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Application Nos.2080 and 4609 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.08.2023
Pronounced on : 31.08.2023

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

Application Nos.2080 and 4609 of 2021

M/s.EDAC Engineering Ltd.,
rep. by its Assistant Manager-Legal,
No.88, Mount Road,
Guindy, Chennai-600 032. ... Applicant in both cases

vs.

1.M/s.Industrial Fans (India) Pvt. Ltd.,
rep. by its Managing Director
C.Arunagiri

2.Hon'ble Mr.Justice F.M.Ibrahim Khalifulla,
Former Judge,
Supreme Court of India ... Respondents in both cases

Prayer in A. No.2080 of 2021: Application filed under Order XIV Rule 8 of Original Side Rules read with Section 39 of the Arbitration and Conciliation Act, 1996 to direct the second respondent to release the lien on the Award dated 30.04.2021 and consequently to provide a complete, signed copy of the Award dated 30.04.2021 to the applicant.

Prayer in A.No.4609 of 2021: Application filed under Order XIV Rule 8 of Original Side Rules read with Section 39(2) of the Arbitration and



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Conciliation Act, 1996 to fix the fees of the second respondent/
Arbitrator, who has passed the Award dated 30.04.2021.

For applicant in both cases : Mr.G.Veerapathiran

For respondents in both cases : Ms.J.Jyothi for R1
Ms.Vinithra Srinivasan for R2

COMMON ORDER

Heard Mr.G. Veerapathiran, learned counsel for the applicant and
Ms.J.Jyothi, learned counsel for the 1st respondent and Ms.Vinithra
Srinivasan, learned counsel for the 2nd respondent.

2. Application No.2080 of 2021 has been filed to direct the second
respondent (Arbitrator) to release the lien on the Arbitral Award dated
30.04.2021 and consequently to provide a complete signed copy of the
Arbitral Award dated 30.04.2021 to the applicant.

3. Application No.4609 of 2021 has been filed to fix the fees of the
second respondent/Arbitrator, who has passed the Arbitral Award dated
30.04.2021.



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4.The applicant is the respondent in the Arbitration and the first respondent is the claimant. Pursuant to the Orders passed by this Court dated 20.03.2018 in O.A. No.1259 of 2017 under Section 11 of the Arbitration and Conciliation Act, 1996, the second respondent, a Former Judge of the Hon'ble Supreme Court was appointed as the Sole Arbitrator to adjudicate the dispute between the applicant and the first respondent. In the order dated 20.03.2018, passed by this Court in O.A.No.1259 of 2017, the Arbitrator was granted liberty to fix his fees and costs. The Arbitrator acted upon the reference pursuant to directions given by this Court on 20.03.2018 in O.A. No.1259 of 2017 and commenced the Arbitration. Both the parties to the dispute participated in the Arbitration, which has culminated in the passing of the Arbitral Award dated 30.04.2021. The first respondent (claimant) has paid its portion of the Arbitrator's fee and cost. However, the applicant, who is the respondent in the Arbitration, failed to pay the balance Arbitrator's fee and cost amounting to Rs.59,73,750/-. The second respondent (Arbitrator) has exercised his statutory lien as per the provisions of Section 39(1) of the Arbitration and Conciliation Act 1996 for non payment of his fees/costs by the applicant. The Arbitrator has not delivered the Original Award dated 30.04.2021 to the applicant, but has delivered the same only to the



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first respondent, who has paid its portion of the Arbitrator's fee/cost.

Aggrieved by the exercise of the statutory lien by the Arbitrator under Section 39(1) of the Arbitration and Conciliation Act 1996, these applications have been filed under Section 39(2) of the Arbitration and Conciliation Act 1996 seeking for the release of the lien and for revising the fees / cost payable to the arbitrator by the applicant.

5. According to the applicant, the Arbitrator (second respondent) has imposed and demanded exorbitant Arbitration fees/costs from the applicant and has wrongfully exercised lien on the Award for the alleged non payment of the Arbitrator's fee/cost as per the provisions of Section 39(1) of the Arbitration and Conciliation Act 1996. It is also the case of the applicant that since the applicant is facing CIRP proceedings before the National Company Law Tribunal, the Arbitrator's fees cannot be paid to the Arbitrator (second respondent). However, according to the Arbitrator (second respondent), only based on a mutual agreement between the parties to the dispute, which has been recorded in the Minutes of the Arbitrator's proceedings, the Arbitrator's fee/cost was fixed. According to him, the first respondent has already paid the Arbitrator's fee/cost as per the agreement and it is only the applicant, who



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is the respondent in the Arbitration, who has not paid the balance fees/costs payable to the Arbitrator. According to the Arbitrator(second respondent), a sum of Rs.59,73,750/- is still due and payable by the applicant towards the balance Arbitrator's fee/cost, which they have failed and neglected to pay despite there being an agreement to that effect, which has been recorded in his Minutes in the Arbitral proceedings.

