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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
IN ITS COMMERCIAL DIVISION**

**COMMERCIAL ARBITRATION PETITION NO.439 OF 2019**

|                           |              |
|---------------------------|--------------|
| Parekh Industries Limited | ..Petitioner |
| Vs.                       |              |
| Diamond India Limited     | ..Respondent |

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Ms.Alpana Ghone with Ms.Sowmya Srikrishna, Mr.Durgaprasad Poojari,  
Ms.Divyasha Mathur i/b. M/s.PDS Legal for Petitioner.  
Mr.Prateik Parija i/b. M/s.Probus Legal for Respondent.

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**CORAM : G.S. KULKARNI, J.**

**DATE : 16<sup>th</sup> APRIL, 2019**

**JUDGMENT :**

1. This is an application under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (for short, “the ACA”) whereby the petitioner/original claimant inter-alia prays for a relief that the mandate of the arbitral tribunal (sole arbitrator) be terminated and a substitute arbitrator be appointed by the Court. The following are the prayers as made in the petition:-

“(a) That this Hon'ble Court be pleased to terminate the mandate of Arbitral Tribunal which was constituted on 26<sup>th</sup> September, 2018;

(b) That this Hon'ble Court be pleased to appoint some fit and proper person as an Arbitrator in substitution of earlier Arbitral Tribunal for resolving the disputes between the Petitioner and Respondent;

(c) The learned Arbitrator be directed to render accounts of the deposits received from the Petitioner and be further directed to return to the Petitioner

unexpended balance from the deposits already made by the Petitioner;

(d) That pending the hearing and disposal of the present Petition, the Arbitral Tribunal be restrained by an order and injunction of this Hon'ble Court from proceeding in the Arbitral proceedings.”

2. Disputes between the parties had arisen under an agreement dated 1 July 2016, whereunder the respondent agreed to sell precious metals to the petitioner. The disputes were referred for adjudication of a sole arbitrator as per the arbitration agreement entered between the parties and contained in clause 42 of the said agreement.

3. The case of the petitioner is that on the petitioner invoking the arbitration agreement by its Advocate's letter dated 7 August 2018, the respondent appointed a sole arbitrator who by his letter dated 11 September 2018 accepted the appointment. A disclosure as per requirement of Section 12(1) of the ACA was also made by the learned sole arbitrator and thereafter the learned sole arbitrator entered a reference. A preliminary meeting dated 26 September 2018 was held by the learned arbitrator in which the learned arbitrator fixed fees at the rate of Rs.50,000/- for reading and Rs.50,000/- per sitting which was consolidated fee for the 'claim' and the 'counter-claim' which was to be filed by the respondent and no separate fees were fixed for the counter-claim.

4. The parties proceeded to place on record of the arbitral tribunal, their respective pleadings which were completed sometime in January 2019. On 17 January 2019 the first hearing was fixed and the arbitrator undertook to mark the documents filed by the respective parties as referred in their respective pleadings, as also framed issues and issued directions to file evidence affidavits. The relevant extract of minutes of the meeting dated 17 January 2019 reads as under:-

“5) The Claimant and the Respondent are directed to file Affidavits in Evidence of all their respective witnesses within 4 weeks from today. All affidavits should be filed together with copies to the other side.

6) The next dates of hearing will be as under:-

(i) 27<sup>th</sup> February, 2019 from 11.30 a.m. to 5.30 p.m.

(ii) 28<sup>th</sup> February, 2019 from 11.30 a.m. to 5.30 p.m.

(iii) 1<sup>st</sup> March 2019 from 11.30 a.m. to 5.30 p.m.  
Each day will be considered as 2 Arbitration sessions per day i.e. 11.30 a.m. to 2.00 p.m. and 3.00 p.m. to 5.30 p.m.

7) Each of the parties had paid Arbitrator's fees of Rs.1,00,000/- each which has been adjusted as under:-  
Rs.50,000/- reading fees per party  
Rs.50,000/- for 2 hearings at Rs. 25,000/- each per party.

8) Both the Claimant and the Respondent are directed to pay a further fee of Rs. 1,50,000/- each to cover six sessions of Arbitration hearing as mentioned above. This should be done on or before 15<sup>th</sup> February, 2019.”

(emphasis supplied)

5. The case of the petitioner is that as per the above directions of the learned arbitrator, the petitioner deposited well in advance an amount of Rs.1,35,000/- (after deduction of TDS), towards the arbitrators fees

for arbitration hearings scheduled on 27, 28 February and 1 March 2019. However, it so happened that the Advocates for the petitioner by their e-mail dated 12 February 2019 inter-alia sought additional time for finalizing the affidavit of evidence and as the petitioner's witness was travelling abroad and was not available, requested the learned arbitrator for an extension of four weeks and accordingly to adjourn the proceedings fixed between 27 February to 1 March 2019. The learned arbitrator was also requested to pass further directions granting liberty to the petitioner to file its affidavit of evidence in the counter-claim.

6. The case of the petitioner is that the above request for extension of time was made well in advance much before the dates of the cross-examination fixed on 27 February 2019, 28 February 2019 and 1 March 2019 and for which dates of hearing, the arbitrator's fees were already deposited in advance by the petitioner.

