



2024:DHC:9253



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI****RESERVED ON – 25.10.2024**

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PRONOUNCED ON – 27.11.2024

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O.M.P.(MISC.)(COMM.) 286/2023**SPML INFRA LIMITED****.....Petitioner**Through: **Mr. Raman Kapur, Sr. Adv. with Mr. Siddhant Jaiswal, Adv.**

versus

POWER GRID CORPORATION OF INDIA LIMITED**.....Respondent**Through: **Mr. S. B. Upadhyay, Sr. Adv. with Mr. Pranay Kishore Mishra, Mr. B. K. Pandey, Adv.**

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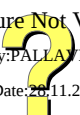
O.M.P. (T) (COMM.) 79/2023, I.A. 1900/2024**SPML INFRA LIMITED****.....Petitioner**Through: **Mr. Raman Kapur, Sr. Adv. with Mr. Siddhant Jaiswal, Adv.**

versus

POWER GRID CORPORATION OF INDIA LIMITED**.....Respondent**Through: **Mr. S. B. Upadhyay, Sr. Adv. with Mr. Pranay Kishore Mishra, Mr. B. K. Pandey, Adv.****CORAM:****HON'BLE MR. JUSTICE DINESH KUMAR SHARMA****J U D G M E N T****O.M.P.(MISC.)(COMM.) 286/2023 & O.M.P. (T) (COMM.) 79/2023****Page 1 of 28**

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Signed By: PALLABI VERMA

Signing Date: 28.11.2024
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DINESH KUMAR SHARMA, J.

1. This judgment proposes to dispose of both the above said petitions by a common judgment. O.M.P.(MISC.)(COMM.) 286/2023 has been filed with the following prayer:

“1. Substitute the arbitral tribunal and appoint fresh arbitrators re- constituting the arbitral tribunal and direct that arbitral proceedings shall continue from the stage already reached, on the basis of material already on record

2. Set Aside the impugned Order dated 01.06.2023 of the Arbitral Tribunal in the above captioned case;

3. Set Aside the impugned Order dated 28.10.2022 of the Arbitral Tribunal in the above captioned case;

4. Pass a direction to the Arbitral Tribunal for conducting and concluding the Arbitration for the Original Agreed Fees as per the Fourth Schedule.

5. Stay the proceedings before the Arbitral Tribunal till the present application pertaining to prayers 1, 2 and 3 has been adjudicated upon by this Hon'ble Court; and

6. Pass such other or further order as this Hon'ble Court may deem fit and proper in favour of the Petitioner in the facts and circumstances of the present case.”

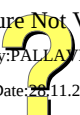
2. O.M.P. (T) (COMM.) 79/2023 has been filed with the following prayer:



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- “1. Substitute the Hon'ble Presiding Arbitrator Justice Deepak Verma (Retd) and appoint fresh arbitrator re-constituting the Arbitral Tribunal.*
- 2. Stay the proceedings before the Arbitral Tribunal till the present application has been adjudicated upon by this Hon'ble Court; and*
- 3. Pass such other or further order as this Hon'ble Court may deem fit and proper in favour of the Petitioner in the facts and circumstances of the present case.”*
3. The Petitioner/Claimant herein i.e. SPML INFRA LTD formerly known as Subhash Projects and Marketing Ltd., is a public limited company incorporated under the provisions of the Companies Act, 1956. The Respondent herein, i.e. Power Grid Corporation of India Limited is also a company incorporated under the provisions of the Companies Act, 1956.
4. Pursuant to the dispute having arisen between the parties with respect to the Rural Electrification Works (RE) in Kaimur District of Bihar, under the Government of India Scheme of Rajiv Gandhi Grameen Vidyutikaran Yojana (RGGVY), an Arbitral Tribunal consisting Hon'ble Mr. Justice Deepak Verma (Presiding Arbitrator), Hon'ble Mr. Justice Dilip Rao saheb Deshmukh (Co-Arbitrator) and Hon'ble Mr. Justice Krishn Kumar Lahoti (Co-Arbitrator) was constituted.
5. In the preliminary hearing held on 02.08.2018 it was decided that the fees of the Ld. Tribunal shall be paid in accordance with the Fourth Schedule of the of Arbitration and Conciliation Act, 1996 (hereinafter



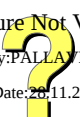


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referred as A&C Act) along with an additional 10% of fees to the Presiding Arbitrator for administrative expenses, by both the parties. It was also decided that fee for counter claim and reading fees shall be fixed at a later stage.

