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

Date of decision: 24.07.2024

+ **O.M.P.(MISC.)(COMM.) 477/2024**

AHLUWALIA CONTRACTS INDIA LIMITEDPetitioner

Through: Mr. Dhruv Rohtagi, Mr. Dev
Jaichandran, Mr. Vaibhav, Ms.
Aamna Hasan, Advocates.

versus

UNION OF INDIA THROUGH EXECUTIVE ENGINEER CPWD
& ANR.Respondent

Through: Mr. Niraj Kumar, Sr. Central
Government Counsel alongwith Mr.
Chaitanya Kumar, Mr. Ajit Kr. Sethi,
Advocate for R-1/UOI.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is a petition filed under section 39(2) of the Arbitration and Conciliation Act, 1996 ("*1996 Act*") seeking directions to the learned Sole Arbitrator i.e. Sh. Rajiv Jain to pass and deliver the Arbitral Award.
2. This Court *vide* Order dated 24.11.2020 passed in Arb.P. 278/2020 appointed the Sole Arbitrator. Relevant paragraphs reads as under:-

"5. In these circumstances, the petition is entitled to succeed and accordingly, Mr. Rajiv Jain, Advocate, (Mobile No: 9810631437) is with the consent of the parties, appointed as the sole arbitrator for adjudication of disputes in relation to the aforesaid agreement.



6. Before commencing proceedings, learned Arbitrator will ensure compliance of Section 12 of the Act. The fee of the learned Arbitrator will be determined in accordance with Schedule IV of the Act.”

3. A perusal of the above quoted paras clearly shows that the fees of the learned Sole Arbitrator will be in accordance with Fourth Schedule of 1996 Act.

4. My attention has been drawn to the final computation of the learned Sole Arbitrator as recorded in its order dated 12.08.2023 which reads as under:-

COMPUTATION OF ARBITRATOR'S FEE (12.08.2023)

	PARTICULARS	(Rs.)
	SUM IN DISPUTE	
1	Claimant: Claim A to O in Statement of Claim (refer pg. 14-16 of Written Submissions dt. 30.6.23)	45,82,51,284
2	Claimant: Claim P in Statement of Claim - Interest at 18% pa on above claims – Pre-reference interest (Claimant's email dt. 7.8.23 shows interest as Rs. 12,84,18,978 due to an error in its sum)	12,91,65,931
3	Claimant: Claim P in Statement of Claim - Interest at 18% pa on above claims – Pendente lite interest (ref. Claimant's email dt. 7.8.23)	17,66,34,176
4	Claimant: Claim Q in Statement of Claim - Cost of Arbitration Rs. 29,57,434 (as per Quantification dt. 24.7.23 of Claimant) minus Rs. 18,75,000 (fee of Arbitrator) -	10,82,434
5	Claimant: Claim Q in Statement of Claim - Cost of Arbitration – cost of fee of Arbitrator (half of total fee Rs. 61,97,390)	30,98,695
6	Claimant: Claim Q in Statement of Claim - Cost of Arbitration – expenses of Arbitrator (half of total expenses 6,50,000)	3,25,000
7	Claimant: Total claims	76,85,57,520
8	Respondents: Counter Claim 1a Reimbursement of GST (refer pg. 111-113 of Written Submissions dt. 22.7.23)	77,45,561
9	Respondents: Counter Claim 1b - Interest at 10% pa on above claim from 31.5.2019 (refer email dt. 7.8.23 of the Claimant)	32,95,577
10	Respondents: Counter Claim 2 - Cost of Arbitration Rs. 1,29,35,134 (as per pg. 115 of Written Submissions dt. 22.7.23) minus Rs. 18,75,000 (fee of Arbitrator)	1,10,60,134
11	Respondents: Counter Claim 2 - Cost of Arbitration proceedings – cost of fee of Arbitrator (half of total fee Rs. 61,97,390)	30,98,695
12	Respondents: Counter Claim 2 - Cost of Arbitration proceedings – expenses of Arbitrator (half of total expenses 6,50,000)	3,25,000
13	Respondents: Total claims	2,55,24,967
14	Cumulative Sum in Dispute	79,40,82,487