7. The respondent's Advocate by an e-mail dated 12 February 2019 informed the learned arbitrator that the respondent would place its objection to this application of the petitioner. Accordingly respondent's reply dated 13 February 2019 (Exhibit-N, page 104) was forwarded to the learned arbitrator by e-mail dated 13 February 2019 at 13.38 IST whereby the respondent contended that the petitioner's application does

not contain any valid, justified or believable reasons for seeking such an extension. The respondent stating that the hearing dates being reserved well in advance, asserted that the application for extension of time as filed by the petitioner be rejected and costs be directed to be paid to the respondents.

8. It appears that the respondent did not dispute the petitioner's statement that the witness of the petitioner would be travelling abroad, and/or that the statement to that effect was a false statement.

9. The learned arbitrator considering the petitioner's application by an e-mail dated 13 February 2019 (13.38 IST) informed the parties that the revised schedule of the arbitral proceedings would be required to be fixed and for which the parties were directed to attend the office of the learned arbitrator on 22 February 2019 at 05.00 p.m. however, this was subject to what the learned arbitrator had recorded in paragraphs 2, 3 and 4 of the said e-mail which needs to be noted:-

“2. Please note that it was agreed by consent during the last hearing on 17.01.2019 that the time schedule for Arbitration would be strictly adhered to by the parties, it was for this reason that extended time of four weeks was given to the Claimants for filing of the Affidavits. The Affidavits in Evidence of the Claimant both in respect of claim and Counter Claim have to be filed together since this is treated as common Arbitration for both Claim and Counter Claim. Therefore Application of claimant to file Affidavits in counter Claim at a later stage is hereby

rejected.

3. Please further note that once the dates are fixed, it is difficult for me to cancel the entire schedule of 6 sessions fixed on 27<sup>th</sup> & 28<sup>th</sup> February, 2019 and 1<sup>st</sup> March, 2019 particularly when all three dates were fixed by consent. These dates and directions given should have been adhered to.

4. Normally I would have rejected the Application of PDS Legal both for delay in filing the Affidavits and for cancellation of hearings fixed for three full days and would have closed evidence of the Plaintiff altogether. However, as a special case, I will be re-fixing the dates with a direction to the Claimant to bear the entire cost of Arbitrator's fees for these three days. Accordingly, the Claimant is hereby directed to pay the entire fee of Rs.3 lakhs to the Arbitrator in lieu of cancellation of 6 sessions fixed on these days from 27<sup>th</sup> February, 2019 to 1<sup>st</sup> March, 2019. This should be paid within a week from today. The fee of Rs.1,50,000/- paid by each party will be adjusted against future hearings.”

(emphasis supplied)

10. The petitioner has a serious grievance in regard to the directions which are made in paragraph 4 of the said communication/order of the learned arbitrator and more particularly to the direction of the learned arbitrator whereby the petitioner is directed to pay the “entire cost of arbitrator's fees” of Rs.3 Lakhs to the arbitrator for cancellation of the sessions fixed on these dates from 27 February 2019 to 1 March 2019, to be deposited within one week from the said communication.

11. The grievance of the petitioner is that the learned arbitrator could not have directed “payment of cost as arbitrator's fees” and that too for all the three days of hearings as scheduled. The petitioner contends that

the direction was quite peculiar in as much as the fees for the said three hearings were deposited well in advance which were directed to be adjusted by the learned arbitrator for the future hearings. The case of the petitioner is that the direction of the learned arbitrator to the petitioner to bear the “entire costs” of the arbitration fees for the said three days was wholly arbitrary, unjustified and there was no question of the arbitrator being entitled to receive any costs from any party. The petitioner contends that as no hearing was to take place and no work would be undertaken the insistence of the learned arbitrator for fees to be paid by the petitioner for the proposed cancelled days was wholly unjustified, this more particularly when the fees for the said period were deposited by the petitioner with the arbitrator well in advance.

12. Thereafter on 22 February 2019 a meeting was held in the office of the learned arbitrator when the petitioner filed an application seeking leave to lead evidence on the counter-claim after the evidence of the respondent on all the issues was concluded. The respondent also made an oral application seeking leave to lead its evidence after the petitioner filed its evidence. In the said meeting, the learned arbitrator also informed the parties that the arbitral fee of Rs.1,50,000/- paid by each of the parties shall be adjusted against the first 6 sessions of hearings as may be fixed henceforth.

13. The petitioner's advocates thereafter by an e-mail dated 26 February 2019 addressed to the learned arbitrator recorded that the application seeking deferral of hearings fixed from 27 February 2019 to 1 March 2019 was made well in advance on 12 February 2019 and hence the petitioner cannot be made liable to pay the fees for the said dates as directed by the arbitral tribunal. The petitioner-claimant therefore expressed its inability to make payment of Rs.3,00,000/- as directed by the tribunal by e-mail dated 13 February 2019.