6. During the proceedings before the Ld. Arbitral Tribunal, an application under Section 29A of A&C Act was filed before this Court, seeking extension of mandate of Arbitration beyond 17.12.2019. The High Court vide order dated 06.01.2020 passed in O.M.P (Misc.) (Comm) 546/2019, extended the mandate of Arbitration, by a period of 1-year w.e.f. 17.12.2019, which was further extended from time to time.
7. Vide order dated 28.10.2022, the Ld. Arbitral Tribunal directed both parties to pay a further fee of Rs.15,00,000/- to each member of the Tribunal, and an additional 10% to the Presiding Arbitrator. The increased fee was directed as the matter was being heard for long number of dates apart from the time spent on perusing the voluminous record.
8. The petitioner aggrieved of order dated 28.10.2022, filed an application bearing No. O.M.P.(MISC.) (COMM.) 94/2023 under Section 29A(1) read with 29A(3), seeking extension of mandate of the Arbitral Tribunal and substitution of Arbitral Tribunal on the ground of unilateral enhancement of fee. This Court vide order dated 27.03.2023 granted 12 months extension of the mandate of the learned Arbitral Tribunal with effect from 28.11.2022, and further directed the Petitioner to raise the dispute regarding enhancement of fee, before the





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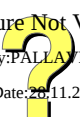


Tribunal and with liberty to file a fresh application, if it is still aggrieved of the decision of the Ld. Tribunal.

9. An application was filed by the petitioner, before the Ld. Arbitral Tribunal, praying for withdrawal of order dated 28.10.2022 and restrict to the original agreed fees as per the Fourth Schedule of the Act. However, the application was dismissed vide order date 01.06.2023, by the learned Arbitral Tribunal with costs to be paid by the petitioner to the respondent.

SUBMISSIONS ON BEHALF OF PETITIONER/CLAIMANT

10. Mr. Raman Kapur, learned senior counsel for the petitioner submitted that the present application is being filed by the petitioner being aggrieved of orders dated 28.10.2022 and 01.06.2023 passed by the Ld. Arbitral Tribunal and in pursuance of the liberty granted to the petitioner, vide order dated 27.03.2023 passed by this Court. Learned senior counsel also submitted that another application bearing no. O.M.P.(Misc)(Comm.) 286/2023 under Section 29A(6) read with Section 151 Code of Civil Procedure, 1908 has been filed before this Court, seeking substitution of the Arbitral Tribunal and stay of proceedings before the Ld. Tribunal.
11. Learned senior counsel further submitted that there is a twofold ground for filing the present petition, i.e. the reason of apprehension of bias and the unilateral enhancement of fees. Learned senior counsel for the petitioner submitted vide order dated 02.08.2018 the fees of the Ld. Arbitral Tribunal was fixed as per the Fourth Schedule of the Act.

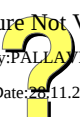




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12. Learned senior counsel submitted that the Ld. Tribunal unilaterally enhanced the fee by Rs.45,00,000/-, vide order dated 28.10.2022 without consent of the petitioner. It was further submitted that no reasons were given to justify the exorbitant and unilateral enhancement of fees outside the ambit of the 4th Schedule of the Act.
13. Learned senior counsel submitted that due to continuous pressure of the learned Arbitral Tribunal calling and directing the petitioner to pay the enhanced fees even though no consent was given, the learned counsel undertook to pay the same, as recorded vide order dated 01.06.2023. Learned senior counsel submitted that there is no provision under the A&C Act empowering the arbitrator(s) to unilaterally issue a binding or enforceable order regarding their fees.
14. Learned senior counsel for the petitioner submitted that the Ld. Arbitral Tribunal erred in holding that no objections were raised by the Petitioner towards the enhanced fees even though the authorized representative of the petitioner was present on all dates off hearings. It was submitted that the authorized representative was not apprised of the amount already paid to the learned Arbitral Tribunal, which caused miscommunication and the authorized representative on 14.02.2023 submitted that the balance fee shall be deposited by 15.03.2023.
15. Learned senior counsel submitted that the primary grounds for alleging bias against the Tribunal is that the Learned Presiding Arbitrator has adjudicated disputes between the same parties relating to similar disputes and has passed orders against the present petitioner. The fact is also recorded in order dated 01.06.2023 passed by the learned Arbitral



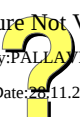


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Tribunal while dismissing the application of petitioner, therefore, exemplifying the apprehension of bias of the Ld. Tribunal towards the petitioner.