Discussion :

6.The law relating to payment of Arbitrator's fees is more or less well settled by the recent decision of the Hon'ble Supreme Court in the case of *Oil and Natural Gas Corporation Limited vs Afcons Gunanusa JV reported in 2022 SCC Online SC 1122*. The said decision has resolved various issues involving the Arbitrator's fees and those issues for which answers have been given by the Hon'ble Supreme Court are as follows:

A)Whether the Arbitral Tribunal can unilaterally determine their fees?

The Hon'ble Supreme Court has held that an Arbitrator cannot determine his fees without consulting the parties, upholding the significance of party autonomy. The Hon'ble Supreme Court has held that the fee schedule prescribed in Schedule IV of the Arbitration and



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Conciliation Act, 1996 is not mandatory and that parties to Arbitration may choose another fee structure for the Arbitrator by agreement.

However, the Fourth schedule shall become the default fee structure, if the parties cannot agree upon the schedule of fees payable to the Arbitrator.

B) Interpretation of “costs and fees”

The Hon'ble Supreme Court held that the term “costs” and “fees” are two different paradigms, where costs shall include Arbitrator's fees. However, an Arbitral Tribunal cannot pass a binding order on its fees, while determining the amount of costs. The Hon'ble Supreme Court also observed that an Arbitrator can demand deposits and supplementary deposits since these advances for costs are provisional. The Hon'ble Supreme Court also held that the Arbitrator in terms of Section 39(1) of the Act, can exercise his lien over the Arbitral Award if any payment remains outstanding. Similarly, a party can approach the Court to review the fees demanded by the Arbitrator under Section 39(2) of the Act, if it believes that the fees are unreasonable. While issuing directions governing fees of Arbitrators in adhoc Arbitrations, the Hon'ble Supreme Court framed certain guidelines exercising power under Article 142 of the Constitution of the India, concerning the fee of an Arbitrator in an adhoc



Arbitration, which are as follows:

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a) Upon constitution of the Arbitral Tribunal, there shall be a maximum of four hearings to finalise the terms of a reference and the Arbitral Tribunal must set out the components of its fee as a Tripartite Agreement.

b) An Arbitrator appointed by the parties in terms of the Arbitration Agreement is liable to be paid as per the Arbitration Agreement. However, where the Arbitrator finds the fees stipulated therein unacceptable, he must clarify his proposed fee in the preliminary hearing. In the event of any disagreement, the Arbitrator may decline the assignment.

c) Once the terms of reference have been finalised and issued, it would not be open for the Arbitrator to vary either the fee fixed or the heads under which the fee may be charged. The fees fixed, however, may be revised upon completion of a specific number of sittings and the quantum of such revision should also be mentioned clearly.



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d)Where the Arbitrators were appointed by the Court and

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e)The Hon'ble Supreme Court also clarified that there can be no unilateral deviation from the terms of reference, which is a Tripartite Agreement.

C)Whether the term "sum in dispute" in the Fourth Schedule to the Arbitration Act means the cumulative total of the amounts of the claim and counter-claim-

The Hon'ble Supreme Court held as follows:

a)The Act treats claims and counter-claims at par and the same procedure and timelines must be followed for both.

b)The Act allows the Arbitrator to fix a deposit of separate costs for claims and counter-claims, considering the same to be distinct proceedings.

The Hon'ble Supreme Court finally concluded that in so far as the Institutional Arbitrations are concerned, parties shall be



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bound by the respective rules of the Institutions and the Arbitrator's fee shall also be payable as per the respective rules.

However, in case of adhoc Arbitration, where the fourth schedule is applicable, the Arbitrator's fee should be calculated separately for a claim and separately for a counter-claim and not on the cumulative value of the two.

D)Whether the Ceiling of Rs.30 lakhs in the entry at Serial No.6 of the Fourth Schedule of the Arbitration Act applies only to the variable amount of the fee or the entire fee amount.

While dealing with these issues, the Hon'ble Supreme Court held that the ceiling of Rs.30 lakhs in entry at Serial No.6 of the Fourth Schedule applies for the sum of the base amount and the variable amount and not just the variable amount. Therefore, the maximum fee payable to the Arbitrator shall be Rs.30 lakhs.

E)Whether the ceiling of Rs.30 lakhs applies as a cumulative fee payable to the Arbitral Tribunal or it represents the fee payable to each Arbitrator.

The Hon'ble Supreme Court held that the fees provided in the Fourth Schedule are for individual Arbitrators, regardless of whether they



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are a multi-member Tribunal or a Sole Arbitrator. However, the Hon'ble Supreme Court clarified that the Sole Arbitrator would be paid 25% over and above the ceiling amount as per the Fourth Schedule.

