



WEB COPY



Arb.O.P (Com.Div.) No.371 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.01.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.371 of 2022

M/s.Chennai Metro Rail Limited,
Administration Building,
Chennai Metro Rail Depot,
Poonamalle High Road,
Koyambedu, Chennai 600 107,
Rep by Chief General Manager (A & CM)

... Petitioner

Vs.

1.M/s.Transtonnelstroy-Afcons JV,
Rep by Afcons Infrastructure Limited,
and comprising:

a)Transtonnelstroy Limited,
4/1, Luganskaya Str,
Moscow, 115583,
Russia

b)Afcons Infrastructure Limited,
Afcons House,
16, Shah Industrial Estate,
Veera Desai Road, Azad Nagar (P.O.),
Post Box No.11878, Andheri (W),
Mumbai 400 053.



Arb.O.P (Com.Div.) No.371 of 2022

2.Dr.M.S.Srinivasan,
Presiding Arbitrator,
No.26, Oliver Road,
Mylapore,
Chennai 600 004.

3.Mr.S.Arunachalam,
Member Arbitrator,
Plot No.59, 3rd Street,
Sowmya Nagar,
Medavakkam,
Chennai 600 100.

4.Mr.G.Sivakumar,
Member Arbitrator,
W-672-2A, East Main Road,
Anna Nagar, West Extension,
Chennai 600 101.

... Respondents

Arbitration Original Petition filed under Sections 14(1)(a)(2), 14(2) and 15(2) of the Arbitration and Conciliation Act, 1996 to declare that the mandate of the second, third and fourth respondents as terminated in respect of the arbitration proceedings between the petitioner and the first respondent, which is referred to as the UAA-01, Reference 3 Arbitration comprising of Claims 8A to 8D filed by the first respondent and the counter claim filed by the petitioner and consequently, substitute the second, third and fourth respondents with other Arbitrators as per the terms of the contract.



Arb.O.P (Com.Div.) No.371 of 2022

For Petitioners : Mr.S.Arjun Suresh
of M/s.Dua Associates

For Respondents : Mr.Masilamani, Senior Counsel
for Mr.Anirudh Krishnan for R1

Mr.N.L.Rajah, Senior Counsel,
for Mr.Sai Sudharsan Sathiyamoorthy,
for R2 to R4

ORDER

The instant Arbitration Original Petition has been filed under Sections 14(1)(a), 14(2) and 15(2) of the Arbitration and Conciliation Act, 1996 (hereinafter called as "the Act") to terminate the mandate of the respondents 2, 3 and 4 as terminated in respect of the arbitration proceedings between the petitioner and the first respondent and consequently, to substitute the respondents 2, 3 and 4 with other Arbitrators as per the terms of the contract.

2. The brief facts of the case are as follows:

2.1 The petitioner is a Special Purpose Vehicle (SPV) with equal



share holding of the Central Government and the State Government of Tamilnadu, that is 50% each. It had quoted a tender for design and construction of five underground stations from Washermenpet to Egmore, with a shaft at May Day Park along with associated Tunnels for a value of Rs.1566.81 Crores in which the first respondent emerged as a successful bidder. The contract was awarded to the first respondent pursuant to this tender and the same was referred as contract “UAA-01”.

2.2. There was several disputes between the petitioner and the first respondent and one such set of disputes were referred to the Tribunal comprising of respondents 2 and 4 wherein the first respondent was claimant and the petitioner was the respondent in the arbitration proceedings. The third respondent was substituted pursuant to the demise of the erstwhile nominee Arbitrator of the first respondent. Hence the Tribunal comprise of respondents 2, 3 and 4 (Arbitral Tribunal – AT), who are the technical members.

2.3. Subsequent to the reference of the dispute, the first respondent,



who was the claimant, filed a claim statement and the petitioner also filed the counter claim. The claim was filed by the first respondent in the year 2021 and the petitioner filed the counter claim on 07.01.2022. Subsequently, the issues were framed.

