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

Judgment reserved on: 12.11.2018
Judgment pronounced on: 20.02.2019

+ O.M.P.(T) 13/2017

SHUSHILA KUMARI & ANR. Petitioners
Through: Ms. Vivya Nagpal, Adv.
versus

BHAYANA BUILDERS PRIVATE LIMITED Respondent
Through: Mr. Satvik Varma with Ms. Meghna
Misra, Mr. Tanveer Oberoi, Mr.
Nipun Gautam, Mr. Udit Chauhan,
Ms. Avshreya Rudy and Mr.
Yashvardhan Bandi, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
RAJIV SHAKDHER, J.

Prefatory facts

1. This is a petition filed under Section 14 and 15 of the Arbitration and Conciliation Act, 1996 (in short "1996 Act"). The substantive prayers made in the petition are :-

(a) to appoint a Substitute Arbitrator in the matter

(b) fix a consolidated amount payable towards Arbitrator's fee.

(c) In addition thereto, the usual residuary prayer has been made which is to pass any other order that may be deemed fit and appropriate in the instant case.

2. The petitioners' grievance, principally, emanates from the order dated 14.07.2017, passed by the learned Arbitrator, whereby he has terminated the arbitration proceedings. Since, the order passed by the learned Arbitrator is brief, the same is extracted hereafter:-

“ It is noted that the status as regard to the non-valuation of the claim by the Claimant remains the same despite specific observations made by this Tribunal on 12.4.2017 that the reliefs which are sought by the Claimant are certainly quantifiable but had not been quantified by the Claimant. Before the Ld. Coordinator also, the Ld. Counsel of the Claimant has maintained and declined to quantify the claim, which according to the Ld. Coordinator are also quantifiable, having regard to the reliefs particularly the one under Clause-18(a).

Even today on being asked, Ld. Counsel for the Claimant maintains that she cannot quantify the valuation of the claim, which is apparently unfair on the part of the Claimant. Having regard to the conduct of Ld. Counsel for the Claimant as observed by the undersigned as also by the Ld. Coordinator, I have no other option except to terminate the proceedings. Accordingly, the proceedings stand terminated.”

3. As would be evident upon a perusal of the order passed by the learned Arbitrator dated 14.07.2017, the arbitration proceedings came to be terminated in view of the failure of the petitioners (who are the original claimants), in valuing their claims. In this behalf, the learned Arbitrator, in his order dated 14.07.2017, referred to his earlier order dated 12.04.2017.

4. According to the learned Arbitrator, the claims are quantifiable. In this behalf, the learned Arbitrator has also adverted to the fact that the Coordinator of the Delhi International Arbitration Centre (in short “DIAC”), apparently, was also of the same view.

5. This, in fact, is at the heart of the dispute obtaining between the parties before me. Therefore, in order to adjudicate upon the instant petition, the following broad facts are required to be noticed.

5.1 The petitioner had approached this Court via Arb. Petition No. 390/2012 for appointment of an Arbitrator. This petition was filed under Section 11(6) of the 1996 Act.

5.2 This Court recognizing the fact that a valid Collaboration Agreement dated 12.11.1981 (in short “C.A.”) obtained between the parties which, in turn in clause 24, incorporated the arbitration agreement proceeded to appoint an Arbitrator after the counsel for the respondent had indicated, *inter alia*, that the objections with regard to limitation and lack of cause of action would be raised in the arbitration proceeding. Resultantly, the Court appointed an Arbitrator and also directed that the arbitration proceedings will be held under the aegis of DIAC.

5.3 It may be relevant to note that at this stage, the C.A. was executed between, one, Dr. Karni Singh (predecessor-in-interest of the petitioners) and the respondent with regard to construction of a Multi Storied Building on the plot owned by Dr. Karni Singh, which is situate at 10 A, Prithviraj Road, New Delhi.

5.4 Thereafter, it appears, Dr. Karni Singh and the respondent entered into a Supplementary Agreement dated 10.06.1985 (in short “S.A.”), apparently, on account of the fact that the Government of India had directed construction of a Group Housing Complex (“subject complex”) on the aforementioned parcel of land.

5.5 The petitioners claim that under the S.A., it was agreed that their predecessor-in-interest i.e. Dr. Karni Singh, would be the full and absolute owner of one-third of the entire covered and uncovered area of the said structure built on the land which included all common areas such as landing places, staircase, lobbies, entrances, liftwell, lift machine, the lift cage, open or covered parking spaces, servants quarters, pump houses etc.

5.6 It is also the petitioners’ stand that under Clause 10 of the S.A., their predecessor-in-interest had the first right to select the basement, garages and

parking spaces whether open or covered which fell within the one-third area allocated to him.