14. Thereafter the learned sole arbitrator passed an order titled as "arbitral order No.1" on 5 March 2019. In the said order, the learned arbitrator inter-alia observed that there was no justification of the petitioner's requesting for extension of time and for rescheduling of dates and it showed on the part of petitioner lack of intention to take arbitration process seriously. As the petitioner-claimant was not willing to pay the fees for the cancelled dates of hearing, the learned arbitrator suspended the arbitral proceedings in regard to the petitioner's claim with 'immediate effect' under Section 38(2) of the Act, however intended to proceed with the counter-claim. It would be appropriate to quote the relevant paragraphs as to what the learned arbitrator says in this order:-

“9. Despite the above, the Claimant was given a chance to pay the entire arbitral fee, on account of their unjustified request making everyone to cancel the 6 sessions of arbitral hearings fixed as far back as on 17<sup>th</sup> January 2019. However, in a cavalier fashion the Claimant has refused to even pay the arbitral fees (which are not in the nature of cost). In view of this attitude of the Claimant, I have no option but to suspend the arbitral proceeding as far as the Claimant's Claim is concerned under second proviso to Section 38(2) of the Act.”

10. ....

11. In the above circumstances I give my Ruling on the application made by the Claimant as under :

a) The Application for further extension of time and rescheduling of dates, as made by the Claimants is hereby rejected.

b) In view of the stand taken by the Claimant for not paying Arbitral Tribunal's fee for the cancelled 6 Arbitral sessions on account of their default, the Arbitral proceeding as far as the Claim is concerned stands suspended with immediate effect under Section 38(2) of the Arbitration and Conciliation Act, 1996.

c) As for the Counter Claim, the Respondent is directed to confirm whether they would be willing to carry on with the Counter Claim in which case further directions will be issued in the matter on the next date of hearing.

d) In case in future, the Claimant decide to pay the Arbitral Tribunal's fee stated above, their Claim will be taken up only after completing the Counter Claim.

e) Next hearing for giving further directions will be held at my office on Friday, 8<sup>th</sup> March 2019 at 5.00 p.m.”

(emphasis supplied)

15. On the backdrop of the arbitral order No.1 dated 5 March 2019 passed by the learned arbitrator, the Advocates for the petitioner addressed an e-mail dated 8 March 2019 to the learned arbitrator recording that the petitioner would like to examine the legality of arbitral order No.1 and requested to adjourn the meeting fixed on 8

March 2019. The meeting was accordingly adjourned to 19 March 2019 with a direction that the same shall not be cancelled or postponed.

16. It is in these circumstances the petitioner is before the Court in this application filed under Sections 14 and 15 of the ACA.

17. This Court considering the above facts and circumstances, by an order passed on 3 April 2019, directed the parties to appear before the arbitral tribunal and raise all contentions including on law, observing that the arbitral tribunal shall take into consideration all such contentions and after hearing both the parties, decide as to whether the same course of action would be required to be confirmed or otherwise.

The said order reads thus:-

*“1. Having perused the order dated 13 February 2019 passed by the learned Sole Arbitrator as also a communication dated 5 March 2019 and the order dated 5 March 2019 titled as “Arbitral Order No.1”, in my considered opinion, it would be appropriate for the petitioner to move the Arbitral Tribunal and raise all the contentions including on law, before the Arbitral Tribunal. The Arbitral Tribunal shall take these contentions into consideration and after hearing both the parties, decide as to 'whether the same course of action would be required to be continued or otherwise.'*

*2. Let this be undertaken within one week from today. Parties are permitted to immediately approach the arbitral tribunal on a day as may be mutually fixed by the learned Sole Arbitrator in consultation with the parties.*

*3. Stand over to 11 April 2019. High On Board.”*

18. Pursuant to the above order passed by this Court, the parties appeared before the learned sole arbitrator on 8 April 2019. The learned arbitrator passed an order, titled as arbitral order No.2 of 2019 and reduced the fee to be paid by the petitioner from Rs.3,00,000/- to Rs.1,50,000/- for the said cancelled dates of hearing. The learned arbitrator after discussing the issues raised on behalf of the parties, passed the following order dated 8 April 2019:-

“1. As per the directions given vide Order dated 3<sup>rd</sup> April, 2019 passed by His Lordship Mr. Justice G.S. Kulkarni in Commercial Arbitration Petition No.439 of 2019, the submissions of the parties were heard in detail.

2. Prior to the hearing, it was inquired with the Claimant's Counsel, whether the Claimant was willing to pay, at least, the Claimant's share of the Arbitrator's fee of Rs.1,50,000/-, as against Rs.3,00,000/- directed earlier, on account of cancellation of six sittings of Arbitration due to Claimant's default. This amounts to reduction of 50% in the Arbitrator's fee originally fixed with the consent of both the parties. However, the Claimant's Counsel Ms.Alpana Ghone, after taking instructions from her clients stated that the Claimant was not willing to pay any fee at all to the Arbitrator for cancelled hearings. The arguments of parties were heard thereafter.

3. Ms. Ghone, Ld. Counsel for Claimant submitted for complete waiver of Arbitrator's fee and strongly relied upon the Order dated 8<sup>th</sup> October, 2018 passed by His Lordship Mr. Justice S.J. Kathawalla in Arbitration Petition No.104 of 2018. The Counsel for, Respondent, Mr. Prateik Parijat responded that the said order of Hon'ble Justice S.J. Kathawalla, on the contrary, covers the issue of payment of Arbitrator's fees payable by the party seeking adjournment.