16. Learned senior counsel for the petitioner submitted that misconduct is attributable to the learned Arbitral Tribunal in view of the unilateral enhancement of the fee vide its order dated 28.10.2022. Learned counsel has placed reliance on **ONGC v. Afcons Gunanusa JV** 2022 SCC OnLine SC 1122 wherein the Hon'ble Supreme Court *inter alia* held that a party who is not agreeable to a unilateral revision of fees demanded by the tribunal in midst of the proceedings has a real apprehension that its refusal may result in an embarrassing consequence, bearing on the substance of the dispute. The Apex Court also *inter alia* held that only if all the parties and the Ld. Tribunal agree to the revised fee, it shall be payable and if any of the party raises any concern regarding such revision, then the Tribunal or the member is free to decline the same.
17. Learned senior counsel has placed reliance upon **Amiraj Construction Co. v. State of Maharashtra** 1987 SCC OnLine Bom 125 and **State of Orissa v. Modern Construction Co.** 1972 SCC OnLine Ori 47, wherein it was held that demand of unreasonable and unconscionable remuneration amounts to misconduct, and the authority of the arbitrator can be superseded on this ground.
18. Learned senior counsel for the petitioner has also submitted that the element of bias can be made a basis to terminate the mandate of the learned Arbitrator, under Section 14 if he becomes *de jure* unable to





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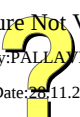


perform his function, thereby placing reliance on *Rashtriya Ispat Nigam Ltd. v. Space Tech Equipments & Structurals Pvt. Ltd & Ors.* 2020 SCC OnLine AP 147.

19. Learned senior counsel submitted that taking into account the forgoing submissions, there is a very real reasonable apprehension of bias and strong grounds for substitution of the learned Presiding Arbitrator. It is further submitted that after so much litigation pertaining to enhancement of fees and subsequent apprehension of bias, it would not be proper and equitable for the petitioner to appear before the said Tribunal for asserting their rights.

SUBMISSIONS ON BEHALF OF RESPONDENT

20. *Per Contra*, Mr. S. B. Upadhyay, learned senior counsel for the respondent submitted that the present application is not maintainable as the allegations made herein, do not satisfy the requisites of Section 14(1)(a) and nor do any of the grounds fall within the 7th Schedule of the Act. Learned senior counsel also submitted that the learned Arbitral Tribunal has acted with expedition and have not caused any delay.
21. Learned senior counsel submitted that bias cannot be attributed merely because an adverse award has been rendered against the Petitioner, by one of the learned Arbitrators herein. Learned senior counsel has placed reliance on *HRD Corporation v. GAIL* (2018) 12 SCC 471 wherein it was *inter alia* held that if learned Arbitrator had already rendered an award in a previous arbitration between the parties in the present matter that would not, by itself be a ground of reasonable likelihood of bias rendering him ineligible to be an arbitrator in a



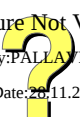


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subsequent arbitration. Learned senior counsel further submitted that the same was also reiterated by this Court in *UOI v. Reliance Industries Ltd. & Ors.* 298 (2023) DLT 773.

22. Learned senior counsel submitted that the allegation pertaining to unilateral enhancement of fee of the Learned Tribunal is not true as initially, the petitioner did not show any disagreement towards the order dated 28.10.2022. In fact, as recorded in order dated 14.02.2023 the petitioner had undertaken to pay the fee of the learned Arbitral Tribunal by 15.03.2023. It is submitted that several dates took place before the Ld. Arbitral Tribunal, between 28.10.2022 and filing of the application wherein the petitioner neither objected nor protested against the enhanced fee, moreover it kept on assuring the learned Tribunal that the same shall be paid. Learned senior counsel further submitted that the enhanced fee has duly been paid by the respondents in compliance to the order dated 28.10.2022.
23. Learned senior counsel for the respondent submitted that in any case, the ground of increase of fees during the pendency of the arbitration is not a ground entertainable under the Section 14 (1)(a) of the Act either for termination of the mandate of the arbitrator or for its substitution. Learned senior counsel placed reliance on *Chennai Metro Rail Ltd. Administrative Building v. M/S Transtonnelstroy Afcons (JV) & Anr.* SLP (C) No.8553/2022.
24. Learned senior counsel therefore submitted that the present application is devoid of merits and is liable to be dismissed as an increase of fees





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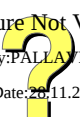
does not amount to per se ineligibility reaching to the level of voiding the Tribunal's appointment and termination of its mandate.

ANALYSIS AND FINDINGS

25. The present petitions have been filed by the petitioner primarily aggrieved of the unilateral enhancement of fees of the learned Arbitral Tribunal vide order dated 28.10.2022 and further the order dated 01.06.2023 vide which the learned Arbitral Tribunal dismissed the application of the petitioner wherein the petitioner had requested to recall the specific portion of the order dated 28.10.2022 whereby the fees of the Arbitral Tribunal was enhanced. In the application it was further prayed to conduct and conclude the present arbitration fairly for the original fees as agreed vide order dated 02.08.2018.
26. The issue regarding enhancement of fees was examined in **ONGC** (*Supra*). The Apex Court after taking into account the issue regarding fees of arbitrators in ad-hoc arbitration *inter alia* held as under:

“104 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



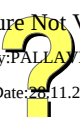


tripartite agreement between the parties and the arbitral tribunal

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 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.*