2.4. On 14.05.2021 vide its minutes, the AT had unconditionally fixed its fee at Rs.1,00,000/- per session. This was on the basis of what was agreed to by the parties during the hearing/meeting whose representatives were also present.

2.5. Under these circumstances, the AT revised its fees from a sum of Rs.1,00,000/- to a sum of Rs.2,00,000/- per session per Arbitrator. According to the petitioner, this is a case of not merely fixing exorbitant fee, but a more serious case of unilateral revision of a fee that was already agreed to earlier by the parties and the AT. This unilateral revision in fee was objected to by the petitioner on 08.07.2022. The first respondent also filed a memo on 10.07.2022, to keep the revision in fee in abeyance, considering that the Hon'ble Supreme Court would pronounce an order in



a separate and distinct case in which the first respondent is a party.

However, the AT vide its e-mail dated 24.07.2022 reiterated its demand for the revised fee. Thereafter, the first respondent had communicated the AT vide e-mail dated 28.07.2022, with a copy to the petitioner, that its share of the revised fee has been remitted by it on 25.07.2022. Hence, the petitioner filed the present petition under Sections 14 and 15 of the Act.

3. Mr.Arjun Suresh, learned counsel of M/s.Dua Associates, who is appearing for the petitioner, submitted that the mandate of the Arbitrator is liable to be terminated due to the following grounds:

(i) The parties have agreed to fixing of fee at Rs.1,00,000/- per session per Arbitrator vide its minutes dated 14.05.2022, unless and otherwise if both the party have agreed, the AT cannot revise the fee on its own. In the present case, unilaterally the AT revised its fees without the consent of the parties from a sum of Rs.1,00,000/- to Rs.2,00,000/-;

(ii) The petitioner has filed an affidavit dated 08.07.2022 wherein he has categorically stated that the fee as fixed by the AT on 01.07.2022 is not acceptable considering that it is contrary to the earlier fee fixed, exorbitant and contrary to the IV Schedule of the Act;



WEB COPY



Arb.O.P (Com.Div.) No.371 of 2022

(iii) In spite of the objection affidavit filed by the petitioner, the respondents 2 to 4 reiterated their demand for the revised fee vide e-mail dated 24.07.2022. Though the request was made by the petitioner that they are not in agreement for the revised fee, without considering the same, the AT had reiterated the revision of fee;

(iv) The first respondent vide e-mail dated 28.07.2022, communicated the AT with a copy to the petitioner that its share of revised fee has been remitted by it on 25.07.2022. The payment of the revised fee by one of the parties would prejudice the Arbitrator against the other party, who has not remitted the revised fee. Further, due to the said payment, the bias that would also operate against the petitioner, considering the unilateral revision of fee by the AT.

4. Therefore, the learned counsel for the petitioner contended that *suo-motto* revision of fee is not permissible and the same is against the agreed terms and conditions of the contract and also contrary to the IV schedule of the Act. He referred to the judgement of this Court and the Hon'ble Supreme Court that the *suo-motto* revision of fees by the Arbitrator without the consent of the parties is not permissible. The refusal to oblige to



the request of the petitioner to not to increase the fee originally agreed and reiterating the revision of fee by the Arbitrator and the unilateral revision of fee and thereafter, payment of first respondents of his share of fee to the AT, not only put the petitioner in embarrassing position as it is reluctant to pay such huge fee but there is also reasonable apprehension of prejudice/bias that would operate against the petitioner. Therefore, he contend that the mandate of the AT is liable to be terminated on the ground that the AT is *de jure* and is unable to perform its function as required.