7. Hon'ble Mr.Justice Sanjay Khanna, one of the Co-authors of the aforesaid judgment has agreed with the findings rendered by Hon'ble Dr. Justice D.Y.Chandrachud, but has given separate reasons while dealing with certain aspects. While discussing the "fee and reasonable fee", Hon'ble Mr.Justice Sanjay Khanna has observed that the fixation of fee by an Arbitrator is a delicate matter as he is then determining the fee which he is entitled to command having regard to a)complexity of the disputes; b)difficulty or novelty of the questions involved; c)the skill, specialised knowledge and responsibility of the Arbitral Tribunal; d)number and importance of documents to be studied; e)value of the property involved or the amount or the sum in issue and f)importance of the dispute to the parties. In his separate opinion, His Lordship Justice Sanjay Khanna has observed that the Arbitrators must therefore openly and in a transparent manner, state the fee that they would like to charge so as to avoid embarrassing allegations and disagreements.

8. Section 39 of the Arbitration and Conciliation Act, 1996 reads as follows :



39. Lien on arbitral award and deposits as to costs.—

(1) Subject to the provisions of sub-section (2) and to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

(2) If in any case an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the Court may, on an application in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into Court by the applicant of the costs demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitral tribunal by way of costs such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(3) An application under sub-section (2) may be made by any party unless the fees demanded have been fixed by written agreement between him and the arbitral tribunal, and the arbitral tribunal shall be entitled to appear and be heard on any such application.

(4) The Court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.



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9. The present dispute raised by the applicant against the fixation of fees/costs by the Arbitrator (second respondent) is an unfortunate, despicable and a contemptuous one. Reckless allegations are made by the applicant in these applications as if arbitrarily, the Arbitrator (second respondent) has fixed exorbitant fees/costs though there is no iota of truth in the said allegation for the following reasons:

a) This Court by its Order dated 20.03.2018, appointed the second respondent as the Sole Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 and granted him liberty to fix his fees.

b) The second respondent (Arbitrator) acted upon the reference and the Minutes of the Arbitral Proceedings dated 22.05.2018 was signed by the learned counsel for the applicant as well as the learned counsel for the first respondent accepting the fee schedule of the Arbitrator. As per the Minutes of the Arbitral Proceedings dated 22.05.2018, the fee of the Arbitrator and out of pocket expenses required for the Arbitrator for secretarial services in relation to the conduct of the proceedings were fixed as hereunder:



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(i)The Arbitrator shall be paid a sum of Rs.1.5 lakhs each for each day of sitting. The parties on either side shall pay an advance on account, subject to final adjustment as may be found to be necessary, covering two sittings, including the present first sitting. The reading fee will be fixed if any need arises;

(ii)The parties were directed to deposit a sum of Rs.5,000/- each towards administrative expenses;

(iii)The fee for preparation of the award will be intimated at the conclusion of the arguments;

c)The details of the Arbitral fee payable to the second respondent was clarified in the Minutes of the Arbitral Proceedings dated 12.04.2019 and the Tripartite Agreement was signed by the second respondent (Arbitrator) and the counsels for the claimant and the first respondent in the Arbitral Proceedings. As per the Minutes dated 12.04.2019, the details of the Arbitrator's fee payable to the Arbitrator was clarified in the following manner:

"Whenever two sessions are held in a day, the fee for the second session will be half of the fee fixed for the first session. The parties were directed to calculate the fee on the above basis for effecting payment to the Arbitrator."

d)In the Minutes of the Arbitral Proceedings dated



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22.05.2019, signed by the counsel for the claimant, counsel for the first respondent and the Arbitrator, the parties to the dispute were directed to effect the payment of fees for the 12 hearings (two sessions in the 12th hearing) held so far expeditiously after giving credit to whatever payments already made. In the Minutes of the 21st hearing held on 26.09.2020, the Arbitrator (second respondent) has directed the parties to bear the expenses for the hearing to be held on 06.10.2020, 07.10.2020 and 08.10.2020. The Arbitrator has also made it clear that depending upon the progress to be made by the learned counsel for the claimant, appropriate directions will be issued for bearing the fees of the Palkhivala Centre for the subsequent dates. In the Minutes of the 31st hearing held on 26.12.2020, it was recorded by the Arbitrator as follows:

"Today, at the very outset, the learned counsel for both parties were informed that the hearing fees for the hearing held upto 03.11.2020 were not fully paid both by the claimant as well as the respondent. As on 27.10.2020, the hearing fees due from the claimant/first respondent was a sum of Rs.22,63,400/- and as far the