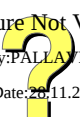
7. *All High Courts shall frame the rules governing arbitrators' fees for the purposes of Section 11(14) of the Arbitration and Conciliation Act, 1996.*

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. ””*

27. In this case Hon’ble Dr. Justice D.Y. Chandrachud the then Hon’ble Chief Justice of India and Hon’ble Mr. Justice Surya Kant *inter alia* answered the issues regarding unilateral enhancement of fees as under:

“158 We answer the issues raised in this batch of cases in the following terms:

(i) Arbitrators do not have the power to unilaterally issue binding and enforceable orders determining their own fees. A unilateral determination of fees violates the principles of

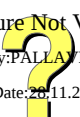




party autonomy and the doctrine of the prohibition of in rem suam decisions, ie., the arbitrators cannot be a judge of their own private claim against the parties regarding their remuneration. However, the arbitral tribunal has the discretion to apportion the costs (including arbitrators' fee and expenses) between the parties in terms of Section 31(8) and Section 31A of the Arbitration Act and also demand a deposit (advance on costs) in accordance with Section 38 of the Arbitration Act. If while fixing costs or deposits, the arbitral tribunal makes any finding relating to arbitrators' fees (in the absence of an agreement between the parties and arbitrators), it cannot be enforced in favour of the arbitrators. The arbitral tribunal can only exercise a lien over the delivery of arbitral award if the payment to it remains outstanding under Section 39(1). The party can approach the court to review the fees demanded by the arbitrators if it believes the fees are unreasonable under Section 39(2);”

28. The Hon’ble the Chief Justice of India Justice Sanjiv Khanna in his separate judgment *inter alia* held as under:

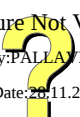
“2. While I am entirely in agreement with the considered view expressed by esteemed brother D.Y. Chandrachud, J. that (a) party autonomy and arbitration agreement are the foundation of the arbitral process, and therefore, when the parties fix the fee payable to the arbitral tribunal, the law does not permit the arbitral tribunal to derogate and ask for additional or higher fee; (b) where the court while appointing an arbitrator fixes the fee, the arbitral tribunal cannot ask for supplementary or higher fee; and (c) in both cases, the fee payable to the arbitral tribunal may be enhanced either by a written agreement between the parties or by a court order. However, I am unable to concur that in the absence of any agreement between the parties, or the parties and the arbitral tribunal, or a court order fixing the fee, the arbitral tribunal is not entitled to fix the fee, as I am of the opinion that by the implied terms of the contract and





as per the provisions of the Arbitration and Conciliation Act, 1996, an arbitral tribunal can fix a reasonable fee, which an aggrieved party, who is not a signatory to the written agreement, can question under sub-section (3) of Section 39 of the A&C Act during the pendency of the arbitration proceedings, or in case the arbitral tribunal claims lien on the award in terms of sub-section (2) to Section 39 of the A&C Act. At the same time, I respectfully agree with brother D.Y. Chandrachud, J., that when an arbitral tribunal, even in the absence of consent of the parties, fixes the fee in terms of the Fourth Schedule, the parties should not be permitted to object the fee fixation. The Fourth Schedule is the default fee, declared by the legislature as fair and reasonable, which can be changed by mutual consensus, and not otherwise. Further, post the enforcement of the Arbitration Amendment Act, 2019 vide Act 33 of 2019 on 30th August 2019, and insertion of sub-section (3A) to Section 11, the proviso to the sub-section states that the fee prescribed in the Fourth Schedule is mandatory and applies to all arbitrations including ad hoc arbitrations, albeit in case of institutional arbitrations, as per sub-section (14) to Section 11 of the A&C Act, the fee fixed by the institution "subject to the rates specified in the Fourth Schedule" would be payable."

29. Hon'ble the Chief Justice dealt in detail regarding the problem of high cost of arbitration, the legislative history and remedial changes in Arbitration and Conciliation Act, 1996 as well the other attendant issues and agreed with Hon'ble Mr. Justice D.Y. Chandrachud the then CJI and Hon'ble Mr. Justice Surya Kant with the aforementioned directions in paragraph No. 158(i). Thus, the bare perusal of the above said judgment makes it clear that the Apex Court has authoritatively *inter alia* held that the A&C Act recognizes the principle of party autonomy. In ***Bharat Aluminium Co. v. Kaiser Aluminium Technical***





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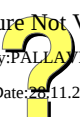


Service (2016) 4 SCC 126 it was *inter alia* held that party autonomy is the “brooding and guiding spirit” of arbitration.