5. Further, he would submit that in the instances mentioned in the Schedules V and VII of the Act, the grounds under which a person to be appointed as an Arbitrator could not only the grounds to make an Arbitrator to become ineligible if they are unable to illustrate over and above the situations and circumstances enumerated under Schedule V and VII of the Act. On the other grounds also, the Arbitrator are to be appointed will become ineligible under Section 14 read with Section 15 of the Act. In the present case, the unilateral revision of fee of the Arbitrator is not a ground under which an Arbitrator become ineligible under Schedules V and VII of



the Act. However he would submit that the unilateral increase of fee by the Arbitrators would be a misconduct, which would fall under the ground that the AT become *de jure* and it is unable to perform its function as required under Section 14 of the Act. Thereby, the mandate of the Arbitrator is liable to be terminated. In support of this submission, the learned counsel for the petitioner referred the following judgements of the Hon'ble Supreme Court:

(i) ***National Highways Authority of India vs. Gayatri Jhansi Roadways Limited with Gammon Engineers and Contractors Private Limited vs. National High Ways Authority of India***, reported in (2020) 17 SCC 626;

(ii) ***Madras Fertilizers Limited vs. SICGIL India Limited and others***, reported in 2010 (2) CTC 357;

(iii) ***Government of Tamil Nadu vs. VDB Projects (P) Limited and others***, reported in 2020 SCC OnLine Mad 15241;

(iv) ***Clarke Energy India Private Limited vs. SAS EPC Solution Private Limited and others***, reported in MANU/TN/8781/2021;

(v) ***National Highways Authority of India vs. Gammon Engineers and Contractor Private Limited***, reported in 2018 SCC OnLine Del 10183;

(vi) ***Union of India vs. Singh Builders Syndicate***,



reported in **(2009) 4 SCC 523**;

WEB COPY

6. Therefore, by referring the aforesaid cases and in view of the above facts and also in view of the law laid down by this Court and the Apex Court, the learned counsel for the petitioner submitted that the mandate of the Arbitrator is liable to be terminated.

7. On the other hand, Mr.G.Masilamani, learned Senior counsel would submit that there is no justifiable ground to terminate the mandate of the Arbitrator under Section 14 of the Act under the ground *de jure* unable to perform its function. Except the repetition of word *de jure* in many places, the grounds under which the petitioner seeks termination of Arbitrator is only a flimsy ground to ask to terminate the mandate of the Arbitrator.

8. The minutes of the meetings dated 01.07.2022 and 24.07.2022 would disclose the valid reason for increase in fee and it does not contains any word to presume that the Arbitrators will be prejudice/biased if the



enhanced fee is not paid. Further, regarding the minutes dated 10.07.2022, the learned Senior counsel would contend that "whether the said order of Hon'ble Supreme Court would be applicable to this Tribunal or not as it may be prospective or retrospective" cannot be construed as AT stating that it is not bound by the order of the Hon'ble Supreme Court as contended by the learned counsel for the petitioner. The allegations of the petitioner that to put the petitioner in an embarrassing situation and cause the petitioner to be prejudice and not to be treated in an impartial manner by the AT, resulting in the AT to become *de jure* unable to perform its functions as required is concerned, the said allegations does not directly and specifically attribute any prejudice or bias to the Tribunal. The petitioner without any tangible basis, assume AT will be prejudice and not able to treat the petitioner in an impartial manner and thereby AT to become *de jure* and unable to perform its function is not correct. It is only a vague assumptions and suspicion against the AT. Therefore, he would submit that on this flimsy reasons, unfounded allegations and suspicion, the mandate of the AT cannot be terminated.



9. The learned Senior counsel further contend that the Tribunal consist of only Engineers in the cadre of serving or retired chief engineer.

The petitioner in its affidavit dated 08.07.2022, while opposing the enhanced fee of Arbitrator, only stated that enhanced fee is not acceptable to the petitioner, since the same is contrary to the earlier fixed fees, exorbitant and the contrary to the IV schedule of the Act, but did not point out any judgements that AT has no power to fix its fees unilaterally without consent of the parties to the dispute. Therefore, he would submit that revising the fee and reiterating the same for reasons mentioned cannot be found fault to that extent of leading to termination of the mandate of the Tribunal. He would further submit that the petitioner has also raised an issue pertaining to the payment of the revised fee by the first respondent to the members of the AT and thereby he has raised an issue that the AT will be prejudice/bias against the petitioner, for this, he would contend that merely the payment or remittance of the enhanced fee by itself cannot be construed/presumed as evidence for proving that the AT would be prejudice/biased against the petitioner and such a presumption is far-fetched and not justified to terminate the mandate of the AT. In the entire body of the petition, he has



not made any allegation of bias against the AT and the allegations made in the paragraph No.34 of the petition did not satisfy any ground mentioned in Schedule V relating to independence or impartiality of Arbitrator as mentioned in Section 12(3) of the Act or Schedule VII of the Act mentioned grounds for making the Arbitrator ineligible as stipulated in Sections 12(5) of the Act.

