

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

ARBITRATION PETITION NO.739 OF 2024

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HCC Infrastructure Co. Ltd., .. Petitioner.
v/s.
Sadbhav Infrastructure Projects Ltd.,
& Others .. Respondents.

Mr. Ashish Kamat, Sr. Advocate with Adv. Jatin Pore, Adv. Ashwini Hariharan and Vishal Mandal i/b. DSK Legal, for the Petitioner.
Mr. Saurin A. Mehta with Adv. Kirit Parikh, for the Respondents.

CORAM: FIRDOSH P. POONIWALLA,J.
DATE : 20th DECEMBER, 2024.

PC:-

By an Order dated 20th September, 2024 passed by this Court, Mr. Justice S. J. Vazifdar, Retired Chief Justice of the Punjab & Haryana High Court, was appointed as the Sole Arbitrator. The said Order records that the Arbitrator was appointed by consent of the parties, and, by consent of the parties, various terms of his appointment were also fixed. One of the terms of appointment was mentioned in paragraph 5(h) of the said Order which provides that, since the appointment of the Sole Arbitrator was by consent of the parties, the Arbitral Tribunal's fees would not be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules 2018 ("the said Rules")

2 It so transpired that, before the Arbitrator, Respondent No.1

contended that the Arbitrator should charge fees as per Fourth Schedule to the Arbitration and Conciliation Act, 1996 (the Act).

3 Mr. Kamat, the learned Senior Advocate appearing on behalf of the Petitioner, has submitted that the said Order dated 20th September, 2024 clearly records the consent of Respondent No.1 to the effect that the Arbitral Tribunal's fees shall not be governed by said Rules. Despite the same, Respondent No.1, in order to delay the Arbitration, raised the said contention and, therefore, the same ought not to be accepted.

4 On the other hand, Mr. Mehta, the learned Counsel appearing on behalf of Respondent No.1, has submitted that, although paragraph 5 (h) of the Order dated 20th September, 2024 states that the appointment of the Arbitrator is by consent of the parties, the direction, that the Arbitral Tribunal's fees shall not be governed by the said Rules, in an order of the Court and not by consent of the parties.

5 Further, the learned Counsel for Respondent No.1 also referred to Section 11 (14) of the Act to contend that it provides that the fees of the Arbitral Tribunal should be subject to fees specified in the Fourth Schedule.

6 The learned Counsel for Respondent No.1 also referred to paragraphs 126 to 129 of the Judgement of the Hon'ble Supreme Court in the case of *Oil and Natural Gas Corporation Limited v/s. Afcons Gunanusa JV, 2024 (4) SCC 481*, which read as under:-

“126. These preliminary hearings should also be conducted when the fees are specified in the arbitration agreement. The arbitration agreement may have been entered into at an earlier point in time,

even several years earlier. It is possible that at the time when the disputes between the parties arise, the fees stipulated in the arbitration agreement may have become an unrealistic estimate of the remuneration that is to be offered for the services of the arbitrator due to the passage of time. 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 being demanded 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. Since the relationship between the parties and arbitrator(s) is contractual in nature, specifically with respect to the payment of remuneration, there must be a consensus on the fees to be paid.

127. It is possible that during the preliminary hearings, the parties and the Arbitral Tribunal may be unsure about the extent of time that needs to be invested by the arbitrator(s) and the complexity of the dispute. It is also possible that the arbitral proceedings may continue for much longer time than was expected. In order to anticipate such contingencies, during the preliminary hearings, the parties and the arbitrator(s) should stipulate that after a certain number of sittings, the fee would stand revised at a specified rate. The number of sittings after which the revision would take place and the quantum of revision must be clearly discussed and determined during the preliminary hearings through the process of negotiation between the parties and the arbitrator(s). There is no unilateral power reserved to the arbitrator(s) to revise the fees on their own terms if they believe that an additional number of sittings would be required to settle the dispute. The fees payable to the Arbitral Tribunal in an ad hoc arbitration must be settled between the Arbitral Tribunal and the parties at the threshold during the course of the preliminary hearings. Resolution of the fees payable to the Arbitral Tribunal by mutual agreement during the preliminary hearings is necessary. Failing such an agreement, the arbitrator(s) who decline to accept the fee suggested by the parties (or any of them) are at liberty to decline the assignment. The fixation of arbitral fees at the threshold will obviate the grievance that the arbitrator(s) are arm-twisting parties at an advanced stage of the dispute resolution process. In such a situation, a party who is not agreeable to a unilateral revision of fees demanded by the Arbitral Tribunal in the midst of the proceedings has a real apprehension that its refusal may result in embarrassing consequences bearing on the substance of the dispute.