4. I have carefully re-considered the matter and in my opinion the said Order of the High Court of Bombay does not apply to the facts of the present case. In para 4 of the said order, it is categorically held that “The Learned Arbitrator is certainly entitled to his fees. Even if a party/parties seek/s and obtain

adjournment/s on the dates fixed for hearings, the Arbitrator/s may still insist that his/their fees or part thereof be paid”.

5. Apart from the above, the reasons given for seeking adjournment in the present case are not “grave”. The adjournment for cancellation of six sittings was sought only on the ground that the Claimant's witness was travelling abroad and was not available till 14<sup>th</sup> February, 2019, and therefore additional time was sought for finalising the Affidavit of Evidence.

Even if the Claimant's witness was travelling, incidentally (his name was not disclosed), the Claimant could have certainly filed Affidavits of Evidence of other witnesses who could have been examined on the dates fixed in advance. Even if the witness was travelling till 14<sup>th</sup> February, 2019, he could have signed his Affidavit later and could have even inter-posed with other witnesses. In any event by no stretch of imagination travel circumstances could be construed as “grave” and certainly a cost could have been imposed on Claimant under Section 24 of the Arbitration and Constitution Act, 1996. However, the Claimant was asked to pay only the Arbitrator's fees which was not in the nature of 'cost' as alleged by the Claimant.

6. In the above connection, I reproduce the following extract from para 4 of Honourable Justice S.J. Kathawalla's aforesaid order which is relevant to the present case:

“If the Learned Arbitrator is of the view that the party is seeking time without showing any grave circumstance, and is doing so only with a view to delay the matter, he has all the powers at his command to reject the Application seeking extension/adjournment, but cannot direct the party/ies to pay costs to him, which admittedly is not covered in the term 'fees', which he is entitled to charge”.

**Order :**

7. In view of the above, since the Claimant is not willing to pay even their own share of the Arbitrator's fee, I have no other option but to reject the application of the Claimant for reconsideration of the Arbitral Order No.1 dated 5<sup>th</sup> March, 2019 and for complete waiver of Arbitration fees. However, I may clarify that as and when the Claimant pays the Arbitrator's fee which stands reduced to Rs.1,50,000/- as stated

above, their claim in Arbitration would stand revived. Till that time, it would remain suspended u/s.38(2) of the Arbitration and Conciliation Act, 1996.”

19. It is on the above backdrop, I have heard learned Counsel for the parties.

20. Learned Counsel for the petitioner in support of the prayers would contend that it was totally unjustified for the learned arbitrator in his communication dated 13 February 2019 to direct the petitioner to pay the entire fee of Rs.3,00,000/- to the arbitrator in lieu of cancellation of the hearings for the three days from 27 February 2019 to 1 March 2019. It is submitted that it was an admitted position that for the said three hearings the petitioner had already deposited Rs.1,35,000/- (less 10% which was after deduction of TDS) which indicated the bonafides of the petitioner on payment of fees and the petitioner's seriousness to the arbitral proceedings, the petitioner itself being the claimant. It is submitted that these directions are nothing but in the nature of costs imposed by the learned arbitrator to be paid to him for adjournment, as clearly seen from the order/ communication of the learned arbitrator dated 13 February 2019, which is not a permissible course of action. It is further submitted that, however the same treatment has not been meted out in regard to the counter-claim of the respondent when there was no separate fees for the counter-claim. It is submitted that the

learned arbitrator ought not to have suspended the petitioner's claim by exercising power under Section 38(2) of the ACA.

21. Learned Counsel for the petitioner would submit that the suspension of the arbitration proceedings in the facts and circumstances of the case and for the reasons as set out in the arbitral order No.1 and arbitral order No.2 was totally unjustified and in fact considering the totality of the facts and circumstances would amount to a bias of the learned arbitrator. This more particularly for the reason that in regard to the counter-claim, no such order has been passed. It is submitted that it is quite clear that such a direction was nothing but in the nature of penalty on the petitioner, and are not fees but they are in fact costs imposed on the petitioner to be paid to the arbitrator. In support of the submission learned Counsel for the petitioner has placed reliance on the decision of learned Single Judge of Madras High Court in case of **Madras Fertilizers Limited, Manali, Chennai-600 068 Vs. SICGIL India Limited**<sup>1</sup> to contend that these are surely circumstances which would lead to loss of confidence attracting provisions of Section 14(1) (a) of the ACA and required to be held that the arbitral tribunal is *de jure* unable to perform its functions.

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<sup>1</sup> 2010(2) CTC 357

22. On the other hand, learned Counsel for the respondent would submit that the petition as filed under Section 14 and 15 of the ACA itself is not maintainable. It is submitted that both the conditions as contained in sub-section (1)(a) and (b) of Section 14 as also no ground under Section 15 is available so as to warrant exercise of jurisdiction by this Court under these provisions. It is further submitted that in pursuance of the order dated 3 April 2019 passed by this Court, the learned sole arbitrator has now reduced the fee to Rs.1,50,000/- to be paid by the petitioner for the cancelled hearing and thus, there is no cause, for any grievance to the petitioner and proceed with the arbitration. It is submitted that if the contentions as urged on behalf of the petitioner are accepted then every procedure would be a subject matter of challenge and this would completely hamper the faith of the parties in the arbitral proceedings as also this would preclude the arbitral tribunal from carrying out its function in a neutral way. It is thus submitted that the arbitral tribunal was justified in passing order No.1, as also order No.2, this more particularly, looking at the conduct of the petitioner in regard to a clear findings as recorded by the arbitral tribunal that the petitioner's application for adjournment and for cancellation of three sessions scheduled from 27 February 2019 to 1 March 2019 was not an acceptable application, for an adjournment. It is accordingly submitted that the petition be dismissed.