10. The learner Senior counsel submitted that the bias or prejudice is a state of mind and no tangible, definite and acceptable material circumstances are pleaded and evidence placed before this Court to arrive at the extreme and fatal decision, to terminate the AT, on a finding that the mind of the AT should be considered biased or prejudiced. In the absence of the pleadings, evidence and proof, AT cannot be sought to be terminate, at the stage of cross examination of witnesses of the claimant.

11. Further, he submit that the members of the AT have been impleaded as parties to this arbitration original petition and they have filed their affidavit stating as follows:



1) They are willing to do the arbitration proceedings with the originally agreed fees as per the Judgement of the Hon'ble Supreme Court.

2) They will discharge their duties as an independent and impartial Arbitrator in deciding the disputes.

12. By referring the said affidavit, the learned Senior counsel submitted that there are no justifiable reasons and circumstances shown to reject the solemn statement of each of the Arbitrator that they will act independently and impartially on deciding the disputes. Therefore, the alleged controversy specified under Section 14(2) of the Act do not remain but stand effaced and consequently the petition is liable to be dismissed.

13. Further he would submit that in view of the subsequent events, that is the objections of the petitioner regarding enhanced and revised fees is no longer subsist as the AT has agreed to do the work with the mutually agreed fee structure. Thus, the apprehension of the petitioner regarding the independence and impartiality has been removed by the solemn statement of the AT. Therefore, there is no cause of action for the termination of the AT.



WEB COPY

14. In addition to the above, the learned senior counsel also contend that the preceding Arbitrator of this Tribunal is also preceding Arbitrator in other Tribunals, where the petitioner and the first respondent are also the parties with regard to the different contracts and another member of this Tribunal is also a member of five other Tribunals. All the said Tribunals relate to the same contract between the same parties. Therefore, the dismantling/termination of this AT on the ground either the Arbitrators are ineligible to be Arbitrators or they lack independence and impartiality or they are prejudiced against the petitioner will cause reflection on the said Arbitrators in the other tribunals. The petition to terminate the Tribunal is only intended to delay and defeat the various claims of the respondent, for work done and completed, now pending before six ATs. Therefore, he contend that this petition may be rejected with cost and in support of this contention, he referred to the following three judgements on the aspect that merely repeating the words in a Statute in the petition will not amount to proper statement of facts:



(i) ***Public Joint Stock Company Power Machines-Ztl, Lmz, Electrosila, Energomachexport vs Bharat Heavy Electricals Limited***, reported in ***MANU/DE/0327/2017***

(ii) ***Mahagun (India) Pvt. Ltd. vs. Infiniti Retail Limited***, reported in ***2011 SCC OnLine Del 2364***

(iii) ***Union of India (UOI) vs. Supriya Kumar Saha***, reported in ***2011 SCC OnLine Cal 3546***.

15. Mr.N.L.Rajah, learned Senior counsel, who is appearing on behalf of the members of the AT, that is respondents 2 to 4, would submit that initially the AT increased the fee from a sum of Rs.1,00,000/- to Rs.2,00,000/- and it has also reiterated the said fee. However subsequent to the judgement rendered by the Hon'ble Supreme Court in ***Oil and Natural Gas Corporation Limited vs Afcons Gunanusa JV*** reported in ***2022 SCC OnLine SC 1122*** (hereinafter called as “***ONGC*** judgement”) on 30.08.2022, the AT has agreed for a sum of Rs.1,00,000/- for each Arbitrator per sitting. Further, he would contend that in this regard all the three Arbitrators have filed a separate affidavit dated 15.09.2022 before this Court stating that they are agreed for a sum of Rs.1,00,000/- (old fee) as agreed by both the parties



and further they undertake to discharge the duty as an independent and impartial Arbitrator in deciding the dispute along with other Arbitrators.

