter-claim”</i>
	<i>: 10264189 + 6361942</i>
	<i>: Rs.1,66,26,131/-</i>
<i>Model Fee</i>	<i>: Rs.337500 + 1% of 66,26,131/-</i>
<i>(as per 4th Schedule)</i>	<i>= Rs.4,03,761/-</i>
<i>Per arbitrator</i>	<i>: Rs.4,03,761/3=Rs.1,34,587/-</i>
<i>Sole Arbitrator</i>	<i>: Rs.1,34,587 + 25% = Rs.1,68,234/-”</i>

9. A perusal of the respondent's calculation would first of all show that it excludes, *albeit*, incorrectly, pre-reference interest. This as discussed above is not what the Fourth Schedule envisages.

10. Furthermore, the calculation is also erroneous for the reason that it assumes that the fee calculated as per the provisions of the Fourth Schedule is for an Arbitral Tribunal comprising three members and, therefore, the same needs to be paired down proportionately to what one member would

get and thereafter, be marked up by 25 per cent.

11. To my mind, these assumptions are not borne out from the provisions of the Fourth Schedule of the 1996 Act. The assumption that there would always be an Arbitral Tribunal comprising three members is baseless. The situation could change if it is a multiparty Arbitral Tribunal.

12. The Fourth Schedule, simply provides for the following:

“[THE FOURTH SCHEDULE

[See section 11 (14)]

<i>Sum in dispute</i>	<i>Model fee</i>
<i>Up to Rs. 5,00,000</i>	<i>Rs. 45,000</i>
<i>Above Rs. 5,00,000 and up to 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 up to 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 up to 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 up to Rs. 20,00,00,000</i>	<i>Rs. 12,37,500 plus 0.75 per cent of the claim amount over and above Rs. 10,00,00,000</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 additional amount of twenty-five per cent on the fee payable

as per the table set out above.]”

13. The learned Arbitrator has taken the provisions of the Fourth Schedule and the Note below as it is and applied the same.

14. The respondent on the other hand has factored in other aspects which are not borne out from the Fourth Schedule.

15. Therefore, the calculations made by the respondent cannot be accepted.

16. Thus, having regard to what I have stated above, the respondent, in my view, ought to have extended the time to enable the learned Arbitrator to pronounce the award as its objections are completely meritless.

17. As alluded to above, the learned Arbitrator has reserved the award as far as back on 3.1.2018.

18. In these circumstances, and after considering the objections of the respondent, I am inclined to grant the prayer for extension of time.

19. Time for publishing and pronouncing the award is extended till 31.01.2019.

20. The respondent will, in the meanwhile, pay its share of the fee to the learned Arbitrator which, according to the calculation submitted by him is a sum of Rs.3,07,728/-.

21. The respondent is directed to pay the fee within one week of receipt of the copy of the order.

22. In case the respondent does not pay its share of the fee, the petitioner will be entitled to pay the fee and have the same factored in the award. The learned Arbitrator will pronounce the award on or before the date given in the order.

23. *Dasti.*

DECEMBER 19, 2018
Rb

RAJIV SHAKDHER
(JUDGE)