

2024.PHHC.164102



**IN THE PUNJAB AND HARYANA HIGH COURT AT
CHANDIGARH**

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**CWP- 26090-2022
Date of Decision: 04.12.2024**

SANTOSH KUMAR CHADHA

... Petitioner

VERSUS

**CHIEF ADMINISTRATOR, HARYANA STATE
AGRICULTURE MARKETING BOARD AND ANR.**

... Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

Present: Mr. Sandeep Panwar, Advocate
for the petitioner.

Mr. Vivek Saini, Advocate
for the respondents.

VINOD S. BHARDWAJ, J. (ORAL)

The present petition has been filed by the petitioner for seeking issuance of direction to the respondents to pay the Arbitrator's Fee of Rs.2,38,500/- alongwith interest.

Learned counsel for the petitioner contends that the petitioner is a retired Chief Engineer from Union Territory, Chandigarh and is on the list of approved Arbitrators. A dispute arose between one S.K. Construction Company, Gurugram (Claimant) and the Executive Engineer, Haryana State Agriculture Marketing Board, Gurugram in relation to the payment for the work of "Raising of 1 No. Common Platform and construction of 5 No. Covered (14 Bays) 19 travel wide 112 meter long in NVM at Gurugram". In order to determine the dispute between the claimant and the Marketing Board, the

petitioner was appointed as the sole Arbitrator in terms of Clause 25-A of the contract agreement vide office order Endorsement No.EE(W)-2019/12984 dated 28.08.2019. The proceedings were accordingly initiated by the petitioner. A statement of claim was submitted by the claimant on 15.11.2019 i.e. on the first date of hearing. The amount demanded as per the statement of claim was Rs.145 lacs. The respondent-Marketing Board also submitted its written statement alongwith a counterclaim on 18.12.2019 i.e. on the second date of hearing. A replication to the written statement and reply to the counterclaim was filed by the claimant on 02.01.2020. As many as ten hearings took place in the said arbitral proceedings on different dates. The tenth hearing was held on 13.02.2021. The fee of the Arbitrator was, however, decided on the second sitting of the Arbitral Tribunal held on 18.12.2019 and paragraph No.6 thereof reads thus:

“6. With the consent of both the parties and learned counsel appearing on either side the fee of the Arbitrator and the expenses in relation to the conduct of the proceedings are fixed as under: -

- (a) The Arbitrator shall be paid Arbitration Fee as per the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015 read with the foot note.*
- (b) The Arbitrator Fee shall be shared equally between the parties (subject to TDS).*
- (c) Secretarial assistance and out of pocket expenses per sitting shall be share equally between the parties if need be.”*

He contends that both the parties, at the stage of arguments and counter-arguments in the proceedings of the case before the Arbitrator, mutually decided to withdraw their respective claims and counterclaims vide a joint statement sent through email dated 23.01.2021. Accordingly, the arbitral

proceedings were terminated in terms of the communication received. A memo of fee for Rs.2,38,500/- was served upon each of the parties in the said Arbitration case, whereafter the claimant- S.K. Construction Co. deposited its share, however, the respondent-Marketing Board did not release its share towards Arbitrator's fee. Accordingly, a legal notice dated 07.08.2021 was sent to the respondent-Marketing Board, to which no reply was given. Accordingly, a reminder dated 21.11.2021 was submitted, whereafter a reply was received vide email dated 09.12.2021, to the effect that the Board is not liable to pay its share of Arbitrator's fee since no final Award was passed by the Arbitrator and the claim was withdrawn by the respective parties. The present writ petition has thus been filed.

Counsel for the petitioner contends that the fee of the Arbitrator/Arbitration Tribunal is determinable on the claim lodged by the respective parties; and once the order, determining the fee of the Arbitrator/Arbitration Tribunal, had already been passed on 18.12.2019, irrespective of the final outcome of the arbitral proceedings, the parties become liable to pay the fee of the Arbitrator/Arbitration Tribunal.

Counsel for the respondent- Marketing Board, on the other hand, contends that as no final Award was passed by the Arbitrator/ Arbitration Tribunal, hence, there was no liability to pay the fee of the Arbitrator. He refers to Section 38 of the Arbitration and Conciliation Act, 1996 to contend that the fee becomes liable to be paid only on passing of a final Award in the arbitral proceedings and since the proceedings never culminated into passing of a final Award by the Arbitrator, hence, the respondent-Marketing Board is not liable to pay any fee.

No other argument has been raised nor any judgment cited by either sides.

I have heard the learned counsel for the respective parties and have gone through the documents and record available on case file with their able assistance.

Before proceeding further into the matter, it would be appropriate to refer to certain relevant statutory provisions of Arbitration and Conciliation Act, 1996. The same are reproduced hereinafter below:

11. Appointment of Arbitrators.—

XXXX XXXX XXXX

(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

XXXX XXXX XXXX

THE FOURTH SCHEDULE
[See section 11(14)]

Sum in dispute	Model fee
Up to Rs.5,00,000	Rs.45,000
Above Rs.5,00,000 and up to Rs.20,00,000	Rs.45,000 plus 3.5 per cent. of the claim amount over and above Rs.5,00,000
Above Rs.20,00,000 and up to Rs.1,00,00,000	Rs.97,500 plus 3 per cent. of the claim amount over and above Rs.20,00,000
Above Rs.1,00,00,000 and Up to Rs.10,00,00,000	Rs.3,37,500 plus 1 per cent. of the claim amount over and above Rs.1,00,00,000
Above Rs.10,00,00,000 and the up to Rs.20,00,00,000	Rs.12,37,500 plus 0.75 per cent. of claim amount over and above Rs.1,00,00,000

Above Rs.20,00,00,000	Rs.19,87,500 plus 0.5 per cent. of the claim amount over and above Rs.20,00,00,000 with a ceiling of Rs.30,00,000.
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Note:— In the event, the arbitral tribunal is a sole arbitrator, he shall be entitled to an additional amount of twenty-five per cent. on the fee payable as per the table set out above.