Hence, he would submit that no element of bias can be attributable to the Arbitrator and further he reiterated the averments contained in the affidavit of the said Arbitrator for the consideration of this Court, apart from reiterating the averments made by Mr.G.Masilamani, learned Senior counsel appearing on behalf of the first respondent.

16. Heard the learned counsel for the petitioner, Mr.G.Masilamani, learned Senior counsel for the first respondent and Mr.N.L.Rajah, learned Senior counsel appearing on behalf of the members of AT, that is respondents 2 to 4.

17. Originally the AT was constituted on 07.05.2021 with the second and third respondents and one Mr.Sridharan. On 14.05.2021, the first and preliminary meeting was conducted and all the parties and the counsel were present. The AT fixed the fee at a sum of Rs.1,00,000/- per session for each of the Arbitrators as per the Clause No.12 of the minutes. The parties have



also agreed for the said fees unconditionally. On 12.08.2021, owing to the demise of Mr.Sridharan, the first respondent appointed the 4th respondent as the Arbitrator. Thereafter, the pleadings were completed and the admission and the denial of documents were submitted by the parties on 09.04.2022. By virtue of the minutes of the 8th meeting dated 13.04.2022, the Tribunal decided to proceed with the adjudication of claim Nos.8B and 8C of the first respondent and the counter claim of the petitioner. On 13.05.2022, the Hon'ble Supreme Court disposed of the Special Leave Petition with respect to the issue of Bank guarantee observing that the Tribunal had attempted to balance the interest on both the parties, further the Hon'ble Supreme Court directed the AT to dispose of the case within a period of four months from the date of the said order. On 06.06.2022, that is on 9th meeting of the Tribunal, a hearing was scheduled and Tribunal made a tentative schedule to complete the arguments for claim Nos.8B and 8C of the first respondent and the counter claim of the petitioner. According to the schedule, the argument were to be completed by 26.07.2022.

18. Under these circumstances, at the 10th meeting held on



01.07.2022, the second to fourth respondents increased the sitting fee from Rs.1,00,000/- to Rs.2,00,000/-.

19. Immediately after increase of the said fee, the petitioner filed the objections to the revision of the fees as indicated by the AT vide affidavit dated 08.07.2022. It is relevant to extract the main contents of the affidavit, which states hereunder:

“(1) I am the Chief General Manager (Arbitration and Contract Management) and authorised signatory of the respondent and as such, well-versed with the facts of these proceedings. I am therefore competent to swear to the contents of this affidavit.

(2) The present affidavit is filed in light of the learned Arbitral Tribunal's last direction dtd 01.07.2022 with regard to the enhanced fee payable by the parties to the dispute viz “each of the arbitrators shall be paid a sum of Rs.2,00,000/- per sitting of 3 hours of part thereof”.

(3) At the preliminary hearing held on 14.05.2021, the Hon'ble tribunal was pleased to fix a hearing fee of Rs.1,00,000/- per arbitrator per session. Subsequent thereto, the pleadings were completed by 31.03.2022. In these circumstances, the learned Tribunal had decided to take up



claims 8B and 8C of the claimant and the respondent's counter claims alone for trial, and decided to take up the claimant's other claims viz claims 8A and 8D later.

(4) Accordingly the Hon'ble Tribunal framed issues in respect of claims 8B and 8C as well as the respondent's counter claims alone on 06.06.2022 and tentative timelines were fixed for trial and oral submissions. On the request of the respondent, the learned tribunal re-scheduled the trial and oral submission dates and the same was informed by the learned tribunal on 01.07.2022.

(5) It is pertinent to state that in the e-mail dated 01.07.2022, the learned tribunal has revised the arbitrator's fee to Rs.2 lakhs per session (from the fee of Rs.1 lakh per arbitrator per session, as fixed earlier). In this regard, the respondent respectfully submits that the fee fixed is not acceptable to the respondent considering that it is contrary to the earlier fee fixed, exorbitant and contrary to the fourth Schedule of the Arbitration and Conciliation Act, 1996 amongst other reasons. This is more significant, especially considering the fact that the learned tribunal had decided to only proceed with 2 of the 4 claims of the claimant as of now.