5.7 Likewise, it is contended that under Clause 22 of the S.A., their predecessor-in-interest would have the first option to select one-third of each facility such as garages, out-houses, the basement, if any, and the covered or open parking space etc. which obtained within the area allocated to him.

5.8 The petitioners took the stand that under Clause 24 of the S.A., the respondent was required to form and register a Co-operative Housing Society and/or a Company or an Association.

5.9 In addition, thereto, reference was also made to Clause 25 and 26 of the S.A. based on which it is contended that while the respondent could sell, transfer or dispose of a part or parts of structure or structures which might be erected by it, the same had to have the approval of their predecessor-in-interest.

5.10 There is, in fact, reference to the Second schedule of the S.A. as well. Based on the provisions of Second Schedule of the S.A., it is contended that the garden or a portion thereof was usable by all flat owners.

5.11 Evidently, Dr. Karni Singh passed away on 06.09.1988. The petitioners' grievance which is based on the stand adverted to hereinabove by me appears to have remained unaddressed.

6. It is in this background that the petitioners in the first round, as indicated above, approached this Court for the appointment of an Arbitrator.

7. The petitioners, thereafter, filed their Statement of Claim (SOC) on 03.03.2016.

8. On 09.03.2016, DIAC sent a mail to the petitioners informing them that their claims had not been quantified. Accordingly, via the very same communication, the petitioners were directed to quantify their claims within a period of one week so as to enable the assessment of the fee payable to the Arbitrator.

9. In response to the said communication, the petitioners' Advocate informed the Coordinator vide letter dated 21.03.2016, DIAC that a sum of Rs. 17,500/- had been deposited towards part payment of the Arbitrator's fee which stood credited to DIAC's account on 15.03.2016.

10. Two days later (i.e. on 23.03.2016) DIAC wrote to the petitioners' Advocate that their SOC had been processed and that the same had been dispatched to the respondent to seek its reply.

11. It appears that thereafter, a meeting was held on 31.05.2016 on the aspect of quantification of claims and determination of fee. This aspect is recorded in DIAC's e-mail dated 31.05.2016 to the petitioners wherein DIAC indicated to the petitioners that till further view is taken, the arbitrator's fee qua the claims lodged by the petitioners would be pegged at Rs. 35,000/-. It was, however, made clear that the said fee was calculated on a tentative basis taking into account the minimum fee payable in a case and that the said determination would be subject to any contrary view that may be subsequently taken by the learned Arbitrator/the Chairperson, DIAC.

12. It appears that the matter which was listed before the learned Arbitrator for hearing on 22.08.2016 had to be adjourned in view of his illness.

13. The respondent, however, on 24.08.2016 filed its reply to the SOC. In response, thereto, the petitioners filed their rejoinder on 06.09.2016.

14. On account of the demise of the Arbitrator appointed by this Court, the petitioners, evidently, moved this Court for appointment of a substitute Arbitrator. The Court acceded to the request and appointed a substitute Arbitrator. Though, the order appointing the substitute Arbitrator is not on record, there is no dispute raised before me that such an application was moved on which an order was obtained by the petitioners.

15. In the proceedings held on 04.03.2017, the substitute Arbitrator, *inter alia*, noted that the case was at the stage of admission/denial of documents and framing of issues.

16. Insofar as the matter concerning fee was concerned, in the order dated 04.03.2017, the following observations were made:-

“...The Centre has reported that the arbitral fee payable could not be assessed as the amount of reliefs sought could not be quantified. Shri Nikhil Chopra, Ld. Coordinator and Ms. Shivani Sinha, Advisory Counsel have been informed and advised to do the needful by intimating the requisite arbitral fee and administrative expenses to the parties within a week so as to enable them to fulfil their obligations at the earliest...”

17. The matter was thereafter taken up by the learned Arbitrator on 12.04.2017. On that date, the learned Arbitrator passed the following order:-

“As per the last proceedings the matter was fixed for today for left over admission/ denial, if any and for framing of issues and to decide about the future cause of action. It is stated by Ld. Counsel for the Claimant that Claimant has not filed rejoinder to the Respondent's statement of defence. It is also pointed by Ld. Coordinator Sh. Nikhil Chopra, that the Claimant was called upon to value the claim as set up in the claim petition, the Claimant has stated that the requisite arbitral fee on the relief has already been deposited, and now on their part, no further fee is required to be paid. On being asked the Ld. Counsel for

the Claimant has again maintained that the relieve as claimed cannot be quantified and, therefore, no further arbitral fee or the expenses are going to be. On going through the claims as set up by the Claimant in the presence of the ld. Counsel for the parties as also ld. Coordinator, I am of the considered view that the Claimant has cleverly drafted the petition, thereby ultimately seeking reliefs which can be definitely quantified.

At this stage, Ld. Counsel for the Claimant requests that the matter be put up before the ld. Coordinator where she can work out and quantify the claim and do the necessary amendments.