**Discussion and Conclusion:**

23. Having heard learned Counsel for the parties and having perused the documents as placed on record, at the outset, some admitted facts are required to be noted. There is no dispute whatsoever in regard to the deposit of the fee of Rs.1,35,000/- by the petitioner for the hearing which was scheduled by the learned sole arbitrator for three days namely 27 February 2019, 28 February 2019 and 1 March 2019. This amount was deposited by the petitioner with the learned arbitrator well in advance on 12 February 2019. It is also not in dispute that the petitioner for the reasons which are set out in the application/letter dated 12 February 2019 sought additional time for finalizing and filing of affidavit of evidence on the ground that the petitioner's witness was travelling and requested the learned arbitrator to pass further directions granting liberty to the petitioner to file its affidavit of evidence in the counter-claim only after the respondent files its evidence in the counter-claim. This nonetheless was opposed by the respondent which can be seen from the reply of the respondent's Advocate dated 13 February 2019. It clearly appears from the record that this reply/opposition on the part of respondent was not taken into consideration by the learned arbitrator when the e-mail dated 13 February 2019 came to be addressed by the learned arbitrator to the petitioner whereby the learned arbitrator recorded that it shall be fixing further dates, however

with a direction to the petitioner/claimant to bear the “*entire costs of arbitration fees*” for three days and accordingly, directed the petitioner to pay the “*entire fee*” of Rs.3,00,000/- to the sole arbitrator in lieu of cancellation of the sessions fixed for the said 3 days from 27 February 2019 to 1 March 2019 to be paid within one week from the said direction. This was coupled with a direction that Rs.1,50,000/- paid by each party shall be adjusted against future hearings. The petitioner by their Advocate's letter dated 26 February 2019 addressed to the learned arbitrator recorded that the petitioner cannot be made to pay the entire fees for the hearing scheduled on these dates as directed by the arbitral tribunal, and expressed the petitioner's inability to make payment of Rs.3,00,000/-. However, such request as made on behalf of the petitioner was rejected by the learned sole arbitrator in the arbitral order No.1 dated 5 March 2019. The learned arbitrator in paragraph 9 of the said order observed that the petitioner was given a chance to pay the entire arbitral fee, on account of the petitioner's unjustified request making everyone to cancel the 6 sessions of arbitral hearings fixed as far back as on 17<sup>th</sup> January 2019. It was recorded that in a cavalier fashion the petitioner had refused “to even pay” the arbitral fees (which are not in the nature of cost). The learned arbitrator observed that considering this attitude of the petitioner, there was no option but to suspend the arbitral proceeding as far as the petitioner's claim is concerned under

second proviso to Section 38(2) of the Act.

24. On the court in its order dated 3 April 2019 directing the parties to re-appear before the arbitral tribunal so that the directions of the arbitral tribunal can be re-considered, the learned arbitrator considering the issues passed arbitral order No.2 of 2019. Referring to the order of the learned Single Judge of this Court in the case of **Mody Dairy Versus Alfa Laval (India) Ltd.**<sup>2</sup> the learned arbitrator observed the course of action as adopted in his order/communication dated 13 February 2019 was the appropriate course of action and accordingly rejected the petitioner's application for re-consideration of the arbitral order dated 5 March 2019. The learned arbitrator however clarified that as and when the petitioner pays the arbitral fees as reduced to Rs.1,50,000/- the petitioner's claim would stand revived and till that time the same would be suspended under Section 38(2) of the ACA although the fee was a consolidated fee for the claim and the counter-claim, no such order was passed in regard to the counter-claim of the respondent.

25. On the above conspectus the question which falls for consideration is as to whether the order/communication dated 13 February 2019 read with arbitral order No.1 and arbitral order No.2 (supra) of the learned arbitrator would in any manner give rise to a

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2 Arbitration Petition No.104 of 2018 decided on 18.10.2018

circumstance that the learned sole arbitrator is *de jure* unable to perform his duty.

26. To aid the discussion, certain provisions of the ACA are required to be noted. Section 31(8) empowers an arbitral tribunal to fix cost of arbitration in accordance with the provisions of Section 31A of the ACA which provides for the “regime for costs”. Sub-section (1) of section 31A in clause (I) provides for “fees and expenses of the arbitrators”. On payment of costs, Section 31A as inserted by Act No.3 of 2016 with effect from 23 October 2015 is a code by itself. Sub-section (2) of Section 31A provides that if an arbitral tribunal decides to make an order as to payment of costs, the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or the arbitral tribunal may make a different order for reasons to be recorded in writing. Further under sub-section (3) in determining costs, an arbitral tribunal is required to take into consideration the circumstances as set out in sub-clauses (a) to (d) of sub-section (3). Another provision which needs to be noted is Section 38 which provides for 'deposits', which authorizes the arbitral tribunal to fix the amount of deposit or supplementary deposit as the case may be as an advance for the costs referred to in Sub-Section (8) of Section 31. The proviso to sub-section (1) provides that in the case of a counter-claim, the arbitral tribunal may

fix separate amount of deposit for the claim and the counter-claim. Proviso to sub-section (2) provides that where one party fails to pay his share of the deposit, the other party may pay that share. It further provides that where the other party also does not pay the aforesaid share as referred in proviso (1) in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or the counter-claim, as may case be.