(6) At this juncture it is pertinent to point out that in



the email dated 01.07.2022, the learned Arbitral Tribunal has indicated that each session will comprise of 3 hours or part thereof. Further, the said minutes state that the hearings will be held between 3.30 pm and 8 pm i.e., 4.5 hours on the days of the hearings. In effect, it appears that the learned Arbitral Tribunal has fixed two sessions per day i.e., 3 hours + 1.5 hours which, if the fee indicated in the email dated 01.07.2022 is applied, would amount to Rs.4 lakhs per day. This would further cause hardship to the respondent.

(7) It is submitted that, as until date, the respondent, pursuant to the earlier direction of the learned Tribunal [dated 15.04.2021] has remitted Rs.3,50,000/- to each of the learned Arbitrators' aggregating to a total of Rs.10,50,000/- with respect to the learned Arbitral Tribunal. In this regard, it is submitted that the learned Arbitral Tribunal may be pleased to fix its fee based on the Fourth Schedule of the Arbitration and Conciliation Act, 1996.

(8) It is submitted that the respondent being a joint venture of the Central Government and the State Government and the caters to the interest of the public at large, the payment of such exorbitant fee per sitting of the learned Arbitrator [as proposed by the learned Arbitral Tribunal] would be highly unjustified especially given the



fact that the respondent is dealing with monies of the public exchequer.”

20. After the filing of aforesaid affidavit dated 08.07.2022, the claimant/first respondent herein has filed a memo dated 10.07.2022, which is extracted hereunder:

“1.The issue regarding the standard of fees interalia the revision of fees during the course of the arbitral proceedings, applicability of the Schedule IV of the Arbitration and Conciliation Act, 1996, is sub-judice before the Hon'ble Supreme Court as a batch matter. It is pertinent to mention that Afcons Infrastructure Limited is one of the parties to the said matter pending before the Hon'ble Supreme Court. The claimant submits that the matter was concluded on 11.05.2022 and the judgment has been reserved by the Hon'ble Supreme Court.

2. Consequently, the claimant anticipates that the Hon'ble Supreme Court would provide appropriate direction on all the matters related to fees of the Arbitral Tribunal. Therefore, the claimant humbly requests the Hon'ble Tribunal to consider the direction dated 01.07.2022



WEB COPY



Arb.O.P (Com.Div.) No.371 of 2022

modifying the fee to be kept in abeyance until the outcome of the decision of the Hon'ble Supreme Court.”

21. A perusal of the averments made in the affidavit makes it clear that the petitioner has expressed his objections for increasing the fee as exorbitant. Apart from that, he has not stated anything about the bias or prejudice against the petitioner by the Arbitrator. He is only concerned about the increasing fee and therefore he had made an objection and if the Arbitrator would have revised their fees immediately acceding to the request of the petitioner, there would be no issues before this Court for the termination of the Arbitrator. As on date of filing the said affidavit on 08.07.2022, the petitioner had not raised any issues of bias or prejudice against the Arbitrator but for the first time, in the petition dated 10.08.2022, the following averments were made:

“.....Without prejudice to the fact that fee now demanded being unreasonable and contrary to what was agreed, the payment by one party and not by the other would



put the petitioner in an embarrassing situation and cause the petitioner to be prejudice and not be treated in an impartial manner by the learned AT, resulting in the learned AT to become de jure unable to perform its function as required. Recently, the AT had also directed the petitioner to provide dates for conducting the cross examination of the respondent's witnesses with regard to the petitioner's counter claim.”

