

\$~64

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

**Date of Decision: 09<sup>th</sup> May, 2022**

+ O.M.P. (T) (COMM.) 48/2022 & I.As. 6739/2022, 6740/2022, 6741/2022, 6742/2022.

NATIONAL HIGHWAY AUTHORITY OF INDIA ..... Petitioner

Through: Mr. Santosh Kumar, Mr. Shashwat Singh and Mr. Daksh Arora, Advocates.

versus

MEP CHENNAI BYPASS TOLL ROAD PVT. LTD. & ANR.

..... Respondents

Through: Mr. Tapes Kumar Singh, Mr. Sukant Vikram and Mr. Aditya Pratap Singh, Advocates.

**CORAM:**  
**HON'BLE MR. JUSTICE SANJEEV NARULA**

**JUDGMENT**

**SANJEEV NARULA, J. (Oral):**

1. National Highway Authority of India [*hereinafter*, "**NHAI**"] invokes Section 14 and 15(2) of the Arbitration and Conciliation Act, 1996, to seek termination of mandate of the Arbitral Tribunal comprising of Hon'ble Mr. Justice Vikramjeet Sen (Retd.), Hon'ble Mr. Justice V. N. Sinha (Retd.) and Mr. Ratan K. Singh, Senior Advocate.

## **THE FACTS**

2. Briefly stated, NHAI and Respondent – MEP Chennai Bypass Toll Road Pvt. Ltd. [*hereinafter*, “**MEP Chennai**”] entered into a Concession Agreement dated 14<sup>th</sup> January, 2013 [*hereinafter*, “**the Agreement**”]. The said Agreement contains an arbitration clause, which reads as follows:

*“36.3.1 Any Dispute which is not resolved amicably by conciliation as provided in Clause 36.2 shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 36.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “Rules”), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.”*

3. When disputes arose, NHAI appointed Dr. Birendra Kumar Sinha, IAS (Retd.) as its nominee Arbitrator in terms of procedure contemplated under the afore-noted Clause. MEP Chennai accepted the said nomination, and in turn, appointed Mr. Ratan K. Singh, Senior Advocate as its nominee Arbitrator. The two Arbitrators then, agreed upon Justice Vikramjeet Sen (Retd.) as the third Arbitrator, and accordingly, the Arbitral Tribunal stood constituted on 19<sup>th</sup> April, 2019.

4. When arbitration commenced, the Arbitral Tribunal *vide* order dated 14<sup>th</sup> May, 2019 declared that although the arbitration clause made a mention of the International Centre for Alternative Dispute Resolution [*hereinafter*, “**ICADR**”] and ICADR Rules, it did not mandate that proceedings must be held under the aegis of ICADR. Further, the Tribunal noted that it did not receive any communication from ICADR and the parties have mutually agreed that the Tribunal may adopt procedure as deemed appropriate and

expedient by it. In light of the same, the Tribunal noted that in the event MEP Chennai preferred a counter-claim, a fee separate to the claim would be payable to Tribunal.

5. Subsequently, the Arbitral Tribunal *vide* order dated 2<sup>nd</sup> November, 2020, directed NHAI to pay the entire arbitral fee on the claim; whereas, MEP Chennai was directed to pay entire arbitral fee on the counter-claim.

6. On 30<sup>th</sup> August, 2021 and 16<sup>th</sup> October, 2021, the Tribunal reiterated that the parties had not paid the arbitral fee in terms of orders dated 14<sup>th</sup> May, 2019 and 2<sup>nd</sup> November, 2020 or the costs imposed *vide* order dated 25<sup>th</sup> January, 2021.

7. On dated 3<sup>rd</sup> November, 2021, the Arbitral Tribunal suspended claims and counter-claims since the parties had failed to clear arrears of arbitral fee. On 9<sup>th</sup> November, 2021, Tribunal restored the counter-claims in view of payment of arbitral fee by MEP Chennai. Since arbitral fee on the claim was still not paid, the same was directed to remain suspended. On 17<sup>th</sup> November, 2021, the Tribunal reiterated that NHAI's claim remains suspended on account of its failure to clear the outstanding arbitral fee and intimated that the claim shall be terminated, if the balance payment is not made.