27. At the outset, it needs to be observed that this is not a case where the petitioner has not paid fees of the learned arbitrator as fixed and agreed to be paid. In fact, the fees for the cancelled dates of hearing were deposited by the petitioner with the learned arbitrator well in advance on 12 February 2019. However, as the petitioner sought an adjournment of the proposed hearings to be held on three days (27 February 2019 to 1 March 2019), the learned arbitrator in his order/communication dated 13 February 2019 observed that “the entire costs of arbitrator's fees for three days shall be borned by the petitioner”. It is thus clear that what the arbitrator wanted to impose upon the petitioner, was cost for the adjournment the petitioner was seeking. How can there be cost to be paid to arbitrator under the garb of fees? In **Mody Dairy Versus Alfa Laval (India) Ltd.** (supra), learned Single

Judge of this Court in a context where an application was made for extension of time to file pleadings, it was held that costs are always payable to other side and certainly not to the learned arbitrator and what the learned arbitrator would be entitled is to his fees. However, in the present case, it is clear from the wordings of the said order/communication dated 13 February 2019 of the learned arbitrator, that what is imposed and what was being demanded was in fact cost for adjournment only from the petitioner, although termed as fees payable by both the parties for the said hearing.

28. It needs to be observed that no doubt arbitral tribunal forms part of alternative dispute resolution mechanism availed by consent of the parties, where the parties agree for payment of fees to the arbitrator, being an element of party autonomy, however, an arbitral tribunal is required to function as per the ACA and on judicial considerations, as it is an adjudicating body which would decide the rights of the parties in the proceedings before it. It is thus necessarily expected that the judicial elements of fairness, proportionality and objectivity are adhered and implemented by an arbitral tribunal so as to maintain the faith of the parties in the arbitral proceedings. Thus the orders which are passed by the arbitral tribunal are required to be based on a rationale and realistic considerations. It is for this reason the provisions of the Arbitration and Conciliation Act were amended by incorporating Section 31A by

amending Act No.23 of 2016 with effect from 23 October 2015. The basis for the amendment is the recommendation of the Law Commission of India in its 246<sup>th</sup> report. To introduce Section 31A in paragraphs 70, 71 and 72 the Law Commission commented as under:-

“70. Arbitration much less traditional adversarial dispute resolution, can be an expensive proposition. The savings of a party in avoiding payment of court fee, is usually offset by the other costs of arbitration – which include arbitrator's fees and expenses, institutional fees and expenses, fees and expenses in relation to lawyers, witnesses, venue, hearings etc. The potential for racking up significant costs justify a need for predictability and clarity in the rules relating to apportionment and recovery of such costs. The Commission believes that, as a rule it is just to allocate costs in a manner which reflects the parties' relative success and failure in the arbitration, unless special circumstances warrant an exception or the parties otherwise agree (only after the dispute has arisen between them).

71. The loser-pays rule logically follows, as a matter of law, from the very basis of deciding the underlying dispute in a particular manner; and as a matter of economic policy, provides economically efficient deterrence against frivolous conduct and furthers compliance with contractual obligations.

72. The Commission has, therefore sought comprehensive reforms to the prevailing costs regime applicable both to arbitrations as well as related litigation in Court by proposing section 6A to the Act, which expressly empowers arbitral tribunals and courts to award costs based on rational and realistic criterion. This provision furthers the spirit of the decision of the Supreme Court in Salem Advocate Bar Association v. Union of India, AIR 2005 SC 3353 and it is hoped and expected that Judges and arbitrators would take advantage of this robust provision, and explain the “rules of the game” to the parties early in the litigation so as to avoid frivolous and merit less litigation/arbitration.”

(emphasis supplied)

29. As noted above, as per the provisions of Section 31(8) of the ACA, the arbitral tribunal is expected to fix costs as per Section 31A. A plain reading of Section 31A clearly indicates that it provides for different facets on which costs can be fixed by the arbitral tribunal adhering to the general rule that the unsuccessful party shall be ordered to pay the costs of the successful party. Sub-section (3) of Section 31A provides that in determining the costs, the Court or tribunal shall have regard to all the circumstances.

30. This apart Section 38 which provides for deposits as an advance for the costs of arbitration as referred to in sub-section 8 of Section 31 which the arbitral tribunal expects will be incurred in respect of the claim submitted to it. There is a mechanism provided in sub-section 2 of Section 38. It is after such mechanism is put into operation and if only when it fails, the proceedings can be terminated under Section 38(2). It is to be noted that this statutory mechanism as provided under sub-section 2 was completely overlooked by the learned arbitrator, in suspending the arbitral proceedings only to terminate the claim of the petitioner and taking a decision that the counter-claim of the respondent can be proceeded with. Learned Counsel for the petitioner would thus be justified in referring to the decision of the learned Single Judge of Madras High Court in **Madras Fertilizers**

**Limited, Manali Vs. SICGIL India Limited** (supra). In paragraphs 23 and 24 of the said case, the following principles in the context of Section 14(1)(a) have been recognized:-

“23. The words used in Section 14(1)(a) is that the mandate of an Arbitrator shall terminate if he has become *de jure unable to perform his functions*. (emphasis supplied). It is true that the second respondent is ready to go ahead with the proceedings, but somehow, the proceedings got bogged down in the light of the controversy with regard to fixation of fees by the second respondent. The word 'Perform his functions' used in Section 14(1)(a) will simply performing his functions effectively without any bias and with full confidence of both the parties. Performing this functions does not simply going through the motion without instilling confidence in the minds of the parties.