The matter will now be taken by the Ld. Coordinator on 06.05.2017 at 3pm. Both the counsels are directed to appear before ld. Coordinator for the above purpose.

Matter be listed before the undersigned after the needful is done by the Claimant as per the rules and provisions of law.”

18. There is nothing on record to suggest as to why the matter was not taken up on 06.05.2017 by the learned Coordinator, DIAC, as indicated in the order of the learned Arbitrator dated 12.04.2017.

19. Suffice it to say that the learned Coordinator took up the matter for assessment of fee on 17.05.2017.

20. The learned Coordinator after extracting the various reliefs claimed by the petitioners observed that since one of the reliefs i.e. relief set out in para 18(a) of the SOC was for possession of immovable property, the same was quantifiable; an aspect which was also averred to by the learned Arbitrator in his order dated 12.04.2017. The learned Coordinator went on to observe that since the market value of the property was not ascertainable from the record, the circle rate could be applied for quantification in order to proceed further in the matter.

20.1 Having said so, it was observed by the learned Coordinator that even the information with respect to circle rate which would be applicable to the subject property was not available on record.

21. Since the counsel for the respondent sought time to obtain appropriate instructions from her client, the matter was adjourned to 29.05.2017.

22. The parties, however, were given a final opportunity to file documents which would enable quantification/valuation of the reliefs.

23. On 29.05.2017, the learned Coordinator took up the matter once again. A perusal of the proceedings of 29.05.2017, shows that the counsel for the petitioners took the stand that she had no further documents to file in the matter.

24. Likewise, the counsel for the respondent indicated to the learned Coordinator that it was for the petitioners (i.e. the claimants) to provide valuation and that he had no instructions as regards valuation of the subject property.

25. The learned Coordinator after noting the stand of the counsel for the petitioners that she would move an application before the Court for determination of the Arbitrator's fee, also went on to record that both parties had indicated that it would be desirable to list the matter before the learned Arbitrator for further directions.

26. It is in this background that, when, the matter was listed before the learned Arbitrator on 14.07.2017, he proceeded to terminate the Arbitration proceedings.

27. Given this backdrop, the petitioners lodged the instant petition on 20.11.2017. Notice in this petition was issued on 04.12.2017. On the next date i.e. 24.01.2018, the matter was adjourned to 09.04.2018, whereupon,

the next substantive hearing was held on 09.10.2018. On that date, counsel for the respondent had sought accommodation to take instructions in the matter.

28. Consequently, the matter was renotified on 12.11.2018. The respondent, however, was given liberty to file a reply in the matter.

29. On 12.11.2018, learned counsel for the respondent, on instructions, submitted that he would argue the matter without filing a reply.

30. Accordingly, submissions were heard and the matter was reserved for judgment. Counsel for the parties, however, were given time to file their written submissions in the matter.

31. Thus, while there is no reply filed in the matter on behalf of the respondent, written submissions have been filed. These written submissions were lying in defect and which have been secured by me in order to render a judgment in the matter.

32. To be noted, the petitioners, on their part, have also filed their written submissions in the matter.

Submissions of Counsel

33. Arguments on behalf of the petitioners were advanced by Ms. Vivya Nagpal, while those on behalf of the respondent were made by Mr. Satvik Varma.

34. Counsel for the petitioners, broadly, contended as follows:-

34.1. That the claim made in the SOC was a non-monetary claim seeking specific performance of the C.A. and S.A. The petitioners had essentially sought the relief of identifying, earmarking and handing over of one-third of the total covered and uncovered area of the subject complex.

34.2. The petitioners, at the time of filing of the SOC, had paid a fee of Rs. 17,500/- and, thereafter, paid another tranche of Rs. 17,500/- once they were conveyed by the DIAC that the total minimum fee payable was a sum of Rs. 35,000/-.

34.3. As a matter of fact, despite the petitioners being informed that they had to pay only 50% of Rs. 35,000/- which was the minimum total fee payable in the matter, they did not seek refund of the excess fee of Rs. 17,500/- deposited with the DIAC.

34.4. Though, the matter was fixed for admission/denial of documents before the substitute Arbitrator, the issue of determination of arbitral fee got taken up at the hearing held on 04.03.2017.

34.5. As per the directions of the learned Arbitrator, the learned Coordinator, DIAC, took up the matter for determination of fee on 17.05.2017 and 29.05.2017. However, since both parties were unable to provide the necessary inputs for ascertainment of fee payable in the matter, the petitioners indicated to the learned Coordinator that they would be moving the Court for determination of the Arbitrator's fee. Given this circumstance, the learned Arbitrator had wrongly terminated the Arbitration proceedings vide order dated 14.07.2017.

