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

\+ O.M.P. (T) (COMM.) 37/2021 & I.A. 9377/2021

NTPC LIMITED ..... Petitioner

Through: Mr. S.B. Upadhyay, Sr. Adv. with Mr. Tarkeshwar Nath, Mr. Saurabh Kumar Tuteja and Mr. Harshit Singh, Advs.

versus

AFCONS R.N.SHETTY AND CO.PVT. LTD JV ..... Respondent

Through: Mr. Manu Seshadri and Mr. Abhijit Lal, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T(ORAL)

% **06.08.2021**

(Video-Conferencing)

1. The petitioner and respondent are, unfortunately, in knots on the fees payable to the learned Arbitral Tribunal, *in seisin* of the dispute between them, and it has fallen to the sorry lot of this Court to untangle those knots.

2. The issue being restricted to the fees payable to the learned Arbitral Tribunal, no detailed allusion to the facts relating to the dispute between the parties is necessary. Suffice it to state that the arbitration agreement between the parties contemplates resolution of the disputes between them by a three-member arbitral tribunal and

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that, having appointed one learned arbitrator each, and the two learned arbitrators not being able to arrive at a consensus *ad idem* regarding the Presiding Arbitrator, the parties approached this Court which, by order dated 21st May, 2018, appointed a learned retired Chief Justice of the High Court of Jammu & Kashmir, who has also adorned the bench of this Court, as the Presiding Arbitrator. The Arbitral Tribunal thus stood constituted.

3. The first hearing of the learned Arbitral Tribunal took place on 12th July, 2018, on which occasion a detailed order came to be passed. Para 7 thereof dealt with the fees payable to the learned Arbitral Tribunal and reads thus:

> "7. During the course of hearing, Counsel for Respondent mentioned that the NTPC has a schedule of fee for Arbitration. It was clarified that the arbitral fee shall be in accordance with 'The Fourth Schedule' of the Arbitration and Conciliation Act, 1996, and not by fee schedule of the Respondent."

4. There can be no dispute, therefore, that, by agreement between the parties, the fees payable to the learned Arbitral Tribunal was to be in accordance with the Fourth Schedule to the Arbitration and Conciliation Act, 1996 ("the 1996 Act"). For ease of reference, the Fourth Schedule to the 1996 Act may be reproduced as under:

"The Fourth Schedule
[See section 11(3A)]

Sl. No.	Sum in Dispute	Model Fees
(1)	(2)	(3)
1.	Upto Rs. 5,00,000	Rs. 45,000
2.	Above Rs. 5,00,000 and upto Rs. 20,00,000	Rs. 45,000 plus 3.5 percent of the claim amount over and above Rs. 5,00,000

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3.	Above Rs. 20,00,000 and upto Rs.1,00,00,000	Rs. 97,500 plus 3 percent of the claim amount over and above Rs. 20,00,000
4.	Above Rs.1,00,00,000 and upto Rs.10,00,00,000	Rs. 3,37,500 plus 1 percent of the claim amount over and above Rs. 1,00,00,000
5.	Above Rs. 10,00,00,000 and upto Rs.20,00,00,000	Rs. 12,37,500 plus .75 percent of the claim amount over and above Rs. 1,00,00,000
6.	Above Rs. 20,00,00,000	Rs. 19,87,500 plus .5 percent of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000

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."

5. Neither of the parties is aggrieved by the fixation of fees of the learned Arbitral Tribunal under the Fourth Schedule to the 1996 Act.