8. Thereafter, NHAI filed an application dated 10<sup>th</sup> December, 2021, *inter alia* asking the Arbitral Tribunal to revise its fee in accordance with Fourth Schedule of the Act – which is *pari materia* with Schedule I of the

ICADR Rules. The Tribunal considered the said application and dismissed the same *vide* order dated 4<sup>th</sup> January, 2022, holding that the it is not bound by the Fourth Schedule of the Act and arbitral fee was determined separately for claims and counter-claims, keeping in mind the facts and complexity of the dispute between the parties. Reliance was also placed on Order VIII Rule 6A of the Code of Civil Procedure, 1908, to hold that counter-claim(s) should be treated separately to a claim(s).

9. Aggrieved with the afore-noted decision of the Arbitral Tribunal, NHAI has approached this Court seeking termination of the mandate of the Tribunal – contending that it has become *de jure* and *de facto* unable to perform its functions.

### **ARGUMENTS ADVANCED**

#### **ON BEHALF OF NHAI**

10. Mr. Santosh Kumar, counsel for NHAI, makes the following submissions:

10.1. NHAI contends that the order passed by the Arbitral Tribunal is wholly impermissible in law, in light of the judgment of this Court in ***Delhi State Industrial Infrastructure Development Corporation Ltd. v. Bawana Infra Development (P) Ltd.***,<sup>1</sup> which was recently upheld by the Division Bench of this Court in ***Jivanlal Joitaram Patel v. National Highways Authority of India.***<sup>2</sup>

---

<sup>1</sup> (2018) SCC OnLine Del 9241.

<sup>2</sup> (2022) SCC OnLine Del 703.

10.2. The Tribunal has erred in fixing the arbitral fee contrary to the terms of the Agreement. Section 31(8) read with Section 31A deals only with the power of the Arbitrators to award costs in arbitration proceedings and cannot be interpreted to mean that the Tribunal has power to fix its own fee without the consent of parties.

10.3. The Agreement between the parties stipulates the arbitral fees payable to the Tribunal, which as per ICADR Rules, is payable on the dispute *i.e.*, claim and counter-claim cumulatively, and not separately. Therefore, the Tribunal could not charge fee separately on claims and counter-claims and higher than what was agreed upon, in light of the interpretations given by this Court to the expression “amount in dispute” – as found in the Fourth Schedule of the Act – which is *pari materia* to Schedule I of the ICADR Rules. Since the Tribunal has decided to charge a fee higher than what was agreed between the parties, it amounts to the Tribunal not accepting the mandate, and is therefore, *de jure* unable to perform its functions.

10.4. The terms of the arbitration agreement are clear and unequivocal. It not only provides the manner of appointment of Arbitrators, but also, the terms and conditions *qua* the fee to be paid. The same is sacrosanct and cannot be ignored, modified or altered by the Tribunal, which, in fact, is a creation of the Agreement itself. If the terms are permitted to be overridden by the Tribunal, the objective of party autonomy and alternative dispute resolution would be completely defeated.

10.5. The Tribunal has awarded costs to itself, which is impermissible. To this extent, reliance is placed on the judgment in *NTPC Ltd. v. Amar India Ltd.*<sup>3</sup>

10.6. The issues urged in the present petition are also pending consideration before a co-ordinate bench of this Court in O.M.P. (T) (COMM.) 91/2021 titled *NHAI v. Haridwar Highways Project Ltd.*<sup>4</sup> as is borne out from the order dated 13<sup>th</sup> September, 2021 passed therein.