30. Similarly in *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.* (2017) 2 SCC 228 the Apex Court referred to party autonomy as the backbone of arbitration.
31. The judgment in the *ONGC(Supra)* case thus makes it clear that the unilateral enhancement of fee is not permissible in the eyes of law. In the present case, the bare perusal of the order dated 28.10.2022 passed by the learned Tribunal, it is revealed that the direction of enhancement of fees is passed as a binding direction to both parties and without any consent of the parties. The relevant portion of the said order is as under:-

“Matter has already been heard for long number of dates, apart from the time that was spent by the Tribunal, for recording of the evidence and then also keeping in mind the voluminous record that is required to be examined by the members of the Tribunal, a further Fees of Rs. 15 Lakhs is fixed to be payable to each member by both the Parties, to be shared equally and 10% additional to the Presiding Arbitrator. Both Parties are directed to make payment of the aforesaid amount, to each member of the Tribunal, within 3 weeks' from today, under intimation to all.”

32. The plea taken by the learned counsel for the respondent is that since “no objection” was raised by the petitioner before the learned Arbitrator after 28.10.2022 therefore it amounts to consent, cannot be accepted in view of the categorical law laid down by the Apex Court in *ONGC(Supra)*. Furthermore, in the present case, the petitioner filed an application before the learned Arbitral Tribunal being aggrieved of





order dated 28.10.2022 and sought for withdrawal of direction of enhancement of fees. The learned Tribunal dismissed the application vide order dated 01.06.2023 and *inter alia* held as under;

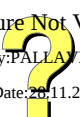
“.....Pertinently, the Order dated 28.10.2022 was passed in the presence of the Ld. Sr. Counsel for Claimant Mr. Mukul Talwar, Ld. Counsel Mr. Arun Saxena and Mr. Lalit Kr. Saraogi, Representative of the Claimant and no objection with regard to the enhanced fee was made by them at any point in time. The matter was then fixed for hearing on 15.11.2022.

Thereafter, vide Order dated 15.11.2022, the Parties were again directed to deposit Fees & Expenses to all the members of the Tribunal, by or before 30.11.2022. Pertinently, in view of the fact that the time period for pronouncement of the Award was expiring on 28.11.2022, vide the Order dated 15.11.2022, the Tribunal also directed the Claimant to apply before the appropriate Court for extension of time by one year.

The next date for the hearing was fixed as 25.01.2023. Pertinently, the Respondent had already cleared and paid its share of additional Fee & Expenses to each member of the Tribunal, before this date. However, the Claimant had to be reminded to clear its outstanding Fee & Expenses of the members of the Tribunal within 10 days from the said date. Notably, even at this juncture, the Ld. Sr. Counsel and all those present for the Claimant, did not raise any objections on fixation of additional fee for the members of the Tribunal.

Thereafter, on 13.02.2023, the Claimant was once again directed to deposit the due fees by the next date, i.e. 14.02.2023, under intimation to all.....”

33. Even this does not say that the fee was enhanced with consent. It merely says that “no objection” was raised. Therefore, giving “consent”





and having “no objection” may be two different things in particular circumstances. The party giving a “consent” to the Ld. Arbitrator and merely raising “no objection” to the direction of Ld. Arbitral Tribunal are two different things.

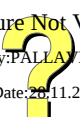
34. On none of the dates i.e., 15.11.2022, 25.01.2023, 13.02.2023 there was recording of “consent”. Merely because on 14.02.2023 the claimant/petitioner stated that outstanding fees would be paid cannot be read as “consent”.
35. Thus, in view of the discussion made herein above, the unilateral enhancement of fees as directed vide order dated 28.10.2022 cannot sustain and is liable to be set aside. Now coming to the prayer made by the petitioner for substitution of the arbitral tribunal and appointment of fresh arbitrators and reconstitution of the Arbitral Tribunal on the ground of the bias. The Court considers that this prayer also, cannot be accepted for the reasons as discussed hereinafter.
36. Section 14(1) of the Arbitration and Conciliation Act provides as under:

“(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if]—

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate”

37. The *de jure* inability refers to the impossibility which occurs by operation of law i.e. the inability of the arbitrator to function due to his



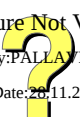


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personal factors. The *de facto* inability refers to inability by fact i.e. circumstances beyond the control of the arbitrator, to act.

38. The third ground contained in clause (a) of Section 14(1) is other reasons where the arbitrator fails to act without undue delay. This is a residuary provision under which the mandate of the arbitrator shall terminate, if for other reasons, the arbitrator is unable to act without undue delay.
39. It is pertinent to mention here that the instant application has been filed by the petitioner as it is alleging strong apprehension of bias on the part of the learned Arbitral Tribunal, as the learned Presiding Arbitrator has adjudicated similar disputes between the same parties and further, the decision of enhancement of fees was not agreed by the petitioner. It is not disputed that the learned presiding arbitrator has adjudicated two similar disputes between the same parties.
40. In ***Chennai Metro*** (*Supra*) the matter was referred to a three-member tribunal and the tribunal in its meeting dated 14.05.2021 fixed the fees for each of the arbitrator with the consent of the parties. The tribunal in its hearing held on 28.06.2022 sought to revise the fees payable from Rs. 1,00,000 to Rs. 2,00,000 for each session of three hours which was objected by the petitioner. The respondent also expressed its disagreement with the enhancement and submitted that applicability of Schedule Four of the Act and the issue of increase of tribunal's fees after initial fixation was sub-judice before this Court and thus requested the tribunal to keep its directions for modification of fees in abeyance till the decision of this Court. The tribunal in its proceedings dated