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respondent was concerned, the balance due was Rs.45,05,000/-. As per the Minutes recorded by the Arbitrator on 27.10.2020, hearings were held on 02.11.2020, 03.11.2020, 18.11.2020, 20.11.2020, 21.11.2020 and today's hearing i.e. 26.12.2020. The hearings held after 02.11.2020 till today were all in single sessions. Therefore, for subsequent hearings held after 02.11.2020, the fees payable by both the parties worked out to Rs.4,60,000/- each apart from the past arrears of Rs.22,63,400/- and Rs.45,05,000/- respectively. In between, there was a payment of sum of Rs.2,35,000/- by the respondent. After disclosing the above facts relating to huge arrears of hearing fees payable by the claimant and the respondent, the learned counsel were requested to ensure the settlement of the said payment of hearing fees before proceeding further in this reference. It was also brought to the notice of the learned counsel that in similar cases, the parties failed to pay the hearing fees in full and thereby the Arbitral Tribunal is put to substantial inconvenience in the matter of receipt of fees while at the same time, the advance tax liability had to be incurred by the Sole Arbitrator. It was, therefore, insisted that unless the parties to the reference settle the payment of fees which are in huge arrears, it will be wholly unfair for the parties to seek for the adjudication of the dispute and for passing of the Award by the Sole Arbitrator. The learned counsel for the claimant



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as well as the respondent fairly appreciated the said position and submitted that they will have to take every earnest effort for the settlement of the hearing fees to the Sole Arbitrator."

e)Periodical Statement of accounts were furnished by the Arbitrator to both the parties with regard to the fees payable by each of them. The details of the hearing were also disclosed in the Statement of accounts. The Statement of accounts were furnished by the Arbitrator to both the parties to the dispute on 09.09.2020, 27.10.2020, 17.02.2021 and 21.04.2021. As per the final Statement of accounts dated 21.04.2021, the balance fees payable by the first respondent to the Arbitrator was Rs.42,13,400/- and the balance fees payable by the applicant to the Arbitrator was Rs.59,73,750/-. In all the statement of accounts furnished by the Arbitrator to both the parties to the dispute, full particulars of the date of hearing, number of sessions held on the date of hearing were disclosed. The calculation for arriving at the balance fees payable to the Arbitrator was also clearly disclosed. As seen from the above proceedings



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recorded by the Arbitrator (second respondent), the applicant did not raise any dispute with regard to the Arbitrator's fees during the pendency of the Arbitral proceedings at any point of time whatsoever.

10.The second respondent (Arbitrator) has also categorically stated in the counter affidavit that during the entire Arbitral proceedings, the applicant only sought time to pay the fees and had throughout agreed to the quantum of fees payable to the Arbitrator. According to the Arbitrator, it is only after the conclusion of the entire proceedings and on pronouncement of the Arbitral Award, the applicant as an afterthought requested the Arbitrator for reduction of the Arbitrator's fee through his letter dated 03.05.2021. The Arbitrator also responded to the applicant's letter dated 03.05.2021 by his reply dated 04.05.2021. As seen from the said reply, the Arbitrator has reiterated that both the parties have agreed to the payment of his fees as per the fee schedule recorded in the Minutes of the meeting of the Arbitral proceedings. He has also stated that considerable time and energy were spent by him in holding the proceedings, reading of the pleadings, recording of evidence, detailed analysis of oral evidence and voluminous documents filed on either side



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and hearing the elaborate submissions of the learned counsel for both the parties. The first respondent, claimant in the arbitration has paid the Arbitrator's fees and the lien exercised by the Arbitrator as per Section 39(1) of the Arbitration and Conciliation Act, 1996 was released as against the first respondent on 07.05.2021. Originally, while passing the Arbitral Award dated 21.04.2021, the Arbitrator (second respondent) had exercised his statutory lien as per the provisions of Section 39(1) of the Arbitration and Conciliation Act, 1996 against both the parties to the dispute for non payment of his fees/costs. Since the first respondent has paid its fees/costs subsequently, the Arbitrator released his lien as against the first respondent and delivered the original Award dated 21.04.2021 to them, but has not released the lien in respect of the applicant, who did not pay the balance fees of Rs.59,73,750/-.

11.It is undoubtedly clear that the applicant, though having agreed to pay the fees of the Arbitrator as per the schedule of fees, which was recorded in the Minutes of the Arbitral proceedings, has taken a complete U-turn by making false allegations against the Arbitrator as if he has charged his fees exorbitantly and has refused to pay the sum of Rs.59,73,750/-, which is the Arbitrator's fees payable by the applicant towards its share in the Arbitral proceedings. Having agreed to the terms



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of the Arbitrator unconditionally through its counsel by accepting the Minutes of the Arbitral proceedings with regard to the payment of the Arbitrator's fees by signing the same, the applicant has frivolously filed these applications under section 39(2) of the Arbitration and Conciliation Act, 1996, which undoubtedly amounts to abuse of process of Court and law.