6. The grievance of the petitioner stems from a subsequent order, which came to be passed by the learned Arbitral Tribunal on 13th July, 2019 and is titled "Procedural Order no. 8", as it was passed on the eighth hearing of learned Arbitral Tribunal. The second paragraph of the said order, which essentially forms the nub of the controversy, read as under:

> "Considering the advance stage of the proceedings, we consider appropriate at this stage to fix the arbitral fee. The original claims of the Claimant as per the Statement of Claim were Rs. Thirty-Seven Crores Fifty-Four Lakhs Four Thousand One Hundred and Thirty-Seven (37,54,04,137/-). Respondent has preferred counter claim of ₹ Ninteen Crores One Lakh Forty-Eight Thousand Seven Hundred and Eighty-Five (19,01,48,785/-). Proviso to Section 38 of Arbitration and Conciliation Act, 1996 provides for fixing a separate fee of counter claim. The fees applicable works out to Rs.28,64,520/- for each member of the tribunal in respect of Claimant's claims. For the counter claim, it works out to

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> Rs.19,13,615/- totalling to Rs.47,78,135/- or 47,80,000/-. The above is exclusive of 10% additional amount paid to the Presiding Arbitrator towards Secretarial and Administrative charges. Parties have been directed to deposit the interim arbitral fee from time to time. Let the further sum of Rs.5,00,000/- each be deposited by the parties to each member of Tribunal within 4 weeks. Additional sum of 10% of the aforesaid amount is to be remitted to the Presiding Arbitrator by each of the parties towards Secretarial and Administrative charges. Parties are also directed to give us statement of account showing the amounts remitted till date towards interim arbitral fee which is adjustable against the arbitral fees fixed."

7. As is clear from a reading of the above paragraph, the respondent's claims were to the tune of ₹ 37,54,04,137/- and the counter-claim of the petitioner was to the tune of ₹ 19,01,48,785/-. The learned Arbitral Tribunal, applying the proviso to Section 38(1) of the 1996 Act, held that separate fees were payable to the learned Arbitral Tribunal on the claims and counter-claims. On that reckoning, the learned Arbitral Tribunal found each member of the learned Arbitral Tribunal to be entitled to be paid ₹ 28,64,520/- for the claims of the respondent and to ₹ 19,13,615/- for the counter-claims of the petitioner, apart from secretarial charges.

8. The contention of the petitioner is, essentially, that the learned Arbitral Tribunal erred in finding itself entitled to separate fees on the claims preferred by the respondent and the counter-claims preferred by the petitioner.

9. What the petitioner urges, as vocalised by Mr. Upadhyay, learned Senior Counsel for the petitioner, is that the claims and

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counter-claims were required to be consolidated in order to work out the fees payable to the learned Arbitral Tribunal and that such consolidated fees would have to abide by the upper limit of ₹ 30 lakhs stipulated at Serial No. 6 of the table contained in the Fourth Schedule to the 1996 Act. At best, therefore, according to the petitioner, each member of the learned Arbitral Tribunal could be entitled to fees of ₹ 30 lakhs and not more than that.

10. The petitioner filed an application before the learned Arbitral Tribunal for modification of the aforesaid order dated 13th July, 2019, on the aspect of fees. The said application was rejected by the learned Arbitral Tribunal by an order dated 8th November, 2019, which reads thus:

> "1. By this order an application dated 21st September, 2019 moved by the Respondent is being decided. Respondent seeks a modification that the order dated 13th July, 2019 which, inter-alia, also fixed the arbitral fee based on the claim and the counterclaims in terms of proviso to Section 38 of the Arbitration and Conciliation Act, 1996. Considering that the claims in question were to the tune of Rs. 37.54 crores and the counter claims were Rs. 19.01 crores, the fee was fixed in accordance with the proviso to Section 38 prescribing separate fee for claims and counter claims and at the rates prescribed in the Fourth Schedule. The fee was fixed and interim directions for deposit were given after hearing the counsel for the Parties and in their presence. The issue sought to be raised by the application was not raised at the time of the order or thereafter in the 9th and 10th hearings. It is only thereafter the present application has been moved.
>
> 2. Ld. Counsel for the Claimant has filed a reply to the same which has been taken on record. Copy has been supplied. The said application has been described as an afterthought by the Respondent. Ld. Counsel Mr. Mukhopadhyay submits that the order passed fixing the arbitral fee separately for the claims and counter claims is in