34.6 The observations made by the learned Coordinator in the proceedings held on 17.05.2017 and by the learned Arbitrator in the order dated 14.07.2017 that the Arbitral fee could be determined by the valuing the reliefs based on application of prevailing circle rate were flawed, for the reason that the petitioners do not claim possession of any portion of the property. The petitioners, merely seek identification, earmarking and handing over of one-third of the total covered and uncovered portions of the subject complex.

34.7. In any event, the petitioners would be willing to pay the fee as as may be deemed fit and proper by this Court.

35. On the other hand, Mr. Varma brought to the fore a whole host of objections which can be, broadly, paraphrased as follows:-

(i) The claims raised by the petitioners were hopelessly time barred. The Cause of action, if any, arose 22 years ago.

(ii) The petitioners are, in fact, seeking relief of possession by seeking delineation of their one-third share in the subject complex. Valuation of the claims was necessary in order to determine what should be the Arbitrator's fee.

(ii)(a) Upon the appointment of the substitute Arbitrator several opportunities both by him and the learned Coordinator were given to the petitioners to quantify their claims so that fee could be calculated as per the rules applicable to the arbitration proceedings conducted under the aegis of DIAC. In this behalf, reference was made to the proceedings held before the learned Arbitrator on 12.04.2017 and 14.07.2017 as also to the proceedings held before the learned Coordinator on 17.05.2017 and 29.05.2017.

(iii) There can be no *ad hoc* determination of fee, since the proceedings were held under the aegis of DIAC. Valuation of claims has to be made by the petitioners in order to enable assessment of the Arbitrator's fee. This Court under Section 15 of the 1996 Act cannot determine the fee that ought to be paid to the Arbitrator.

(iv) Even if one were to assume that this Court could apply the provisions of the Fourth Schedule of the 1996 Act, it would still be imperative to value the claims. Since the petitioners have made no such valuation, the relief set forth by them under prayer clause (b) cannot be granted.

(v) The amendment with respect to fee brought about by the DIAC in 2018 which factors in a situation where the claims cannot be valued in

pecuniary terms requires the Coordinator to assess and demand the fee and decide the objections, if any, relating to the quantification or valuation of claims. In this behalf, reference was made to the third Proviso appended to Rule 3(ii)¹ of the DIAC (Administrative Costs & Arbitrators' Fees) Rules, 2018 (in short the "DIAC (Fee) Rules, 2018").

(vi) No relief under Section 15 of the 1996 Act can be granted in a case involving termination of arbitration proceedings. The power to terminate the proceedings is available to the Arbitrator under Section 32 of the 1996 Act. Section 15 of the 1996 Act can be invoked and substitution can be sought only where the mandate of the arbitrator has been terminated and not in a case where arbitration proceedings have been terminated.

(vii) The petitioners have wrongly claimed that they moved the petition under Section 14 and 15 of the 1996 Act. The petition, in fact, has been filed only under Section 15 of the 1996 Act.

(viii) Even if it is assumed that the instant petition is filed under Section 14(2) of the 1996 Act, this Court, would still have no jurisdiction to deal with the matter, in view of the petitioners failure to value their claim. For this Court to entertain the instant petition, it would have to conclude that the reliefs claimed have a value of Rs.2 crores or more as otherwise it would not have the pecuniary jurisdiction to deal with the matter, in view of the fact that the arbitration proceedings have been terminated due to non-valuation of their claims by the petitioners.

¹ 3. Arbitrators' Fees –

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(ii) The fee shall be determined and assessed on the aggregate amount of the claim(s) and counter claim(s).

PROVIDED that in the event of failure of party to arbitration to pay its share as determined by the centre, on the aggregation of claim(s) and counter claim(s), the Centre may assess the claim(s) and counter claim(s) separately and demand the same from the parties concerned.

PROVIDED further that for the purposes of valuation or quantification of the Claims, the Centre shall be governed by the laws of India, and the principles governing the valuation of claim before the Courts of Civil Jurisdiction.

PROVIDED further that in the case of undervaluation or where the value is not determinable in pecuniary terms, the Co-ordinator would be entitled to assess and demand the revised fee on the basis of assessment and to decide the objections, if any, relating to the quantification or valuation.

(ix) This Court should evaluate the conduct of the petitioners and in exercise of its power under Section 31A of the 1996 Act impose requisite costs on them.

35.1 In support of his submissions, learned counsel for the respondent relied upon the following judgments:-

(i) *Lalitkumar V. Sanghvi (Dead) through LRs Neeta Lalit Kumar Sanghavi and Another Vs Dharamdas V. Sanghvi and Others*, (2014) 7 SCC 255.