12.Earlier orders passed by this Court in these applications will also prove the gross misconduct of the applicant and the scant respect shown by them to the Arbitrator in the Arbitral proceedings. The Arbitrator (second respondent) is a respected and an honoured Judge, having served impeccably as a Judge of this Court, Chief Justice of Jammu and Kashmir High Court and a Judge of the Hon'ble Supreme Court.

13.In the decision rendered by the Hon'ble Supreme Court in the case of **Oil and Natural Gas Corporation Limited vs Afcons Gunanusa JV reported in 2022 SCC Online SC 1122**, which has more or less settled the law relating to payment of Arbitrator's fees, the Hon'ble Mr.Justice Sanjay Khanna, one of the co-authors of the judgment, has observed that the fixation of fees by an Arbitrator depends upon (a) complexity of the disputes, (b) difficulty or novelty of the questions



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involved, (c) the skill, specialised knowledge and responsibility of the Arbitral Tribunal, (d) number and importance of documents to be studied, (e) value of the property involved or the amount or the sum in issue and (f) importance of the dispute to the parties. In the case on hand, the decision making involved all the aforementioned aspects.

14. Undoubtedly, as a Former Supreme Court Judge, his fees cannot be equated to a regular Arbitrator. His experience as a Chief Justice of Jammu and Kashmir High Court and as a Judge of the Hon'ble Supreme Court will certainly add enormous value /weight to an Arbitral Award. As seen from the proceedings of the Arbitrator (second respondent), he has spent enormous time and effort for passing the Arbitral Award, though it may be against the applicant. Whether Arbitral Award is passed in favour of the applicant or the first respondent is immaterial. The Arbitrator (second respondent) is a neutral person, who decides the dispute only based on the oral and documentary evidence available on record and he is an impartial person, who has no liking to any party and will not favour any of them.

15. This Court, while appointing the second respondent as an



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Arbitrator under Section 11 of the Arbitration and Conciliation Act 1996, has appointed him only based on his credentials and his integrity.

However, despite knowing fully well the second respondent's credentials, the applicant has recklessly filed these applications under Section 39(2) of the Arbitration and Conciliation Act, 1996 seeking for reduction of the Arbitrator's fees and for revision of the same by this Court by making false allegations against him as if he has claimed exorbitant fees from the applicant without any basis. The Fourth schedule to the Arbitration and Conciliation Act 1996 applies only to cases where the Court while appointing the Arbitrator had directed the parties to pay the fees as per the Fourth schedule to the Arbitration and Conciliation Act 1996. In the case on hand, it is not so.

16.As seen from the order passed by this Court under Section 11 of the Arbitration and Conciliation Act, 1996, by which the second respondent was appointed as an Arbitrator, this Court had granted liberty to the Arbitrator to fix his fees. The order appointing the second respondent as an Arbitrator was passed by this Court on 20.03.2018.

17.The Hon'ble Supreme Court, in the decision rendered in ***Oil and Natural Gas Corporation Limited vs Afcons Gunanusa JV*** referred



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to supra, has made it clear that the parties by agreement can fix the fees of the Arbitrator and the fees agreed upon may be higher or lower than the Fourth Schedule to the Arbitration and Conciliation Act 1996. In the case on hand, admittedly, the parties had agreed to pay the Arbitrator's fees as per the Minutes recorded by the Arbitrator in the various meetings held by the Arbitrator during the course of the Arbitral proceedings. Statement of accounts were also furnished by the Arbitrator with regard to his balance fees payable, which is also duly acknowledged by both the parties to the dispute. They did not raise any hue and cry during the pendency of the Arbitral proceedings with regard to the Arbitrator's fees fixed by the Arbitrator which was fixed only with the consent of both the parties during the course of the Arbitral proceedings.

18. Having not raised any dispute during the Arbitral proceedings with regard to the quantum of Arbitrator's fee/ cost, the question of entertaining these applications filed under Section 39(2) of the Arbitration and Conciliation Act, 1996 at this stage will not arise and has to be rejected by this Court for being vexatious and for abuse of process of Court and Law.

