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

Date of decision: 21st April, 2023

+ **O.M.P.(MISC.)(COMM.) 118/2023**

JAGMEET SINGH BHATIA Petitioner

Through: **Mr.Manish Kaushik, Adv.**

versus

ANAY KUMAR GUPTA Respondent

Through: **Nemo**

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

I.A. 7559-60/2023 (exemption)

1. Allowed, subject to all just exceptions.

O.M.P.(MISC.)(COMM.) 118/2023

2. This petition has been filed under Section 29A of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying for the following reliefs:

"b. Appoint a new Arbitrator in the Arbitration proceedings titled as "Anay Kumar Gupta vs. Jagmeet Singh Bhatia" and pass directions for fixing arbitral fee as per Schedule IV of the Act;

c. Transfer the arbitral fees paid by the parties before the Arbitral Tribunal in the name of newly appointed Arbitrator;

d. Counter claim filed by the Petitioner may be allowed to be admitted."

3. The learned Arbitrator was appointed, on an application filed by the petitioner herein under Section 8 of the Act, vide order dated 20.09.2021 passed by this Court in CS(COMM) 409/2021, titled **Anay Kumar Gupta v. Jagmeet Singh Bhatia**. As far as the fee of the learned Arbitrator was concerned, this Court directed vide the same order that the learned Arbitrator may fix his own fees.

4. The learned Arbitrator entered upon the reference on 23.09.2021. Vide an order dated 25.09.2021, the learned Arbitrator directed the parties to make an initial deposit of Rs.5 Lakhs each towards the Arbitral fee alongwith Rs.15,000/- each towards secretarial and administrative expenses.

5. The learned Arbitrator thereafter vide order dated 11.10.2021, while considering an application under Section 17 of the Act, directed the parties to make a further deposit of Rs.2.5 Lakhs each to be paid on or before the next date of hearing. The petitioner did not comply with the said direction. In the meantime, the learned Arbitrator continued to consider the application filed by the respondent under Section 17 of the Act and pass certain *interim* directions.

6. The petitioner herein did not comply with the *interim* directions passed by the learned Arbitrator nor deposited the second tranche of the *interim* fee. The learned Arbitrator, therefore, vide his order dated 13.01.2022 *inter alia* directed that the matter would be taken up subject to the petitioner herein complying fully with the directions given and subject to the petitioner depositing the interim Arbitral fee. The learned counsel for the petitioner appearing before the learned Arbitrator sought

10 days' time to comply with the directions.

7. Instead of complying with the interim directions passed by the learned Arbitrator including depositing the interim fee, the petitioner herein filed an application before the learned Arbitrator claiming that the learned Arbitrator had revised his fee vide order dated 11.10.2021 to Rs. 2.50 lakhs per hearing.

8. The said application was dismissed by the learned Arbitrator vide his order dated 31.01.2022, holding that there was no such direction issued by the learned Arbitrator fixing a fee of Rs.2.5 Lakh per hearing. The learned Arbitrator also observed that there was no direction by the Court for application of the Schedule IV, rather there was a specific direction enabling the Arbitral Tribunal to fix its own fee.

9. Finally, by his order dated 16.02.2022, the learned Arbitrator fixed a fee of Rs.75,000/- each for the claimant and the respondent, exclusive of the administrative and secretarial expenses, for sessions of 2 to 2.5 hours each. The learned Arbitrator specifically recorded in his order dated 16.02.2022 that the fee so fixed is acceptable to both, the claimant and the respondent, who have sought instructions from their respective clients and have confirmed the same. It was further directed that the earlier fee deposited by the parties shall be adjusted in the fee now fixed by the learned Arbitrator. Paragraphs 3 and 4 of the said order are reproduced herein below:

"3. The Arbitrator was to fix its own fee. Ld. Counsel for the Respondent submits that the Respondent has suffered losses but would like to pursue its Counterclaims which are in the range of Rs.3.5 Crores. He prays that the Tribunal may fix the Arbitral fee as per the 4th Schedule or

reasonable fee per hearing. This is a matter involving several contentious issues. Besides, it entails evidence with regard to marketing expenses, sales, Excise Duty liabilities and numerous accounting entries and record. The matter has been discussed with both the Counsel, who have obtained instructions from the Respondent. Given the nature of the controversy, evidence involved as well as the financial constraints pleaded, the Arbitral fee per hearing is fixed at Rs. 75,000/- each for the Claimant and the Respondent exclusive of the Administrative and Secretarial expenses for session of 2 to 2.5 hours each. The above is acceptable to the Claimant and the Respondent, after seeking instructions from their respective clients have confirm the same.