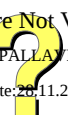


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24.07.2022 reiterated its stand about entitlement of revised fees and directed to pay the revised fees from 10th virtual meeting onwards i.e., in effect for the past hearing too.

41. However, Afcons paid the revised fees for five hearings and thereafter Chennai Metro Rail Ltd. filed an application before the Madras High Court under Section 14 and sought the declaration that the mandate of the tribunal be terminated in respect of disputes referred to them. It was highlighted in these proceedings that the payment of the disputed increased amount by one party has placed Chennai Metro in an embarrassing situation and caused the petitioner to be prejudiced and not be treated in an impartial manner by the learned Arbitral Tribunal resulting in the learned Arbitral Tribunal to become *de jure* enable to perform its functions as required. Thus, the facts of the present case are identical to the ***Chennai Metro Rail Limited (Supra)*** case.
42. It is pertinent to mention here that in ***Chennai Metro Rail Limited (Supra)*** on 15.09.2022 all three members of the tribunal filed affidavits in response to Section 14 petition acknowledging that this Court's judgment in ***ONGC (Supra)*** delivered on 30.08.2022 had decided the issue and thus members of the tribunal decided to revert back to the originally decided fees. In identically worded affidavits, members of the tribunal also stated that the order would not create any prejudice to any party and they were in agreement that they would continue to discharge their duty in an independent and impartial manner in deciding the dispute and the parties need not have any apprehensions.





The Madras High Court dismissed the petition filed by the Chennai Metro which was impugned before the Supreme Court.

43. The Apex Court after noting the entire law on the point *inter alia* held as under:

“29. It is, therefore, evident that the rules for disqualification or ineligibility are fairly clear. The ineligibility which attaches to the appointment is the first category: it is contained in Section 12(1) read with the explanation and the Fifth Schedule to the Act. As recounted earlier this schedule has 34 items. In the event any of these circumstances exist, the appointment of the arbitrator is barred. The second category is where the arbitrator to start with is eligible but after appointment incurs any, or becomes subject, to any of the conditions, as enumerated in the Fifth Schedule. In that event, it is open to the party to claim that there could be justifiable doubts about his independence or impartiality. The remedy even then, would be that the party has to seek recourse and apply to the arbitrator in the first stance by virtue of Section 13(2). The wording of Section 13(2) clarifies that a party who intends to challenge the arbitrator, after becoming aware of certain circumstances which lead to justifiable doubts, that party has to within 15 days [of becoming aware] approach the tribunal and seek a ruling. In the event the party is not successful under Section 13(4), the tribunal is duty bound to continue with the proceedings. When the award is made, it can be subjected to challenge under Section 34, by operation of Section 13(5). Clearly, then the substantive grounds and the procedure applicable in relation to situations where justifiable reasons exist or arise, for questioning the eligibility of a tribunal to decide the reference are enumerated in Sections 12 and 13.

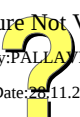
30. As clarified in HRD (supra), the grounds of ineligibility which would apply at the appointment stage, would also





continue during the proceedings by virtue of Section 12(2). In other words, if during the continuance of the proceedings, the arbitrator becomes subject to any eligibility condition outlying in the Fifth Schedule, the application for his removal on the grounds of justifiable doubts about his impartiality and independence, can be made. According to the procedure outlined in Section 13(2) read with Section 12, such a procedure has to first be followed which means that the party should first appear before the arbitrator and object to his continuance. In case of ineligibility which goes the root of the appointment and this is the consequence of the introduction of Section 12(5) [which is in emphatic terms and overrides other previous agreements], the arbitrator's relationship with the parties or counsel or the subject matter of the dispute or the existence of any of the categories of the Seventh Schedule (which are 19 specific enumerated grounds) render that tribunal ineligible to even continue. The only exception is if the party waives that ineligibility expressly in writing in terms of the proviso to Section 12(5). Per HRD (supra), in that event, the Arbitral Tribunal becomes de jure, unable to perform its functions.