24. Now, if the mandate is not terminated and the second respondent is permitted to continue with Arbitration proceedings, it will amount to forcing a higher fee on the petitioner which they are not capable of paying. Further, after these controversies, disputes, exchange of correspondences, etc. with regard to fixation of fee, if the second respondent continues the Arbitration proceedings, the petitioner may not be in a proper frame of mind to proceed with the arbitration before the second respondent. They will definitely have some doubt as to the conduct of the Arbitrator and this doubt would certainly lead to loss of confidence. Therefore, such an unpleasant situation is to be avoided in the best interest of the parties including the Arbitrator.”

(emphasis supplied)

31. I am in agreement with the above view of the learned Single Judge of the Madras High Court, that in the context of Section 14(1)(a) of the ACA, to ascertain as to whether an arbitral tribunal is *de jure* unable to perform its functions, would take within its ambit due

consideration to the fact as to whether the arbitral tribunal is functioning without any bias and confidence of the parties, which is very fundamental to such adjudication process. This more particularly for the reasons that an arbitral tribunal has all traits of a judicial dispensation involving vital elements of a fair and just adjudication of disputes, which include procedural fairness to the expectation of the parties who have reposed such confidence in the arbitral tribunal.

32. A perusal of the directions of the learned arbitrator as contained in e-mail dated 13 February 2019 undoubtedly has imposed the entire burden of costs referred as arbitral fees, on the petitioner for the hearings to be held for the three days (27 February, 28 February and 1 March 2019). It is quite clear that this approach has been adopted even before considering the reply of the respondent which is of the same date but which was later in time as can be seen from the timings of the e-mails. However, one would fail to understand the logic and the reason as to why the petitioner was saddled with entire costs of Rs.3,00,000/- before a reply of the respondent to be considered as section 38 sub-section (2) proviso would contemplate. Section 38(2) reads thus:-

“38(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties: Provided that where one party fails to pay his share of the deposit, the other party may pay that share: Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or

terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.”

33. Further it is pertinent that the petitioner had deposited in advance the arbitrator's fees for the said three days on 12 February 2019. This aspect, in my considered opinion is a matter of concern and also gives some credence and weight to the arguments as advanced on behalf of the petitioner of loss of confidence of the petitioner in the arbitral tribunal. This for the reason that the learned arbitrator was already secured by the petitioner for his fees for three sessions to be held between 27 February 2019 to 1 March 2019. What is peculiar is that the learned arbitrator adopted an approach, that on one hand, he would demand fees of Rs.3,00,000/- being the entire fees from the petitioner for the said three dates and on the other hand, intended to retain the fees of Rs.1,50,000/- already deposited for the said three hearings with him to be adjusted in the future hearings. In this direction, at the threshold, was it the intention of the arbitrator that the respondent in some manner would be compensated for the fees which the respondent would be required to bear for the three days which includes the fees also for the counter-claim ? This is something which is being reflected from peculiar approach of the learned arbitrator. The said direction of the learned arbitrator is not logical or a normal course which an arbitral tribunal would adopt. If the learned arbitrator was of the opinion that the petitioner's adjournment application was not bonafide then the

learned arbitrator could have imposed costs to be paid by the petitioner to the respondent as the provisions of the ACA would provide. It would have been normal as also natural to simplicitor observe that the fees which are deposited by the parties would be appropriated for the cancelled hearing and call upon the parties to deposit the further fees for the future hearing. However, the learned arbitrator has acted in reverse manner and for the reasons which are totally unknown and which are definitely not reflected in the order but implicit in the orders of the learned arbitrator. This also for the reason that the arbitrator has remained consistent with this approach which is clear from the arbitral order No.1 dated 5 March 2019 and arbitral order No.2 dated 9 April 2019. Thus it needs to be observed that this has certainly created reasonable doubts in the mind of the petitioner in regard to the fairness of the arbitral proceedings. The learned arbitrator has given a complete go-bye to the provisions of Section 31(8) read with Section 31A and Section 38 sub-section (2) read with its both provisos and which provisions are a code by itself as far as costs are concerned. There is much substance in the case as advanced on behalf of the petitioner that the continuation of the arbitral proceedings by the same arbitral tribunal is thus harmful to the interest of the parties to the arbitral proceedings. I am therefore inclined to accept the submission of the learned Counsel for the petitioner referring to the decision of the learned single

Judge of Madras High Court that all these circumstances definitely would lead to a conclusion that there is loss of confidence of the petitioner in the arbitral proceedings and consequently this is a sufficient circumstance for the Court to exercise jurisdiction under Section 14(1)(a) of the ACA to hold that the arbitral tribunal is *de jure* unable to perform its functions.