22. Except the above averments in the petition, no word stated anything about to make route to ground for bias or for prejudice attributable to the Arbitrator. The petitioner has merely stated that the payment by one party and not by other will put the petitioner into embarrass situation and cause the petitioner to be prejudice and not be treated in an impartial manner. This is the only main ground under which the petitioner seeks this Court to terminate the mandate of the Arbitrator on the ground to *de jure* unable to perform its function as required. When the fee was increased, the request made by the petitioner before the Tribunal by virtue of an affidavit dated 08.07.2022 was that to not to revise the fees except that he has not made any allegations with regard to the bias or prejudice and thereafter,



even the first respondent also filed a memo dated 10.07.2022 requesting the AT to keep in abeyance of the decision to modify the fee until the outcome of the decision of the Hon'ble Supreme Court. Thereafter, the Tribunal has refused to revise its fees and the same was indicated through its minutes of the meeting dated 24.07.2022. Therefore, both the petitioner and the first respondent are on the same position with regard to the increase of the fees up to 24.07.2022.

23. Now the first respondent has remitted its fees on 25.07.2022 and the same was communicated to the AT by e-mail dated 28.07.2022. Therefore, the petitioner took a stand stating that in the event of payment of revised fee by one party and non-payment of other party would put the petitioner in embarrassing situation and cause the petitioner to be prejudiced and not to be treated in an impartial manner by the learned AT, resulting in learned AT to become *de jure* unable to perform its functions as required.

24. When the matter stood thus, the Hon'ble Supreme Court rendered its judgement in **ONGC** judgement with regard to fixation of fee holding



that the Arbitrator cannot revise the fees unilaterally. Therefore, subsequent to the said judgement, all the Arbitrators have filed separate affidavit before this Court stating as follows:

“(i) I am the second respondent in the above petition.

As per the directions of the Hon'ble High Court, Madras in its Judgement dated 24.03.2021, the petitioner and the first respondent referred certain disputes to the orbital Tribunal wherein I am the presiding Arbitrator and the 3rd and 4th respondents are the Member Arbitrators.

(ii) I have perused the affidavit filed in support of the above petition dated 12.08.2022 received on 29.08.2022 and the counter affidavit of the first respondent dated 13.09.2022 received on 14.09.2022. At the outset, being an arbitrator, I am not inclined to go into the averments made by both the parties. However, I would like to clarify the apprehensions, and place my statements on record before this Hon'ble Court.

(iii) The Arbitral Tribunal in the preliminary meeting held on 14.05.2021 with the consent of the parties fixed Rs.1,00,000/- as fees and fixed schedule for submission of pleadings and further hearings. The first respondent



submitted the statement of claim along with the supporting documents on 31.08.2021. The petitioner submitted its statement of defence and its counter claim along with supporting documents on 05.01.2022. Both the parties decided to examine the fact witnesses and the expert witnesses and filed their affidavits along with voluminous of additional documents.

(iv) At this juncture, considering the complexity of the claims, counter claims, and volume of the documents filed by the parties, the tribunal increased the remuneration of each arbitrator by an additional sum of Rs.1,00,000/- per sitting which was to be shared equally by both the parties. The petitioner vide its letter dated 08.07.2022 expressed its difficulties for revision of fees. The first respondent in their memo dated 10.07.2022 brought to the notice of the tribunal about a case pending before the Hon'ble Supreme Court relating to fee issue and requested to defer the issue till the disposal of the said case. The tribunal, in the minutes of meeting dated 24.07.2022, instructed the parties to pay the revised fee for the reasons stated therein.

(v) The Hon'ble Supreme Court in the matter Oil and Natural Gas Corporation Limited vs Afcons Gunanusa JV had decided the issues relating to fee of Arbitrator in its



judgment dated 30.08.2022. Since the said judgment is binding on the tribunall and the parties, I am acceptable to Rs.1,00,000/- as Arbitrator fee as already agreed by the parties.

(vi) I state though both the parties had reservation in the matter of revision of fee, I wish to state that it would not create any prejudice on any of the party. I hereby assure that I will continue to discharge my duty as an independent and impartial arbitrator in deciding the disputes along with other Arbitrators. Hence, the parties need not have any apprehensions. I further state that I have been Arbitrator in more than 18 Arbitration matters, out of which as a Presiding Arbitrator in 9 Arbitration matters. Till date, there have been no allegations of bias made against me.