31. The analysis in HRD (supra), and the subsequent decision in Bharat Broad Band (supra), therefore are clear enunciations of law in that any legal disability which attaches on the grounds enumerated in the Fifth Schedule [or any other circumstance, given the terminology of Section 12 (3) which is not restricted to fifth schedule ineligibility], the aggrieved party has to first apply before the tribunal as a matter of law. In other words, the tribunal should be given the opportunity to deal with the party's reservations and decide whether or not to continue with the proceedings. This view is in accord with the long line of decisions of this court rendered in the context of reasonable apprehension of bias by courts and quasi-judicial authorities starting from Manak Lal v Dr. Prem Chand to





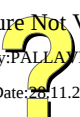
raise the issue, at the earliest opportunity before same forum.

32. The decisions in HRD (supra) and Bharat Broadband (supra) are unequivocal and to the effect that the issue of bias should be raised before the same tribunal at the earliest opportunity. The advertence of the time limit of 15 days is nothing but a statutory incorporation of that idea. However, when the grounds enumerated in the Seventh Schedule occur or are brought to the notice of one party unless such party expressly waives its objections, it is ipso facto sufficient for that party, to say that the Tribunal's mandate is automatically terminated. The party aggrieved then can go ahead and challenge the tribunal's continuation with the proceedings under Section 14.

33. In the present case, this court is conscious of the fact that ONGC (supra) is the authority for the proposition that the issue of fixation of fee, is contractual, and wherever there is no prior arrangement or court order, the tribunal has to fix it at the threshold. The arrangement is by way of a tripartite agreement, which means that regardless of what mode of payment (ad-valorem or sitting fee, or different rates, depending upon the number of hearings, or the issue of fee increase being contemplated allowing the tribunal to revise its fee at a later stage), any revision or revisiting of the fee condition, should be based on consultation, and agreement of both contesting parties, and the tribunal. This is clear from the directives enunciated by ONGC (supra), through the majority opinion, which has the concurrence of the third judge as well:

"1. [..]

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



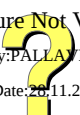


stipulated in the arbitration agreement is unacceptable, the fee proposed by the arbitral tribunal must be indicated with clarity in the course of the preliminary hearings in accordance with these directives. In the preliminary hearings, if all the parties and the arbitral tribunal agree to a revised 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."

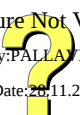
34. The ruling in ONGC (supra) is undoubtedly clear that fee increase can be resorted to only with the agreement of parties; in the event of disagreement by one party, the tribunal has to continue with the previous arrangement, or decline to act as arbitrator. Yet, whether the breach of that rule, as in the present case, by insisting that the increase of fee should prevail does not in this court's opinion, amount to a per se ineligibility, reaching to the level of voiding the





tribunal's appointment, and terminating its mandate. This can be illustrated with the facts in *HRD (supra)*, where the challenge was on the ground of existence of factors mentioned in the fifth schedule, i.e. rendering of opinion by a former Chief Justice, to one of the parties to the dispute, in relation to an unconnected case. The court rejected the plea of ineligibility. Similarly, the objection to the continuance of another arbitrator, a former judge, because he had rendered an award in a previous reference between the same party, and the assumption that he would have some kind of subject matter bias, was overruled. The other case, where this court noted that a fee increase was sought and was warranted, because of revision of fee in a schedule referred to for the purpose of ascertaining fee, became the focus of dispute. The tribunal noted the need to increase the fee; yet after justifying it, declined to actually direct its increase, because of a previous High Court judgment to the contrary. This court held that such conduct did not render the tribunal ineligible from continuing and deciding the reference. It would be useful to advert to the decision of this court in *National Highways Authority of India & Ors. vs. Gayatri Jhansi Roadways Limited & Ors.*²¹ where in an analogous fact situation, where the tribunal felt that fee increase was justified, its mandate was challenged. The court overruled the plea, and held that:

"12. We have heard learned Counsel for the both the sides. In our view, Shri Narasimha, learned senior Counsel, is right in stating that in the facts of this case, the fee Schedule was, in fact, fixed by the agreement between the parties. This fee schedule, being based on an earlier circular of 2004, was now liable to be amended from time to time in view of the long passage of time that has ensued between the date of the agreement and the date of the disputes that have arisen under the agreement. We, therefore, hold that the fee Schedule that is contained in the Circular dated 01.06.2017, substituting the earlier fee schedule, will



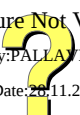


now operate and the arbitrators will be entitled to charge their fees in accordance with this Schedule and not in accordance with the Fourth Schedule to the Arbitration Act.

13. We may, however, indicate that the application that was filed before the High Court to remove the arbitrators stating that their mandate must terminate, is wholly disingenuous and would not lie for the simple reason that an arbitrator does not become de jure unable to perform his functions if, by an order passed by such arbitrator(s), all that they have done is to state that, in point of fact, the agreement does govern the arbitral fees to be charged, but that they were bound to follow the Delhi High Court in Gayatri Jhansi Roadways Limited case which clearly mandated that the Fourth Schedule and not the agreement would govern.