(ii) *Gangotri Enterprises Limited Vs. NTPC Tamil Nadu Energy Company Limited*, (2017) SCC Online Del 6560

Reasons

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

37. As indicated right at the beginning, the petitioners have approached this Court on account of the learned Arbitrator terminating the arbitration proceedings for the reason that they had failed to value their claims and thus disabled the DIAC from assessing the fee payable by the parties qua the arbitration proceedings.

38. What has, however, unequivocally emerged from the record is the following:-

(i) That the petitioners did pay a sum of Rs. 17,500/- at the time of lodging the SOC with the DIAC.

(ii) The petitioners were conveyed by the DIAC, *albeit*, tentatively that fee qua the arbitration proceedings had been assessed at Rs. 35,000/- which was the fee payable for claims of a value of Rs. 5,00,000/- and less.

(ii)(a) This aspect was communicated to the petitioners by the DIAC via e-mail dated 31.05.2016. In this e-mail, it was also indicated to the petitioners that the Arbitrator's fee which was pegged at Rs. 35,000/- was subject to a

contrary view being taken by the DIAC, the Arbitrator or the Chairperson of DIAC.

(iii). The record shows that upon the demise of the Arbitrator appointed by this Court via order dated 17.12.2015, the issue of fee came up before the substitute Arbitrator (who evidently was also appointed by this Court) at the proceedings held on 04.03.2017.

(iii)(a) On that date, upon the substitute Arbitrator being informed that the Arbitrator's fee could not be assessed as claims had not been quantified by the petitioners, directed the Coordinator and the Advisory Counsel of the DIAC to take necessary steps in the matter.

(iii)(b) Pertinently, the learned Arbitrator, in the very same order, also noticed that the matter was positioned at the stage of admission/denial of documents and for framing of issues.

(iv) Thereafter, the matter came up before the learned substitute Arbitrator on 12.04.2017, whereat, the learned Arbitrator, *inter alia*, observed that though the petitioners had drafted the SOC cleverly, the reliefs claimed therein could be quantified. Furthermore, upon petitioner's counsel conveying that the matter be placed before the learned Coordinator, DIAC for working out and quantifying claims and to carry out necessary amendments, the learned Arbitrator directed the counsel for the parties to appear before the Coordinator for the said purpose on 06.05.2017.

(v) The proceedings before the Coordinator thereupon got taken up on 17.05.2017 and 29.05.2017.

(vi) The Coordinator ultimately, *albeit*, after noting that the quantification could be carried out based on the prevailing circle rate of the subject properly placed the matter before the learned Arbitrator.

39. It is in this background that the learned Arbitrator passed the order dated 14.07.2017 terminating the arbitration proceedings.

40. However, what was missed, to my mind, by the learned Arbitrator was the fact that in the proceedings held before the learned Coordinator, on 29.05.2017, counsel for the petitioners had indicated that they may have to move the Court for fixing the fee in the matter.

40.1 After noting this stand advanced by the counsel for the petitioners, the learned Coordinator went on to observe in the very same proceedings that the parties desired that the matter be placed before the learned Arbitrator. Clearly, in so far as the petitioners were concerned, as regards determination of fee that would have to be paid, the petitioners wanted to approach the Court.

40.2 As to whether such an avenue, at the relevant time, was open to the petitioners in law is something that need not be answered as after the amendment brought as out in the 1996 Act with effect from 23.10.2015, Section 31A has been inserted which gives the jurisdiction both to the Court as well as the Arbitral Tribunal to, *inter alia*, determine the matters with regard to the quantification of cost which among other ingredients includes fee and expenses payable to the arbitrators.

41. In the regime, as obtaining prior to the insertion of Section 31A in the 1996 Act, the fees in case of *ad hoc* arbitrations were fixed by the Arbitral Tribunal, *albeit*, with the consent of the parties and in case of institutional arbitrations by taking recourse to the rules framed in that behalf.

42. Since this was the case of an institutional arbitration, the fee could have been fixed, *inter alia*, by taking recourse to the, then prevailing DIAC Rules.

43. Admittedly, at the relevant time, the DIAC Rules did not provide for fixation of fee where value of claims was not determinable in pecuniary terms.

44. This lacuna has however been got over by incorporating the necessary provision in the DIAC (Fee) Rules, 2018.

45. The provision, in such situations, authorizes the Coordinator to assess the fee where the value is not determinable in pecuniary terms. This provision has been made in the proviso appended to Rule 3(ii) of the DIAC (Fee) Rules, 2018.

46. Since fixing of fee, in my view, is a procedural matter, the DIAC (Fee) Rules, 2018 can be taken recourse to and the Arbitrator's fee can be fixed even where the claims are incapable of valuation.

47. Besides this, for the same reason, I could also, perhaps, take recourse to the provisions of Section 31A of the 1996 Act.

48. However, before I proceed further, I must deal with the objections raised on behalf of the respondent with regard to the reliefs sought in the petition.