128. 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 finalised 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 the 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."*

129. *Conscious and aware as we are that : (i) Arbitration proceedings must be conducted expeditiously; (ii) Court interference should be minimal; and (iii) Some litigants would object to even a just and fair arbitration fee, we would like to effectuate the object and purpose behind enacting the model fee schedule. When one or both parties, or the parties and the Arbitral Tribunal are unable to reach a consensus, it is open to the Arbitral Tribunal to charge the fee as stipulated in the Fourth Schedule, which we would observe is the model fee schedule and can be treated as binding on all. Consequently, when an Arbitral Tribunal fixes the fee in terms of the Fourth Schedule, the parties should not be permitted to object the fee fixation. It is the default fee, which can be changed by mutual consensus and not otherwise.*

7 It is the submission of the learned Counsel for Respondent No.1 that, as per the law laid down by the Hon'ble Supreme Court, the fees of the Arbitral Tribunal have to be fixed with the consent of the parties, and if the fees fixed are not agreeable to the Arbitrator, then, the Arbitrator should decline his assignment.

8 In my view, it is not possible to accept the submissions of Respondent No.1.

9 Paragraph 5 of the Order dated 20th September, 2024 is very clear that, by consent of the parties, the Court appointed an Arbitrator on certain terms and conditions, which are also by consent of the parties. Paragraph 5 of the Order reads as under:-

“5:- Hence, by consent of the parties, this Court appoints Hon’ble Mr. Justice S. J. Vazifdar, former Chief Justice of Punjab & Haryana High Court, to act as the Sole Arbitrator to decide the disputes and differences between the parties on the following Terms and Conditions.”

10 Hence, on reading of paragraph 5 itself, it is clear that the terms for appointment of the Arbitrator, which are mentioned under paragraph 5, are by consent of the parties.

11 Paragraph 5(h) of the Order dated 20th September, 2024 will have to be read in the light of the opening part of paragraph 5. Paragraph 5(h) of the said Order, reads as under:-

:5(h):- Fees: Since, the appointment of the Sole Arbitrator is by consent of the parties, the arbitral tribunal’s fees shall not be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

12 On reading of paragraph 5(h), there is no doubt in my mind that the parties have, by consent, agreed not only to the appointment of the Arbitrator but also that the Arbitral Tribunal’s fees shall not be governed by the said Rules.

13 This being the position, it is not now open for Respondent No.1 to contend that the Arbitral Tribunal must charge its fees as per the Forth Schedule to the Act.

14 Section 11(14) of the Act, which provides that the fees should be subject to the rates specified in the Forth Schedule, obviously does not apply when a party has already consented that the Arbitral Tribunal will not be bound by the said Rules (which contain the same rate of fees as the Fourth Schedule)

15 Further, there can be no dispute with the law laid down by the Hon'ble Supreme Court in the case of Oil and Natural Gas Corporation Ltd., (supra). However, in the present case, in the light of the consent given by Respondent No.1 in the Order dated 20th September, 2024 itself, what is laid down by the Hon'ble Supreme Court, in the said judgement, would not be applicable.

16 In these circumstances, it is made clear that the Arbitrator is free to charge fees as fixed by him and his fees would not be subject to fees specified either by the said Rules or the Fourth Schedule of the Act.

17 Accordingly, Respondent No.1 is directed to pay the fees as fixed by the Arbitrator.

(FIRDOSH P. POONIWALLA,J.)