XXXX XXXX XXXX

31. Form and contents of arbitral award—

- (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.*
- (2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.*
- (3) The arbitral award shall state the reasons upon which it is based, unless— (a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award on agreed terms under section 30.*
- (4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.*
- (5) After the arbitral award is made, a signed copy shall be delivered to each party.*
- (6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.*
- (7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period*

between the date on which the cause of action arose and the date on which the award is made.

- (b) *A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.*

Explanation.—*The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).*

- (8) *The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.*

Explanation.— *For the purpose of clause (a), “costs” means reasonable costs relating to—*

- (i) *the fees and expenses of the arbitrators and witnesses,*
- (ii) *legal fees and expenses,*
- (iii) *any administration fees of the institution supervising the arbitration, and*
- (iv) *any other expenses incurred in connection with the arbitral proceedings and the arbitral award.*

XXXX XXXX XXXX

38. Deposits—

- (1) *The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it:*

Provided that *where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.*

- (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.

- (3) *Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.*

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.”*

It is evident from a perusal of the above that the fixation of a fee of an Arbitrator/Arbitration Tribunal is Governed by Section 11 (14) and that an Arbitrator/ Arbitration Tribunal is held entitled to such fee as may be specified in the Fourth Schedule. A perusal of the Fourth Schedule clearly shows that the determination of fee of the Arbitrator/Arbitration Tribunal is based on the sum in dispute and not on the passing of final Award. Hence, the entitlement of the fee of an Arbitrator/Arbitration Tribunal is not contingent upon final outcome of the proceedings that have been set in motion before the Arbitrator/Arbitration Tribunal.

The reference made by the counsel for the petitioner to Section 31 of the Arbitration and Conciliation Act, 1996 deals with form and content of an Arbitral Award. Cost as a part of Award U/S 31 (8) is in the context as to what all would be constituted therein if costs are also awarded. The same do not mean that the fee, which is a part of the fee, cannot be paid unless an Award is passed to be paid with costs. Mentioning of the same as a part of the Award is not to mean that absence of an Award disentitles an Arbitrator to his fee.

Similarly, Section 38 of The Arbitration and Conciliation Act, 1996 deals with deposits to be made and the entitlement to set off the fee from amongst the deposit. The same is a pre-emptive, pre-deposit and a separate order is passed under Section 38 of The Arbitration and Conciliation Act, 1996 and is not in the nature of a provision which determines the liability. The order

for fee has been passed in the present case as per Section 11(14) of The Arbitration and Conciliation Act, 1996 alongwith Schedule IV and neither Section 31 nor Section 38 of The Arbitration and Conciliation Act, 1996 impose any restriction on the right to determine and recover the fee. Rather, the same are additional provisions which tend to ensure recovery of the fee payable to an Arbitrator. To read the said Clause as the only stage and way to claim the fee would be a gross misreading of the statutory provision and link the payment liability to passing of an Award.

Since none of the Clauses referred to and relied upon by the counsel for the respondent create the liability to pay the fee at the time of the Award or to be recovered only from the deposit, no such prohibition can be read into it. Had the legislative intent been there to link the payment of Arbitrator's fee to the passing of a final Award, there would have been no necessity of empowering the Arbitrator/Arbitration Tribunal to terminate or suspend the proceeding of an arbitration case on account of non-payment of Arbitrator's fee.

Further, Section 39 of Arbitration and Conciliation Act, 1996 further supplements the observations recorded above. The Arbitrator/Arbitration Tribunal is entitled to create a lien on the Award and it becomes executable only upon settling the dues of the Arbitrator/Arbitration Tribunal. Thus, the fee of the Arbitrator/Arbitration Tribunal has been given a primacy over the arbitral Award that is required to be passed.

Considering it from either of the perspectives and from all the angles that have been brought up before this Court, I find that the fee of the Arbitrator/Arbitration Tribunal becomes payable at the initiation of the arbitral proceedings on the basis of the Fourth Schedule as is determinable by taking

into consideration the claims/counterclaims that may be filed by the respective parties before the Arbitrator/Arbitration Tribunal. The payment thereof is not contingent upon passing of a final Award.

In the present case, undisputedly, more than ten hearings had taken place, before the parties decided to withdraw their respective claim/counterclaim after having settled amicably between themselves. The respondent-Marketing Board was not justified in saying that since the petitioner-Arbitrator has not passed an final Award in the arbitral proceedings, it is not liable to pay its share of the Arbitrator's fee.

The present writ petition is accordingly, allowed.

The respondents-Marketing Board are thus directed to pay their share of the Arbitrator's fee to the tune of Rs.2,38,500/- within a period of two months of the receipt of certified copy of this order.

It is made clear that in case the abovesaid payment is not made within the above stipulated period, the petitioner-Arbitrator shall be entitled to interest @ 6% per annum from the date of institution of the instant petition till its final disbursement. The Marketing Board shall be entitled to effect recovery of the interest liability so accrued from the erring officer/official, on whose part the delay would be.

04.12.2024.
rajender

(VINOD S. BHARDWAJ)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No