4. Claimant has already paid a total sum of Rs. 7.5 Lakhs which would account for 10 hearings. Respondent has paid Rs. Five Lakhs, it would remit within 10 days the sum of Rs. 2.5 Lakhs towards its share of Arbitral fee up to 10 hearings. Parties would also deposit on/or before the 10th hearing the advance Arbitral fee as may be directed."

10. As the petitioner herein did not comply with the order for depositing the fee, the claimant, that is the respondent herein, deposited the share of the fee of the petitioner herein as well in accordance with the earlier order dated 11.10.2021. Further, the learned Arbitrator vide his order dated 08.03.2022 directed the counter-claim of the petitioner herein to remain suspended.

11. The petitioner admittedly did not make the deposit of the fee even thereafter nor did he take any legal remedy to challenge the said orders of fixation of fee. In the meantime, the proceedings before the learned Arbitrator continued and were listed before the learned Arbitrator on

07.04.2022, 11.05.2022, 14.07.2022, 10.08.2022, 12.08.2022, 13.08.2022, 02.09.2022, 03.09.2022, 09.09.2022, 03.10.2022, 07.11.2022 and 25.11.2022. The learned Arbitrator completed the recording of the cross-examination of the witnesses of the parties and fixed the proceedings for hearing final arguments.

12. It is only at this stage that the petitioner finally woke up and filed a petition before this Court praying therein that the learned Arbitrator be directed to fix his fee as per Schedule IV of the Act. The said petition, being OMP(T)(COMM) 120/2022, on 30.11.2022, was withdrawn by the petitioner with liberty to approach the learned Arbitrator afresh in view of the judgment of the Supreme Court in ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV***, 2022 SCC OnLine SC 1122.

13. The petitioner thereafter filed an application before the learned Arbitrator requesting the learned Arbitrator to fix the fee in accordance with Schedule IV of the Act. The said application did not even make a reference to the order dated 16.02.2022 passed by the learned Arbitrator fixing his fee with the consent of the parties. The said application was dismissed by the learned Arbitrator vide his order dated 24.01.2023, observing as under:

“5. It is not necessary to delve into the averments made by Respondent inter-se which are subject matter of adjudication in these proceedings. Reliance has been placed on Arb. Pet. No. 5/2022 titled "Oil and Natural Gas Corporation vs. Afcons Gunanusa JV" to urge the applicability of the Fourth Schedule to the present case. In the instant case, the Court had left it on the Arbitrator to fix its own fee which was done in consultation with the Counsel and with consent of the parties. Respondent, a liquor manufacturer and hotelier, simply wishes to retract from the fee fixed with the

consent of the parties after having got the benefit of urgent interim relief. Besides, Oil and Natural Gas (Supra) which came on 31.08.2022 has the dictum that the Arbitrator's fee should be fixed at the very inception. The judgement would not have any retrospective application especially where the Arbitral fee was fixed at an early stage of proceedings on 16.02.2022 in consultation with and consent of the parties. Besides, the terms of reference provided for the Arbitrator to fix its own fee. The application has no merit and is dismissed."

14. The learned counsel for the petitioner, on the above facts, submits that the learned Arbitrator, in terms of the judgment of the Supreme Court in ***Oil and Natural Gas Corporation*** (supra), should have fixed his fee in accordance with Schedule IV of the Act. He submits that as the period for passing of the Award has expired, a fresh Arbitrator may be appointed for considering the counter-claim of the petitioner.