48.1 The first and foremost objection that has been raised on behalf the respondent is that the instant petition having been filed under Section 15 of the 1996 Act is not maintainable as the said section comes into play only when the Arbitrator's mandate is terminated and not when arbitration proceedings are terminated.

48.2. Secondly, even if it is assumed that that petition has been filed under Section 14(2) of the 1996 Act, this Court would have jurisdiction to deal with the matter only if it comes to the conclusion that the claims raised have pecuniary value of not less than Rs.2 crores.

48.3. Third, no relief under Section 14(2) could be granted as the instant petition has been filed under Section 15 of the 1996 Act.

49. Let me answer the last objection first as it relates to facts which emanate from the record of case filed before the Court:-

49.1 A bare perusal of the captioned proceedings along with index filed would show that it has been filed both under Section 14 and 15 of the 1996 Act.

49.2. I may, however, note that the reference to Section 14 has been made by hand and that is, perhaps, the reason why the copy which the respondent has been served with does not bear that insertion. The petition placed before me bears reference to both Section 14 and 15 of the 1996 Act.

49.3 That being said, Mr. Varma is right in contending that both these provisions speak about termination of mandate of an Arbitrator and not about termination of the Arbitration proceedings. This Contention of Mr. Varma pertains to the first objection noted hereinabove.

50. Section 14 of the 1996 Act states that the mandate of an Arbitrator stands terminated upon occurrence of circumstances provided therein. The Section goes on to state that upon termination of mandate of the Arbitrator, he can be substituted by another Arbitrator.

50.1 As to circumstances in which Arbitrator's mandate shall stand terminated, the Section provides that it shall stand terminated, firstly, when the arbitrator *de jure* or *de facto* is unable to perform his function or for any other reasons fails to act without undue delay and secondly, when, he withdraws from his office, the parties agree to the termination of his mandate.

50.2 These provisions are made in Clauses (a) and (b) of Subsection (1) of Section 14.

50.3 Insofar as the circumstance as provided in Clause (a) of Subsection (1) is concerned, Subsection (2) of Section 14 states that if controversy remains with regard to any of the grounds referred to therein, a party could apply to the Court to render a decision on the termination of the mandate of the Arbitrator unless there subsists an Agreement to the contrary between the parties.

51. Subsection (1) of Section 15 provides for additional circumstances other than those provided in Sections 13 or 14 which could lead to termination of the mandate of the Arbitrator.

52. It may be relevant to note that Section 13 as a matter of fact only provides for the process of challenging a person's appointment as an Arbitrator in a matter on the grounds given in Section 12(3) of the 1996 Act.

53. Insofar as the additional grounds are concerned, which could lead to termination of mandate of an Arbitrator, clause (a) of sub-section (1) of Section 15 adverts to a situation where an arbitrator withdraws from his office for any reason, while clause (b) of the very same subsection of Section 15 speaks of a circumstance, whereby, pursuant to an agreement arrived at between the parties, the Arbitrator's mandate is terminated.

54. In a situation where any of the circumstances provided in clauses (a) and (b) of Subsection (1) of Section 15 stand attracted, under Subsection (2) of Section 15 the substitute Arbitrator can be appointed according to the rules that were applicable to the appointment of the incumbent Arbitrator.

55. In this case, as noticed above, since the incumbent Arbitrator via order dated 14.07.2017 has terminated the arbitration proceedings without referring to any provisions of 1996 Act, the same, as has been correctly

argued by Mr. Varma, would fall only under the provisions of Section 32 (2) (c) of the 1996 Act.

56. It is important to note that Subsection (1) of Section 32 speaks about termination of arbitration proceedings either upon a final award being rendered in the matter or by virtue of an order passed by the Arbitral Tribunal under Subsection (2) of the very same section.

57. Under Subsection (2) of Section 32, an Arbitral Tribunal can order termination of the Arbitral proceedings under three situations as contemplated in Subclauses (a) to (c) of the very same provision.

57.1 Clause (a) of Sub-section (2) of Section 32 provides for a situation where the claimant withdraws his claim and the respondent does not object to the termination of the arbitration proceedings. In case, the respondent objects, then, the learned Arbitrator would have to continue with the arbitration proceedings if it recognizes that the respondent has a legitimate interest in obtaining a final settlement of the dispute at hand.

57.2 Clause (b) of Subsection (2) of Section 32 provides for a circumstance where parties agree to the termination of the proceedings.

57.3 Lastly, clause (c) of Subsection (2) of Section 32 provides that Arbitral Tribunal may terminate the arbitration proceedings if it finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

58. In the instant case, the substitute Arbitrator terminated the arbitration proceedings as he found that the petitioners were obdurate in their stand of not valuing their claims and thereby enabling ascertainment of the Arbitrator's fee.