14. The arbitrators merely followed the law laid down by the Delhi High Court and cannot, on that count, be said to have done anything wrong so that their mandate may be terminated as if they have now become de jure unable to perform their functions. The learned Single Judge, in allowing the Section 14 application, therefore, was in error and we set aside the judgment of the learned Single Judge on this count."

39. The attempt by Chennai Metro to say that the concept of de jure ineligibility because of existence of justifiable doubts about impartiality or independence of the tribunal on unenumerated grounds [or other than those outlined as statutory ineligibility conditions in terms of Sections 12 (5)], therefore cannot be sustained. We can hardly conceive of grounds other than those mentioned in the said schedule, occasioning an application in terms of Section 12 (3). In case, this court were in fact make an exception to uphold Chennai Metro's plea, the consequences could well be an

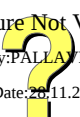




explosion in the court docket and other unforeseen results. Skipping the statutory route carefully devised by Parliament can cast yet more spells of uncertainty upon the arbitration process. In other words, the de jure condition is not the key which unlocks the doors that bar challenges, mid-stream, and should "not to unlock the gates which shuts the court out" from what could potentially become causes of arbitrator challenge, during the course of arbitration proceedings, other than what the Act specifically provides for."

44. Now coming to the facts of the present case, it is pertinent to mention here that the petitioner initially filed an O.M.P.(MISC.)(COMM.) 94/2023 praying therein for extension of the period of 12 months and further to substitute arbitral tribunal and appoint fresh arbitrators reconstituting the arbitral tribunal. The prayer for substitution of arbitral tribunal was sought on the ground of unilateral revision of the fees payable by the parties. The coordinate bench of this Court vide order dated 27.03.2023 extended the period by period of 12 months with effect from 28.11.2022. However, in respect of another prayer which was permitted to be withdrawn by the petitioner with liberty to file appropriate proceedings and in case the petitioner is aggrieved of the decision taken by the learned Arbitral Tribunal.
45. Pursuant to this the petitioner seems to have moved an application dated 14.04.2023 with the following prayer as reflected in order dated 01.06.2023;

"a) His Lordship the Hon'ble Justice Mr. Deepak Verma (Retd.), Ld. Arbitrator may be pleased to withdraw/void the specific portion of the Order dated 28.10.2022, whereby the fee of the Arbitral Tribunal was enhanced in the instant matter.



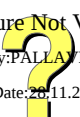


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- b) The Hon'ble Arbitral Tribunal to conduct and conclude the present Arbitration fairly for the original fees as agreed vide order dated 02.08.2018.*
- c) Such other or further order or directions as your Honour may deem fit and proper.”*
46. The bare perusal of these prayers makes it clear that the petitioner has not made any submissions regarding bias or has raised any issue of ineligibility. In **Chennai Metro Rail Limited(Supra)** it was categorically held that if during continuance of the proceedings the arbitrators become subject to any eligibility condition, the party should first appear before the arbitrator and object to his continuance. Though these observations were in relation to Section 12 of the A&CA Act but reading together the **HRD(Supra)** and **Bharat Broadband Network Limited vs. United Telecoms Limited** SLP (Civil) 1550/2018 makes it clear that the aggrieved party has to first apply before the tribunal as a matter of law and the tribunal should have an opportunity to deal with the parties' reservations and decide whether to continue with the proceedings.
47. In **Chennai Metro Rail Limited(Supra)** it was specifically *inter alia* held that this view is in accord with the long line of decisions of the Supreme Court rendered in the context of reasonable apprehension of bias by courts and quasi-judicial authorities starting from **Manak Lal v. Dr. Prem Chand** (1957) 1 SCR 575 to raise the issue at the earliest opportunity before same the forum. Thus, the issue of bias has to be raised first before the same tribunal at the earliest opportunity.

CONCLUSION





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48. The petitioner in the present case on the face of it has not raised the issue of bias before the learned Arbitral Tribunal and thus the issue of bias raised before the present Court is not sustainable in the eyes of law. In the facts and circumstances of the case and the discussions made herein above, the order dated 28.08.2022 regarding unilateral enhancement of fees is set aside. The mandate of the tribunal has already expired on 28.11.2023 and is therefore, the same is extended till 30.03.2025.
49. The parties shall appear before the learned Arbitral Tribunal. The learned Arbitral Tribunal may continue with the fees already decided in the preliminary hearing held on 02.08.2018. In case, the learned Arbitral Tribunal chooses not to continue with the proceedings on the earlier decided fees, the parties shall be at liberty to approach the Court for the appropriate proceedings.
50. The petitions along with pending application(s) stands disposed of.

DINESH KUMAR SHARMA, J

NOVEMBER 27, 2024

Ankit/KR