15. I am unable to agree with the submissions made by the learned counsel for the petitioner.

16. The order dated 20.09.2021 passed in CS(COMM) 409/2021, while appointing the learned Arbitrator, had also left it to the learned Arbitrator to fix his own fee. Such fee was determined by the learned Arbitrator with the consent of the parties, as is recorded in the order dated 16.02.2022. Once the fee has been fixed with the consent of the parties, even in terms of the judgment of the Supreme Court in ***Oil and Natural Gas Corporation*** (supra), the parties are bound to pay the same. In ***Oil and Natural Gas Corporation*** (supra), the Supreme Court has observed as under:

"124. We believe that the directives proposed by

the amicus curiae, with suitable modifications, would be useful in structuring how these preliminary hearings are to be conducted. Exercising our powers conferred under Article 142 of the Constitution, we direct the adoption of the following guidelines for the conduct of ad hoc arbitrations in India:

“1. Upon the constitution of the arbitral tribunal, the parties and the arbitral tribunal shall hold preliminary hearings with a maximum cap of four hearings amongst themselves to finalise the terms of reference (the “Terms of Reference”) of the arbitral tribunal. The arbitral tribunal must set out the components of its fee in the Terms of Reference which would serve as a tripartite agreement between the parties and the arbitral tribunal.

2. In cases where the arbitrator(s) are appointed by parties in the manner set out in the arbitration agreement, the fees payable to the arbitrators would be in accordance with the arbitration agreement. However, if the arbitral tribunal considers that the fee stipulated in the arbitration agreement is unacceptable, the fee proposed by the arbitral tribunal must be indicated with clarity in the course of the preliminary hearings in accordance with these directives. In the preliminary hearings, if all the parties and the arbitral tribunal agree to a revised fee, then that fee would be payable to the arbitrator(s). However, if any of the parties raises an objection to the fee proposed by the arbitrator(s) and no consensus can be arrived at between such a party and the tribunal or a member of the tribunal, then the tribunal or the member of the tribunal should decline the assignment.

3. Once the Terms of Reference have been finalized and issued, it would not be open for the arbitral tribunal to vary either the fee fixed or the heads under which the fee may be charged.

4. The parties and the arbitral tribunal may make a carve out in the Terms of Reference during the preliminary hearings that the fee fixed therein may be revised upon completion of a specific number of sittings. The quantum of revision and the stage at which such revision would take place must be clearly specified. The parties and the arbitral tribunal may hold another meeting at the stage specified for revision to ascertain the additional number of sittings that may be required for the final adjudication of the dispute which number may then be incorporated in the Terms of Reference as an additional term.

5. In cases where the arbitrator(s) are appointed by the Court, the order of the Court should expressly stipulate the fee that arbitral tribunal would be entitled to charge. However, where the Court leaves this determination to the arbitral tribunal in its appointment order, the arbitral tribunal and the parties should agree upon the Terms of Reference as specified in the manner set out in draft practice direction (1) above.

6. There can be no unilateral deviation from the Terms of Reference. The Terms of Reference being a tripartite agreement between the parties and the arbitral tribunal, any amendments, revisions, additions or modifications may only be made to them with the consent of the parties.

7. All High Courts shall frame the rules governing arbitrators' fees for the purposes of Section 11(14) of the Arbitration and Conciliation Act, 1996.

8. The Fourth Schedule was lastly revised in the year 2016. The fee structure contained in the Fourth Schedule cannot be static and deserves to be revised periodically. We, therefore, direct the Union of India to suitably modify the fee structure contained in the Fourth Schedule and continue to do

so at least once in a period of three years.”

(Emphasis supplied)

17. In the present case, the fee has been fixed by the learned Arbitrator with the consent of the parties, at the initial stages of the arbitral proceedings itself. One of the parties cannot now insist on modification thereof and/or pray for change of the Arbitrator for the reason that he does not agree to such modification of the fee. The consequences of non-deposit of the requisite fee are prescribed in Section 38(2) of the Act, which is reproduced as under:

“38. Deposits.

xxx

(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties:

PROVIDED that where one party fails to pay his share of the deposit, the other party may pay that share:

PROVIDED FURTHER that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral Tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.”

18. The learned Arbitrator has followed this course and no fault can be found in the same.

19. I also find that the learned Arbitrator has acted with expedition in the proceedings. Therefore, even otherwise, there is no reason to substitute the learned Arbitrator.

20. As the petitioner submits that he is not seeking an extension of mandate of the learned Arbitral Tribunal, it is made clear that this Court has dealt with only the contention of the petitioner for change of the

learned Arbitrator for his counter-claim.

21. In view of the above, I find no merit in the present petition. The same is dismissed.

NAVIN CHAWLA, J

APRIL 21, 2023/Arya