59. To my mind, the learned Arbitrator could not have taken recourse to Section 32 (1) (c) of the 1996 Act as, however, unreasonable the learned Arbitrator found the stand of the petitioners, it would still not be a circumstance which vested him with the power of terminating the arbitration proceedings. The reason I say so is that under clause (c) of Section 32(2) of the 1996 Act, the learned Arbitrator could have terminated the arbitration proceedings only if their continuation had become either unnecessary or impossible.

59.1 That adjudication of the matter and therefore, its continuation was necessary is evident from the fact that the petitioners wanted to press their claims and towards this end had paid moneys towards arbitral fee which, though, according to the Arbitrator, was not the appropriate fee. That continuation of the proceedings had not become impossible is evident from the fact that the matter, admittedly, before the substitute Arbitrator was positioned at the stage of admission/ denial of documents. Therefore, to my mind, the order dated 14.07.2017 is unsustainable.

60. The question, however, still remains as to whether the said order can be set aside in the instant proceedings, which, in effect, is the relief that the petitioners seek as they pray for issuance of a direction for appointment of a substitute Arbitrator in a petition filed under Section 14 and 15 of the 1996 Act.

61. There is, to my mind, a lacuna in the statute in as much as there is no clear remedy provided in the 1996 Act to an aggrieved party which seeks to challenge an order passed by the Arbitral Tribunal terminating the Arbitration proceedings under Section 32 of the 1996 Act.

61.1 As a matter of fact, the power to terminate the arbitration proceedings is also available in Section 25 of the 1996 Act.

61.2 However, qua these orders, apparently, no explicit remedy has been provided under the 1996 Act.

61.3 The scheme of the 1996 Act is suggestive of the fact that a party can ordinarily approach the Court against the decision of the Arbitral Tribunal under Part I of the 1996 Act only under Sections 14, 37 and 34.

61.4 Section 14, as noticed above, allows a party to approach the Court where an Arbitrator's mandate is sought to be terminated.

61.5 Section 37 allows a party to file an appeal where orders are passed by the Court or an Arbitral Tribunal under the circumstances provided in subsection (1) and (2) of the very same section respectively. Appeals under Subsection (1) of Section 37 are available to a Court which is authorized by law to hear appeals from original decrees of the Court where an order is passed refusing to refer the parties to arbitration under Section 8 or an order is passed granting or refusing to grant any of the contemplated measure(s) under Section 9 or an order is passed setting aside or refusing to set aside an arbitral award under Section 34.

61.6 Subsection (2) of Section 37, on the other hand, allows an aggrieved party to file an appeal to the Court against an order of the Arbitral Tribunal where it has accepted the plea referred in Subsection (2) or Subsection (3) of Section 16 or granted or refused to grant an interim measure under Section 17.

61.7 Section 34, on the other hand, allows an aggrieved party to take recourse to the Court to assail an Arbitral award passed by an Arbitral Tribunal.

61.8 As regards other orders, such as, an order passed under Section 13(3) of the 1996 Act where challenge is laid to the appointment of the learned

Arbitrator, the party which is unable to sustain the challenge is required to delay its challenge to the Arbitral Tribunal's ruling till a final award is rendered in the matter.

61.9 Likewise Section 27 of the 1996 Act which, *inter alia*, allows the party to take assistance of the Court for taking evidence, *albeit*, with the permission of the Arbitral Tribunal has to wait, where such an application is rejected, till such time an award is rendered in the matter. (See: *Harinarayan G. Bajaj Vs. Sharedeal Financial Consultants Pvt. Ltd., Mumbai and Another*, AIR 2003 Bom 296).

62. Thus, at first blush, Section 32 presents a similar difficulty. The Supreme Court, however, in *Lalitkumar's* case has reached the conclusion that where arbitration proceedings are terminated under Section 32 of the 1996 Act, the remedy under Section 14(2) of the 1996 Act would be available to an aggrieved party as it would tantamount to the Arbitrator's mandate being terminated.

62.1 This was the case where the Arbitral Tribunal had, *inter alia*, terminated the proceedings on the grounds similar to the instant case i.e. that the fee had not been paid.

62.2 The Court by juxtaposing the provisions of Subsections (3) and 32(2)(c) of Section 32 came to the conclusion that where an Arbitral Tribunal reaches a decision that continuation of Arbitration proceedings has become impossible, it would tantamount to termination of the mandate of the Arbitrator.

62.3 The relevant observations of the Supreme Court made in that behalf are extracted hereafter :-

“10.3. Section 14 declares that “the mandate of an arbitrator shall terminate” in the circumstances specified therein. They are-

*“14. **Failure or impossibility to act.**—(1) The mandate of an arbitrator shall terminate 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 the mandate.”

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.”