34. In any event in my opinion, it is not a case where the arbitral tribunal could suspend the proceedings. This was totally uncalled for. It also needs to be noted that in the decision of the learned Single Judge of this Court in **Mody Dairy Versus Alfa Laval (India) Ltd.** (supra) learned single Judge has observed that though the arbitral tribunal would be within its jurisdiction to insist on fees for adjournment however the arbitrator cannot direct a party to pay costs to him. From the tenor of the order dated 13 February 2019 as confirmed by the subsequent orders of the arbitral tribunal though the learned arbitrator now says that the saddling of the fees on the petitioner is not imposition of cost but the arbitral fees, the circumstances however would require such imposition to be held as costs saddled by the arbitral tribunal to be paid to it. This was thus completely an abnormal course of action.

35. There is another aspect which cannot miss the attention of the Court namely that it was not the grievance of the respondent that the

petitioner was habitual in seeking adjournments and in the past the arbitrator was required to cancel hearings. There has to be a reasonable flexibility in the arbitral procedure. There cannot be absolute rigidity in the procedural elements even in arbitration. It is trite law that bonafide adjournments are required to be allowed, they are allowed by Courts of law which are overburdened who as a matter of judicial policy would not favour adjournments so that early justice is dispensed to the parties who are before the Court. However there is proportionality, reasonableness and rationale in the approach the Courts would adopt. The obligation on an arbitral tribunal within the frame work of the ACA would also attract adherence to these principles so as to maintain the confidence of the parties in the arbitral process.

36. In view of the above discussion, the contentions as urged on behalf of the respondent cannot be accepted. In the facts and circumstances of the case, there are clear grounds to terminate the mandate of the arbitral tribunal under Section 14 of the ACA and appoint a substitute arbitrator. As observed in the foregoing paragraphs, it is quite clear that the learned arbitrator wanted to impose costs on the petitioner for the petitioner's seeking adjournment of arbitration hearings scheduled on 27, 28 February and 1 March 2019, however it is in the nature of fees to be paid to the learned arbitrator, as clearly seen from the directions as contained in the

learned arbitrator's e-mail dated 13 February 2019. The reasoning of the learned arbitrator that the petitioner (who is itself a claimant) was interested in delaying the proceedings, and therefore is liable to pay the fees for the cancelled dates of hearing is also totally untenable as there was no factual basis to support such observation. In fact such observation of the arbitrator clearly indicates an inherent bias on the part of the arbitrator against the petitioner resulting into petitioner's loss of confidence in the arbitral tribunal. Learned Counsel for the respondent, therefore would not be correct in his contention, that the conduct of the petitioner to delay the proceedings was sufficient to saddle fees of the arbitrator on the petitioner. The learned arbitrator reducing the fee from Rs.3,00,000/- to Rs.1,50,000/- in the arbitral order No.2, passed in pursuance of the orders of this Court would also not change the position, considering the peculiar approach adopted by the arbitrator to adjust the already paid fees to be utilized for the future hearings, while demanding fresh fees from the petitioner, for the cancelled hearings. This approach was also contrary to the proviso to Sub-Section (2) of Section 38 of the ACA in the learned arbitrator suspending the arbitral proceedings, only qua the petitioner's claim. If the totality of the circumstances is taken into consideration, it is certainly a case whereby it can be said that the petitioner has lost confidence in the arbitral tribunal [see **Madras Fertilizers Limited,**

**Manali Vs. SICGIL India Limited** (supra)].

37. Thus in the approach as adopted by the learned arbitrator, in my considered opinion all the essential requirements falling within Section 14(1)(a) of the ACA are present, namely for the above reasons the arbitrator becoming *de jure* unable to perform his function, and for these reasons has failed to act without undue delay, by suspending the proceedings. These are sufficient grounds for this Court to exercise jurisdiction under Section 14 read with Section 15 of the ACA and grant the prayers as made by the petitioner.

38. In the light of the above observations, the petition needs to succeed. It is accordingly declared that the mandate of the learned arbitral tribunal as constituted on 26 September 2018 stands terminated as the learned arbitrator is *de jure* unable to perform his functions. Hence, the following order:-

**ORDER**

- (i) Mr.Karl Shroff, Advocate of this Court is appointed as a prospective substitute arbitrator to adjudicate the disputes and differences between the parties under the agreement for purchase of precious metals dated 1 July 2016;
- (ii) The learned substitute arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration

and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this petition with a copy to be forwarded to both the parties;

(iii) The learned sole arbitrator as constituted on 26 September 2018 is directed to render the accounts of the deposits received from the petitioner and return to the parties any amount which has remained unexpended;

(iv) The learned prospective arbitrator shall continue the proceeding from the stage as reached by the erstwhile arbitral tribunal;

(v) All contentions of the parties on merits of the disputes are expressly kept open;

(vi) The petition is accordingly allowed in the above terms. No costs.

(vii) Office to forward a copy of this order to the learned Arbitrator on the following address:

“316, Commerce House, Opp. Kala Ghoda Cafe, Fort, Mumbai.”

39. At this stage, Mr.Parija, learned Counsel for the respondent seeks stay of this order. Considering the facts of the case, the request is rejected.

**[G.S. KULKARNI, J.]**