19. The contumacious conduct of the applicant is also seen by their scant respect shown by them to the following orders passed by this Court



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earlier in these applications:

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a)A direction was issued by this Court on 03.11.2022 in these applications that as a condition precedent for hearing these applications, the applicant was directed to create an interest bearing Fixed Deposit for a sum of Rs.59,73,750/- in favour of the Registrar General of this Court in any Public Sector Bank. The said direction was not obeyed by the applicant;

b)By order dated 29.11.2022, this Court had recorded the earlier order dated 03.11.2022 under which the applicant was directed to create a Fixed Deposit for a sum of Rs.59,73,750/- in favour of the Registrar General of this Court to the credit of these applications and has also recorded the fact that despite the order dated 03.11.2022, the applicant has not deposited the sum of Rs.59,73,750/- to the credit of these applications. Since the applicant expressed its difficulty on account of freezing of the bank account of the applicant by the bank concerned, the applicant was directed to place before this Court those documents evidencing the freezing of the bank account. The



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d) In its order dated 05.01.2023, this Court had recorded the submissions made by the learned counsel for the applicant requesting further time for the applicant to comply with the order of this court dated 02.12.2022. This Court had directed the applicant to comply with the order dated 02.12.2022 on or before 20.01.2023; **The said order was also not complied with;**

e) In its order dated 23.01.2023, this Court recorded the submissions of the learned counsel for the applicant that the applicant has created a Fixed Deposit with DCB Bank for a sum of Rs.15,00,000/- on 20.01.2023 in the name of the Registrar General, Madras High Court. In the very same order, this Court directed the applicant to create a Fixed Deposit for the balance amount on or before 23.04.2023. ***The said order was also not complied with by the applicant;***

f) In its order dated 16.08.2023, this Court had recorded the submissions of the learned counsel for the applicant, on instructions that the applicant is willing to file an unconditional apology for having made false allegations



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against the Arbitrator, who is a Former Judge of the Hon'ble Supreme Court;

g)On 18.08.2023, the applicant through its Senior Legal Officer, Mr. R.Sathish Kumar filed an affidavit dated 18.08.2023, pursuant to the directions given by this Court on 16.08.2023 tendering his unconditional apology for having made allegations against the Arbitrator and has unconditionally withdrawn all the allegations made by the applicant in both the affidavits filed against the learned Arbitrator. The said affidavit of unconditional apology was filed by Mr. R.Sathish Kumar, working as a Senior Legal Officer in the applicant company and no Board Resolution was passed by the applicant in favour of Mr.R. Sathish Kumar to enable him to file an affidavit of unconditional apology on behalf of the applicant. The Directors of the applicant company, who are responsible for the conduct of the affairs of the applicant's business, have not chosen to file an affidavit of unconditional apology, but instead an affidavit of unconditional apology has been filed by a Senior Legal Officer, who is only an employee of the applicant and



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is not involved in the decision making process of the applicant in its day to-day administration. The affidavit of unconditional apology given by Mr. R.Sathish Kumar on behalf of the applicant was taken on record by this Court and after hearing the arguments of all the counsels at length, this Court had reserved the applications for pronouncement of orders.

20. The above said events undoubtedly prove the contumacious conduct of the applicant. The applicant, who has agreed to pay the fees of the Arbitrator as seen from the Minutes recorded by the Arbitrator on several occasions, cannot now question the fixation of the fees by the Arbitrator. Till date, despite directions given by this Court on many occasions, the applicant has not deposited the sum of Rs.59,73,750/-, but instead has chosen to deposit only a sum of Rs.15,00,000/- to the credit of these applications. The applications filed before this Court under Section 39(2) of the Arbitration and Conciliation Act, 1996 is a sheer abuse of process of the law and Court as seen from the conduct of the applicant and is a vexatious one. There is absolutely no merit in these applications.



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21. The applicant has also raised an issue that no amount can be paid to the Arbitrator (second respondent), since a moratorium order under Section 14 of the Insolvency and Bankruptcy Code, 2016 has been passed by the National Company Law Tribunal against the applicant.

22. Section 14 of the Insolvency and Bankruptcy Code, 2016 reads as follows:

“14(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;



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(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

23. The Arbitrator (second respondent) has already exercised his statutory lien for non payment of his fees / costs under Section 39(1) of the Arbitration and Conciliation Act, 1996. Under the Arbitral Award,



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the Arbitrator has directed the applicant to pay a huge amount together with interest and costs to the first respondent. Having exercised his statutory lien for non payment of his fees/costs as per the provisions of Section 39(1) of the Arbitration and Conciliation Act, 1996, the petitioner will not be in a position to challenge the Arbitral Award passed against them by the Arbitrator. The moratorium order dated 08.08.2023 passed by the National Company Law Tribunal does not prohibit the Insolvency Professional / Liquidator from paying the fees of the Arbitrator who is liable to be paid in respect of the arbitration between the applicant and the first respondent, which has culminated in the passing of the Arbitral Award, dated 30.04.2021, which is much prior to the moratorium order dated 08.08.2023. The order of moratorium will come into effect only from 08.08.2023 and will not apply to the payment of the Arbitrator's fees which is an admitted liability of the applicant as seen from the Minutes of the Arbitral Proceedings recorded by the Arbitrator and the said liability was payable by the applicant as early as in the year 2021 itself. Unless and until the applicant pays the agreed balance Arbitrator's fees, the lien exercised by the Arbitrator's under Section 39(1) of the Arbitration and Conciliation Act, 1996 will not get extinguished. Since, the Arbitral Award has been passed against the applicant, the applicant