ON BEHALF OF MEP CHENNAI

11. Mr. Tapes Kumar Singh, counsel for MEP Chennai, on the other hand, contends that the entire petition is misconceived. He submits that the Arbitral Tribunal is free to decide its own fee. The appointment of the Tribunal *vide* order dated 14<sup>th</sup> May, 2019 makes it absolutely clear that the Tribunal had agreed to charge fee on claims and counter-claims separately, and not cumulatively. The judgments relied upon by NHAI, are therefore, not applicable to the facts of the present case. Reliance is placed on the judgement of the Supreme Court in *NHAI v. Gayatri Jhansi Roadways Ltd.*<sup>5</sup> Therein, the Arbitral Tribunal had placed reliance on the decision of a Single Judge of the Delhi High Court<sup>6</sup> and passed a procedural order that the Fourth Schedule of the Act and not the agreement between the parties would govern the arbitral fee. This order was impugned, seeking termination of the Arbitral Tribunal's mandate on the ground that it was *de jure* unable to

---

<sup>3</sup> 276 (2021) DLT 742.

<sup>4</sup> O.M.P. (T) (COMM.) 13/2022 dated 3<sup>rd</sup> November, 2020.

<sup>5</sup> (2020) 17 SCC 626

<sup>6</sup> *NHAI v. Gayatri Jhansi Roadways Ltd.*, 2017 SCC OnLine Del 10825.

perform its functions for wilful disregard to the agreement between the parties. The Supreme Court found this to be a disingenuous application for the reason that the Tribunal merely followed the law and no *de jure* inability on that ground can be alleged.

### **ANALYSIS**

12. The Court has considered the contentions advanced by the counsel for the parties. The crux of the matter is whether appointment of the Tribunal herein, is in terms of the ICADR Rules. The judgments relied upon by NHAI would assume significance, provided the answer to the above question is in the affirmative.

13. The Court has deliberated on this aspect and the order dated 14<sup>th</sup> May, 2019 is suggestive of how the Arbitral Tribunal came to be constituted and the terms of their appointment. The relevant portion of the said order, reads as under:

*“The Arbitral Tribunal also noted that whilst the Arbitration Clause makes a mention of the ICADR, it does not mandate that the arbitral proceedings must be held under the aegis of this 'institution. The Arbitral Tribunal notes that the Arbitration Clause postulates compliance with the ICADR Rules, which inter-alia states that if the parties or the Arbitral Tribunal so request, ICADR may provide administrative services. The Arbitration Clause stipulates that the venue of these proceedings shall be Delhi. **Moreover, this Tribunal has not received any communication from the ICADR. In these circumstances, the parties have conveyed their mutual agreement that this Tribunal may adopt the procedure found by it to be appropriate and expedient.**”*

xx... xxx ... xx

“5. Fees of the Arbitrators:

a. **The fees of Arbitration shall be as per the slabs prescribed under**

*Schedule IV of 'The Arbitration and Conciliation (Amendment) Act, 2015. Each of the Arbitrators shall be entitled to such sums as contemplated in the Fourth Schedule of the Act. Fees shall be chargeable/payable on the Claims and separately on the Counterclaims which the parties shall share equally.* In respect of the counter claims, the arbitral fee shall be charged separately on the lines of the slabs prescribed under Schedule IV of the Arbitration and Conciliation (Amendment) Act 2015. This fee shall be payable by the parties in equal share.

*b. In case either party does not agree to share the Arbitral fees then the Claimant shall be liable to pay the Arbitral Fees on its claims and the Respondent shall pay the Arbitral fees on the Counterclaims separately. The fees paid by the parties shall be subject to the Final Award being passed by the Arbitral Tribunal. Out of total fees payable to the Arbitrator, 40% of the fees will be paid initially before settlement of issues/points of differences between the parties and balance in two installments of 30% each. After payment of initial installment of 40% of the fees, the next installment will be payable at the time of commencement of evidence by the parties and third installment at the time of commencement of Arguments. In addition to the Sitting Fee the Presiding Arbitrator shall be entitled to administrative expenses, fixed at ten percent of the Sitting Fee.*

*c. If the parties so consent, the proceedings for the Claim and the proceeding for the Counterclaim may be taken up together.”*

[Emphasis Supplied]

It emerges from the afore-noted order that the Tribunal had clearly indicated to the parties that it is not bound by the ICADR Rules for fixation of its fee.