Section 14(2) provides that if there is any controversy regarding the termination of the mandate of the arbitrator on any of the grounds referred to in clause (a) then an application may be made to the Court – “to decide on the termination of the mandate”.

11. Section 32 of the Act on the other hand deals with the termination of arbitral proceedings. From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the arbitral tribunal under sub-Section 2. Sub-section (2) provides that the arbitral tribunal shall issue an order for the termination of the arbitral proceedings in the three contingencies mentioned in clauses (a) to (c) thereof.

12. On the facts of the present case, the applicability of clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29-10-2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-section (2), clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the arbitral tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court “as provided under Section 14(2)”.

13. The expression “Court” is a defined expression under Section 2(1)(e) which reads as follows:-

*“ 2(1)(e) “**Court**” means the principal Civil Court of original jurisdiction in a district, and includes the High*

Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes;”

14. Therefore, we are of the opinion, the apprehension of the appellant that they would be left remediless is without basis in law.”

(emphasis is mine)

62.4 On this aspect, a Coordinate Bench of this Court in the matter of *Gangotri Enterprises Limited vs. NTPC Tamil Nadu Energy* has adopted the same approach (see para 26² and 27³ of the judgment).

63. Therefore, to my mind, the contention advanced on behalf of the respondent that the petition under Section 14(2) of the 1996 Act would not lie to assail an order passed under Section 32 (2) (c) is not tenable. Thus, for the reasons set out above, I am inclined to set aside the order. It is ordered accordingly.

64. Consequently, Hon’ble Mr. Justice R.V. Easwar, former Judge, Delhi High Court (Cell: 9560899997) is appointed as an Arbitrator in the matter.

65. This brings me to the aspect as to whether or not I should proceed to fix the Arbitrator’s fee in the matter. Since, the order of appointment i.e. order dated 17.12.2015, had directed that the arbitration proceedings will be held

² 26. The decision in the case of Lalitkumar V. Sanghavi (supra) also turned on the principle that the petitioner could not be rendered remediless on account of the arbitrator terminating the proceedings. In that case no recourse would be available to the petitioner under Section 34 of the Act and thus the question would have to be considered within the scope of Section 14 of the Act. Thus, this decision applies only in cases where the arbitral proceedings are terminated by the arbitrator other than by making an award, that is, under Section 32(2) of the Act; it is clearly not applicable where the arbitral proceedings are terminated by virtue of Section 32(1) of the Act, that is, by making of an award.

³ 27. Thus, the second question, whether the order dated 28.04.2016 closing the right of GEL to file its statement of claims and thereby terminating the proceedings qua such claims, is amenable to challenge under Section 14 of the Act, is answered in the affirmative. In cases where the arbitrator's mandate is terminated, a re-course to Section 14(2) of the Act would be available provided a specific remedy is not provided under the Act. In the present case, the arbitrator's mandate to adjudicate any claims of GEL under the Agreement, stands terminated. Concededly, the order dated 28.04.2016 as also the final award that may be passed, in as much as it would not include GEL's claim, would not be amenable to challenge under Section 34 of the Act.

under the aegis of DIAC, in my opinion, the best course would be for the fee to be fixed by the Coordinator. As noticed hereinabove, the DIAC (Fee) Rules, 2018 do entitle the Coordinator to assess the fee where value of a claim is not determinable in monetary terms.

65.1 The proviso to Rule 3(ii), DIAC (Fee) Rules, 2018 makes that abundantly clear.

65.2 Since fixing of fee, as alluded to hereinabove, is a procedural matter, the said rule can be made applicable even to the proceedings which commenced prior to framing of the DIAC (Fee) Rules, 2018. Accordingly, the Coordinator is directed to assess the fee in the matter, in accordance with the extant rules, given the stand taken by the petitioners that they do not seek any monetary claim.

65.3 The petitioners will pay their share of the fees as determined by the learned Coordinator within the time frame stipulated by him.

65.4 In the event, the petitioners fail to deposit the fee as quantified by the Coordinator, the learned Arbitrator will take the said conduct into account and pass appropriate directions while rendering the final award in the matter.

66. Before I conclude, I may also indicate that the objection taken by the respondent that this Court cannot fix the fee on account of lack of pecuniary jurisdiction does not require further elaboration in view of the fact that the respondent chose not to file a reply to the petition. To my mind, the failure to file a reply disabled the respondent from raising any objection with regard to lack of pecuniary jurisdiction of this Court and that too at the stage of final arguments. The objections as to pecuniary jurisdiction have to be taken at the earliest.

66.1 This objection, in my view, given the stage and manner in which it has been taken cannot be entertained, there being no failure of justice.

67. The petition is, accordingly, disposed of in the aforesaid terms.

RAJIV SHAKDHER
(JUDGE)

FEBRUARY 20, 2019/hs