	ARBITRATOR'S FEE (Refer Fourth Schedule of the Act)	Rs.
1	Fixed fee for sum in dispute above Rs. 20,00,00,000	19,87,500
2	Variable fee @ 0.5% of sum in dispute exceeding 20,00,00,000 (Or, 79,40,82,487 - 20,00,000 = 59,40,82,487) $0.5\% \times 59,40,82,487 = 29,70,412$ (max. 30,00,000)	29,70,412
3	Total of Fixed plus Variable fee	49,57,912
4	Plus 25% of 49,57,912 (being the sole Arbitrator)	12,39,478
5	TOTAL Arbitrator's fee	<u>61,97,390</u>
Note: Based on the Fourth Schedule of the A & C Act as interpreted in the judgement dt. 10.7.2020 of the Delhi High Court in Rail Vikas Nigam Ltd. Vs Simplex Infrastructures Ltd.		

5. The learned Sole Arbitrator in the said order has further recorded as under:-

“4. The computation of fee is based on the judgement dt. 10.7.2020 of the Delhi High Court in Rail Vikas Nigam Ltd. Vs Simplex Infrastructures Ltd. in case no. OMP(T)(COMM) 28/2020. As per this judgement, the upper limit of fees payable to a sole Arbitrator under the Fourth Schedule of the A&C Act is Rs. 62,34,375 (Rs. 49,87,500 x 1.25). This interpretation of the Fourth Schedule of the A&C Act was prevalent on 24.11.20 when this arbitration matter was assigned by the Delhi High Court to AT and on which basis the proceedings had been conducted. The Supreme Court judgement dated 30.8.22 in ONGC vs Afcons Gunanusa JV (refer para 200 in 2022 SCC Online SC 1122) is a subsequent judgement and applicable prospectively.”



6. The learned Sole Arbitrator was of the view that since he was appointed prior to the judgment of *ONGC Ltd. v. Afcons Gunanusa JV*, (2024) 4 SCC 481, the judgment of *Rail Vikas Nigam Ltd. v. Simplex Infrastructures Ltd.*, 2020 SCC OnLine Del 2101 would be applicable as far as computation of fee is concerned. I am unable to agree. The judgment of *Rail Vikas Nigam Ltd. (supra)* was under challenge before the Hon'ble Supreme Court and in *ONGC Ltd. (supra)*, the same was set aside on 30.08.2022. Hence the date which the order dated 12.08.2023 was passed calculating the Arbitrator's fee, the judgment of *Rail Vikas Nigam Ltd. (supra)* was no longer good law. Therefore, the learned Sole Arbitrator erred in relying upon a judgment which had already been set aside.

7. In *ONGC Ltd. (supra)*, the Hon'ble Supreme Court has observed as under:-

"G. Conclusion

G.1. Findings

187. We answer the issues raised in this batch of cases in the following terms:

187.1. 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 i.e. 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 31-A 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);

187.2. Since this judgment holds that the fees of the arbitrators must be fixed at the inception to avoid unnecessary litigation and conflicts between the parties and the arbitrators at a later stage, this Court has issued certain directives to govern proceedings in ad hoc arbitrations in Section C.2.4 (see paras 125 to 129);

187.3. The term “sum in dispute” in the Fourth Schedule to the Arbitration Act refers to the sum in dispute in a claim and counterclaim separately, and not cumulatively. Consequently, arbitrators shall be entitled to charge a separate fee for the claim and the counterclaim in an ad hoc arbitration proceeding, and the fee ceiling contained in the Fourth Schedule will separately apply to both, when the fee structure of the Fourth Schedule has been made applicable to the ad hoc arbitration;

187.4. The ceiling of Rs 30,00,000 in the entry at Sl. No. 6 of the Fourth Schedule is applicable to the sum of the base amount (of Rs 19,87,500) and the variable amount over and above it.



Consequently, the highest fee payable shall be Rs 30,00,000; and 187.5. This ceiling is applicable to each individual arbitrator, and not the Arbitral Tribunal as a whole, where it consists of three or more arbitrators. Of course, a sole arbitrator shall be paid 25% over and above this amount in accordance with the Note to the Fourth Schedule.”