14. The Tribunal, *vide* order dated 4<sup>th</sup> January, 2022, also dismissed an application filed by NHAI seeking to revise calculation *qua* arbitral fee on the ground that the Fourth Schedule of the Act is *pari materia* to Schedule I of ICADR Rules. Having said so, the Tribunal made it clear that the arbitral fee chargeable shall be payable separately on the claim and counter-claim.



15. The Arbitral Tribunal had thus, articulated the terms of appointment unequivocally and unambiguously. It had made it clear to the parties that its appointment and the proceedings before them would not be governed by ICADR Rules. This view has now been echoed in the latest order dated 4<sup>th</sup> January, 2022, where the Tribunal observes that “*the present proceedings are an ad hoc arbitration*”. Since the Tribunal accepted its appointment outside the mandate of the ICADR, it was entitled to determine its fee and not be bound by ICADR Rules.

16. While making payment of the arbitral fee, NHAI did not make any reservations or indication to the Tribunal that it must accept payments either under the Fourth Schedule of the Act or under Schedule I of ICADR Rules in terms of the Agreement. Nearly three years later, NHAI has now approached this Court seeking termination of the mandate by contending that the Tribunal could not have accepted its appointment, if it was not agreeable to the arbitral fees being paid in terms of the Agreement. Much water has flown under the bridge since the passing of its appointment order. The continuation of proceedings and periodical payments made by NHAI all throughout, without any protest or reservation, signifies that NHAI had agreed and accepted the fee decided to be charged by the Tribunal. It is too late in the day for NHAI to now question the appointment of the Tribunal and argue that the such appointment is contrary to the terms of the Agreement. In the order dated 14<sup>th</sup> May, 2019, the Tribunal’s observations that arbitral fee was to be determined in terms of Fourth Schedule of the Act, does not mean that the fee was to be charged cumulatively on claim and counter-claim.

17. The judgments of this Court in *Delhi State Industrial Infrastructure Development Corporation Ltd. v. Bawana Infra Development* (Supra) and *Jivanlal Joitaram Patel v. NHAI* (Supra) are thus, inapplicable and distinguishable on facts. The afore-noted judgments would be applied only if the Tribunal had agreed to be bound by the Fourth Schedule or if the appointment was to be governed in terms thereof. There is no dispute between the parties that the Tribunal had been constituted without intervention of the Court. At the stage of accepting the appointment, neither of the parties had to approach ICADR for appointment of the third/ presiding Arbitrator – which was a contingency contemplated in case the nominee Arbitrators could not agree upon the third/ presiding Arbitrator. That said, Mr. Kumar very candidly admits that ICADR is today dysfunctional and does not provide any administrative services to the parties.

18. Mr. Kumar has argued that the present petition has been filed within limitation and delay if any to question the appointment on the part of NHAI should be ignored. The Court is not convinced by this argument at all. Continuation of the arbitral proceedings since 2019 indicates NHAI's explicit acceptance of the terms of appointment. The proceedings before the Tribunal proceeded on the basis of NHAI's acceptance as they never questioned the fee hereto before. Therefore, substantial delay in approaching this Court cannot be overlooked and is in fact, a good ground for the Court to refuse interference at this stage. Nonetheless, in the opinion of the Court, the Tribunal was permitted to fix its fee, since its appointment was made by

way of an *ad hoc* agreement between the parties. Therefore, the Court does not find any ground to interfere, and accordingly the present petition is dismissed along with the pending applications.

19. That said, on the question of maintainability, the Court had initially expressed its reservations. On this issue, Mr. Santosh Kumar has relied upon the judgment in *NTPC v. Amar India* (*Supra*), referred above, wherein the Court had exercised its power under Section 14 to terminate the mandate of an Arbitral Tribunal that charged fee contrary to the agreement between the parties. Since the Court has not found any ground to interfere on merits, the question of maintainability has not been deliberated upon in depth and is left open.

**MAY 9, 2022**

as

**SANJEEV NARULA, J**