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will be in a position to challenge the same only if the Arbitral Award is received from the Arbitrator. In view of the same, necessarily, in the interest of the applicant and to the body of creditors of the applicant, the balance arbitrator's fees has to be paid to the second respondent (arbitrator) for obtaining release of the statutory lien exercised by the Arbitrator as per the provisions of Section 39(1) of the Arbitration and Conciliation Act, 1996. Since the Arbitral Award is for a huge amount, which will be detrimental to the interest of the applicant, if the same is not challenged, this Court is of the considered view that the applicant / Interim Resolution Professional cannot avoid payment of the balance Arbitrator's fees by relying upon the moratorium order, dated 08.08.2023 passed by the National Company Law Tribunal under Section 14 of the Insolvency and Bankruptcy Code, 2016. As observed earlier the said order also does not prohibit payment of arbitrator's fees which was liable to be paid by the applicant in the year 2021 itself, much prior to the passing of the moratorium order, dated 08.08.2023. The payment to the Arbitrator(second respondent), who was appointed by orders of this Court under Section 11 of the Arbitration and Conciliation Act, 1996 has to be treated on par with the liquidator's costs. The Arbitrator appointed by this Court has to be paid by giving a preferential status. The



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Arbitrator (second respondent) who was appointed by orders of this Court in the year 2018 and has passed the Arbitral Award dated 30.04.2021 much prior to the initiation of the CIRP Proceedings, which was initiated only recently should not be deprived of his fees / costs which was earlier agreed by the applicant to be paid during the course of the arbitral proceedings. The arbitrator (second respondent) is seeking payment of his balance fees / costs only in terms of the consent given by the applicant for paying the said fees. The Liquidator's remuneration and fees for administering the liquidation process have to be first paid. The Arbitrator appointed by this Court who has passed the Arbitral Award in the year 2021 itself much prior to the passing of the moratorium order dated 08.08.2023 has to be treated on par with the liquidator, who is having the priority to recover his fees / expenses. If the Arbitrators are not paid their fees / costs on account of the moratorium order passed by the National Company Law Tribunal, the object of arbitration will get defeated as competent Arbitrators will hesitate to become Arbitrators in a dispute involving Companies facing financial crisis. It is also possible that deliberately in order to avoid making payment to the Arbitrator, CIRP proceedings may be initiated against a Company, who is a party to the arbitration. Such an attitude should not be encouraged and it has to



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be nipped in the bud as it would never have been the intention of the legislature to deprive the fees of an Arbitrator, who has adjudicated the dispute in the interest of the parties for the early resolution of the dispute. Section 14(2) of the Insolvency and Bankruptcy Code, 2016 also makes it clear that the supply of the essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during the moratorium period.

24. The Insolvency and Bankruptcy Board of India (IBBI) has issued Circular No. IBBI/IP/013/2018 dated 12.06.2018 on the subject of fee and other expenses incurred by Insolvency Professional for Corporate Insolvency Resolution Process. Under the said Circular, guidelines have been prescribed by the Insolvency and Bankruptcy Board of India (IBBI), which are as follows :-

a) the fee payable to him, fee payable to an Insolvency Professional Entity, and fee payable to Registered Valuers and other Professionals, and other expenses incurred by him during the CIRP are reasonable;

(b) the fee or other expenses incurred by him are directly related to and necessary for the CIRP;

(c) the fee or other expenses are determined by him on an arms' length basis, in consonance with the requirements of integrity and independence;



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(d) written contemporaneous records for incurring or agreeing to incur any fee or other expense are maintained;

(e) supporting records of fee and other expenses incurred are maintained at least for three years from the competition of the CIRP;

(f) approval of the Committee of Creditors (CoC) for the fee or other expense is obtained, wherever approval is required; and

(g) all CIRP related fee and other expenses are paid through banking channel

As seen from the guidelines of IBBI, payment of the fee payable to an Arbitrator appointed by this Court by the Insolvency Professional cannot be held to be unreasonable. The fees payable to an Arbitrator appointed by this Court has to be necessarily treated as costs incurred for Corporate Insolvency Resolution Process. Unless and until the applicant obtains release of the statutory lien exercised by the Arbitrator under Section 39(1) of the Arbitration and Conciliation Act, 1996, the applicant will not be able to challenge the Arbitral Award under Section 34 of the Arbitration and Conciliation Act, 1996, which will be detrimental to the interest of the Corporate Debtor, the applicant herein.