Emphasis added

8. On perusal of the above paras, it is evident that Arbitrator has to calculate his fees separately for claims and counter claims in ad hoc arbitration and the ceiling limit in the fourth schedule shall also be separately applicable.

9. In the present case, the total claim of the petitioner is to the tune of Rs. 76,85,57,520. Hence, the said claim will fall under serial No. 6 of the fourth schedule. As per the serial No. 6, the base amount will be Rs. 19,87,500 along with 0.5% of claim exceeding Rs. 20,00,00,000 (Rs. 76,85,57,520 – Rs 20,00,00,000 = 56,85,57,520), $0.5\% \times 56,85,57,520 = 28,42,787.6$. On adding the base amount and Rs 28,42,787.6 is exceeding the ceiling limit i.e. Rs. 30,00,000. Therefore, the ceiling limit of Rs. 30,00,000 will apply on the claims of the petitioner. In addition, the Sole Arbitrator shall be entitled to 25% of Rs. 30,00,000 which will be Rs. 7,50,000. By adding both the amount, the total fees of the Arbitrator for the claims of the petitioner will be Rs. 37,50,000.

10. The counter claims of the respondent are to the tune of Rs. 2,55,24,967. Hence the said claim will fall under serial No. 4 of the Fourth Schedule. As per the serial No. 4, the base amount is Rs. 3,37,500 alongwith 1% of the claim exceeding Rs. 1,00,00,000 (Rs. 2,55,24,967 – Rs.



1,00,00,000 = Rs. 1,55,24,967), $1\% \times \text{Rs. } 1,55,24,967 = \text{Rs. } 1,55,249.67$. On adding the base amount and Rs. 1,55,249.67, the total sum will amount to Rs. 4,92,749. In addition, the Sole Arbitrator shall be entitled to 25% of Rs. 4,92,749 which will be Rs 1,23,187.5. By adding both the amounts, the total fees of the Arbitrator for the counter claims of the respondent will be Rs. 6,15,936.25.

11. From the above calculation, the total fees of the Sole Arbitrator on the claims and counter claims will be Rs. Rs. 37,50,000 + Rs. 6,15,936.25 = **Rs. 43,65,936.25.**

12. Diving the said amount, each party is liable to pay **Rs. 21,82,968.12.**

13. The Sole Arbitrator *vide* its order dated 16.05.2024 has recorded as under:-

ARBITRATOR'S FEE				
		Paid so far	Balance to pay	Total
1	By Claimant	30,98,695	0	30,98,695
2	By Respondents	18,75,000	12,23,695	30,98,695
	Cumulative TOTAL	49,73,695	12,23,695	61,97,390

14. On perusal, the petitioner has paid an amount of Rs. 30,98,695 which is in excess to the amount payable as noted above. On the other hand, the respondent has only paid a sum of Rs. 18,75,000 which is the less amount than the amount noted above i.e. Rs. 21,82,968.12.

15. As per the order dated 31.05.2024 passed by the Sole Arbitrator, the Award is ready with the Sole Arbitrator as noted in para 3 of the said order which reads as under:-

“3. This award is signed today 31st day of May 2024 at New Delhi. The Award is directed to be released



and given to the parties on payment of balance amount of Rs 12,23,695/- to AT along with interest thereon @ 10% per annum from the date of the Award.”

16. For the said reasons, the following directions are issued:-

A.) The Sole Arbitrator is directed to repay the excess amount paid by the petitioner within 2 weeks to the petitioner.

B.) The Respondent is directed to pay the deficient amount within 10 days to the learned Sole Arbitrator.

C.) The Sole Arbitrator is directed to publish the Award within 1 week thereafter.

17. The registry is directed to communicate this order to the learned Sole Arbitrator forthwith.

18. With these directions, the petition is disposed of.

19. In case, the same is not done, the petitioner is at liberty to revive the present petition and appropriate action will be taken thereafter.

JASMEET SINGH, J

JULY 24, 2024/MSQ