(vii) I submit that I have no prejudice on any of the parties and only insist the parties to extend their cooperation to conclude the proceeding expeditiously.”

25. A perusal of the averments in the affidavit made it clear that the Arbitrators have agreed for a sum of Rs.1,00,000/- as Arbitrator fee as already agreed by the parties. Further, they have stated at paragraph No.6, that **“though both the parties had reservation in the matter of revision of**



fee, I wish to state that it would not create any prejudice on any of the parties". Therefore, the learned Arbitrators stated that they would continue

to discharge the duty as an independent and impartial Arbitrator in deciding the dispute along with the other Arbitrators. Further, it is clear that in the Arbitrators' mind, it is not only the revision of fee was objected by only the petitioner but it was objected by both the parties, which is clear from the affidavit filed by the Arbitrator. In the present case, up to 24.07.2022, the parties were in the same position. Only subsequent to 24.07.2022, the first respondent paid the revised fee. However the petitioner had not paid the revised fee and the same continued up to 30.08.2022, for a period of 36 days approximately. Thereafter, after the judgement of Hon'ble Supreme Court, the Arbitrators have revised their fee to the original fee of Rs.1,00,000/- per Arbitrator. Therefore, subsequent to 30.08.2022, the issue of non-payment of fee would not arise. Even when the Arbitrator filed their affidavit, they have stated that both the parties had reservation in the matter of revision of fee and they have not mentioned anything about only the petitioner. It is admitted fact that both the parties have originally make opposition for the revision of fees.



WEB COPY 26. In the **ONGC** judgement at paragraph No.229, the Hon'ble Supreme Court has also observed as follows:

“..... In all fairness, it must be stated that Mr.K.K.Venugopal, learned Attorney General for India, had accepted this legal position, and I quote... “this of course would indicate that no ground of bias can be raised if the Arbitrator directs one party to pay the fee payable by the party, in case the other party is not prepared to pay the fee. No question of bias would arise.”

27. In the present case, one party has not paid the fee and other party has paid the fee. Even in the situations when the fee which is paid by one party and not prepared to pay by other party, or even when the entire fees is borne by one party, the Hon'ble Supreme Court has held that no bias can be raised. In the present case, temporarily for a period of 36 days, the revised fee has not been paid by one party and the other party has paid the fee. After



30.08.2022 Arbitrator has also revised with their own fee. It was not that the objection for revision of fee was made only by the petitioner but both the petitioner as well as the respondent. Therefore, I am of the considered view that no bias or prejudice can be attributable for the acts of the Arbitrator in revising the fee, in the present facts and circumstances of the case.

28. As contended by Mr.G.Masilamani, learned Senior counsel, in the entire pleadings of this petition, the petitioner is reiterated only the word *de jure*, unable to perform its function, biased and prejudice, by referring to the payment of fees by the first respondent and this will not be bias or prejudice as contended by the learned counsel for the petitioner, in view of the law laid down by the Hon'ble Supreme Court in **ONGC** judgement and in the manner stated above.

29. For all these reasons stated above, I am of the view that the present petition is not sustainable and I do not find any substance in the submission made on behalf of the petitioner by the learned counsel for the petitioner. As far as the very many case laws that have been referred by the



Arb.O.P (Com.Div.) No.371 of 2022

parties with regard to the bias and prejudice, since on fact, this Court came to conclusion that there is no bias or prejudice and on the fact and the circumstance of the present case, the other case laws referred by the respective parties could not be applicable for the present case.

30. Therefore, this Arbitration Original Petition is dismissed. The Arbitrators are directed to commence the proceedings immediately and decide the case in accordance with law. There shall be no order as to costs.

24.01.2023

Speaking/Non-speaking order
Index : Yes / No
Neutral Citation: Yes / No
nsa



WEB COPY



Arb.O.P (Com.Div.) No.371 of 2022

KRISHNAN RAMASAMY.J.,
nsa

Arb.O.P (Com.Div.)No.371 of 2022

24.01.2023