25. The following decisions also makes it clear that unless the proceedings are derogatory to the assets of the Corporate Debtor, the



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arbitration can be proceeded :

WEB COPY 1) *Power Grid Corporation of India Ltd. vs. Jyoti Structures Ltd.*

reported in MANU/DE/5162/2017.

2) *SSMP Industries Ltd. v. Perkan Food Processors Pvt. Ltd.*

reported in MANU/DE/2362/2019.

3) *Trading Engineers International Ltd. vs. U.P. Power*

Transmission Corp. Ltd. reported in MANU/UP/2270/2022

26. In the case on hand, admittedly, the Arbitral Award was passed by the Arbitrator in the year 2021 itself, much prior to the initiation of the CIRP proceedings before the National Company Law Tribunal. Therefore, the question of deferring the payment of fees/ costs to the Arbitrator will not arise.

27. The second respondent (Arbitrator) is a former Judge of Hon'ble Supreme Court and was appointed as an Arbitrator by this Court under Section 11 of the Arbitration and Conciliation Act, 1996. As seen from the Arbitral Proceedings, several sessions were held by the Arbitrator in order to complete the Arbitral proceedings. In a methodical and meticulous manner, the Arbitrator has conducted the Arbitral



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proceedings. Certainly, the arbitrator has put his enormous effort by spending considerable amount of time and energy in the Arbitration. The proceedings recorded by the Arbitrator which have been filed by the Arbitrator before this Court speaks for itself. An Arbitrator appointed by this Court cannot be left high and dry. His fees / costs are paramount and they have to be treated as preferential payments even in case where CIRP proceedings are pending before the National Company Law Tribunal, which has passed a moratorium order on 08.08.2023 under Section 14 of the Insolvency and Bankruptcy Code, 2016. The Arbitrator's fees payable to the Arbitrator appointed by this Court stands on a higher pedestal and has to be treated as a priority payment. His fees/costs for the services rendered by him during the arbitration and for pronouncement of the Arbitral Award cannot be deferred / deprived in the considered view of this Court.

28. There is an amount of Rs.15,00,000/- lying in Fixed Deposit favouring the Registrar General of this Court to the credit of these applications pursuant to directions given by this Court to the applicant. This Court is having "*custodia legis*" over the same. The said sum deposited is towards part of the Arbitrator's fees. Necessarily, this Court



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will have to permit the Arbitrator (second respondent) to obtain payment out of the same as there is no merit in these applications. Insofar as the balance amount of Rs.44,73,750/- and the costs that is being awarded by this Court to the Arbitrator (second respondent) for the abuse of process of Court and law committed by the applicant is concerned, the Insolvency Resolution Professional has to be directed to pay the aforesaid amounts to the Arbitrator (second respondent) on priority basis as such a payment is a condition precedent for the release of the Arbitral Award by the Arbitrator.

29. This Court determines the cost payable to the Arbitrator in addition to his fees of Rs.59,73,750/- for not paying the admitted Arbitrator's fees and filing these frivolous and vexatious applications amounting to abuse of process at Rs.5,00,000/- (Rupees five lakhs only). Only after giving due consideration to the deliberate misconduct of the applicant as well as to the credentials of the Arbitrator (second respondent), the cost of Rs.5,00,000/- is imposed on the applicant.

30. For the foregoing reasons, there is absolutely no merit in these applications and these applications are dismissed by issuing the following directions :-



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a) The Registrar General of this Court is directed to endorse the Fixed Deposit Receipt for a sum of Rs.15,00,000/-, which is now lying to the credit of these applications together with accrued interest in favour of the Arbitrator (second respondent) as expeditiously as possible, without any further delay to enable the Arbitrator to encash the Fixed Deposit.

b) The Insolvency Professional appointed for the applicant by the National Company Law Tribunal is directed to pay the second respondent (Arbitrator) the balance amount of Rs.44,73,750/- payable to the Arbitrator(second respondent) on a priority basis from and out of the funds of the applicant as such payment will only entitle the applicant / IRP to obtain release of the statutory lien exercised by the Arbitrator (second respondent) over the Arbitral Award.

c) The Insolvency Professional / applicant is also directed to pay costs of Rs.5,00,000/- to the Arbitrator (second respondent) on account of these vexatious applications filed by the applicant which amounts to abuse of process on a priority basis and it is made clear that only on payment of the balance Arbitrator's fees and costs as determined by this Court, the



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Arbitrator (second respondent) shall release the statutory lien exercised by him as per the provisions of Section 39(1) of the Arbitration and Conciliation Act, 1996.

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31.08.2023

Index: Yes/ No
Speaking order / Non speaking order
Neutral citation : Yes / No
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vsi2

**Pre-delivery Order in
Application Nos.2080 and 4609 of 2021**

31.08.2023