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accordance with the statutory provisions namely, proviso to Section 38, which specifically provides for the Tribunal fixing separate fee for the claims and the counter claims. Mr. Mukhopadhyay urges that the above is in accordance with the statutory intent and scheme inasmuch as claims and counter claims are independent of each other and even if one is rejected the other can be proceeded with. He has also drawn our attention to two reported decisions. The first one is ***Chandok Machineries v. S.N. Sunderson & Co.*** reported in ***2018 SCC OnLine Del 11000*** and the second one is ***Rehmat Ali Baig v. Minocher M. Deboo***, reported in ***2012 SCC OnLine Bom 914: (2012) 5 Bom CR 889***, a decision of the Division Bench of the High Court of Bombay. In ***Chandok Machineries v. Sunderson & Co.*** *supra*, the Ld. Single Judge observed in para 39 as under:

> *39. A reading of Section 38 would show that the Arbitral Tribunal may fix separate amounts of deposit for the claims and counter claims. Though the deposit is payable in equal shares by the parties, on the failure of a party to pay its share of the deposit, the other party may pay that share and in case of failure of the other party to pay the aforesaid share in respect of the claims or the counter claims, the Arbitral Tribunal may suspend or terminate the arbitration proceedings in respect of such claims or counter claims.*

3. Similarly, the Division Bench in ***Rehmat Ali Baig***, *supra* in para 8 of the judgment has upheld the jurisdiction of the arbitrator of fixing separate arbitral fee for the purposes of claims and counter claims in terms of proviso to Section 38 of the Act.

4. There is merit in Mr. Mukhopadhyay's submission that claims and counter claims being independent of each other for which separate fee is to be fixed and same cannot be combined for purposes of ceiling. Moreover, it cannot also be lost sight of that the Fourth Schedule of the Act can only serve as a guiding principle in the absence any rules being framed by the High Court. In view of the foregoing discussions, the order passed by us does not call for any modification or review. The application is accordingly dismissed."

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As such, the learned Arbitral Tribunal was of the view that, by operation of the proviso to Section 38(1) of the 1996 Act, separate arbitral fees were payable on the claims and counter-claims.

11. Mr. Upadhyay, learned Senior counsel for the petitioner, does not dispute the fact that, if this position in law is correct, i.e. if the learned Arbitral Tribunal is entitled to charge separately on the claims and counter-claims, then the fees payable for the claims and counter-claims would each be within the upper limit of ₹ 30 lakhs stipulated in the Fourth Schedule.

12. For ready reference, Section 38(1) of the 1996 Act may be reproduced thus:

> "**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*."
>
> (Emphasis supplied)

Section 38(1), therefore, cross references Section 31(8) which, in turn, refers to Section 31A of the 1996 Act. Section 31(8) and 31A(1) of the 1996 Act may also, therefore, for ease of reference, be reproduced as under:

> "**31. Form and contents of arbitral award –**

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

"31A. Regime for costs. –

(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine –

(a) whether costs are payable by one party to another;

(b) the amount of such costs; and

(c) when such costs are to be paid.

Explanation. – For the purpose of this sub-section, "costs" means reasonable costs relating to –

(i) the fees and expenses of the arbitrators, Courts 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 or Court proceedings and the arbitral award."

13. After the passing of the aforesaid order, dated 8th November, 2019, of the learned Arbitral Tribunal, the petitioner filed yet another application, before it, for modification of the directions regarding payment of fees, relying, this time, on the rules pertaining to the Delhi International Arbitration Centre (DIAC). It was sought to be

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contended that the rules of the DIAC contemplated the consolidation of the claims and counter-claims for reckoning the fees payable to the Arbitral Tribunal.

14. I do not deem it necessary to enter into this aspect, as the DIAC Rules apply only to arbitration contemplated under the aegis of the DIAC.

15. Mr. Upadhyay, too, very fairly did not seriously canvass the applicability of the DIAC Rules.

16. The second application filed by the petitioner was decided by the learned Arbitral Tribunal by a detailed order dated 14th January, 2021.

17. On the merits of the petitioner's submission that the fixation of fees by the learned Arbitral Tribunal was not in accordance with the provisions of the 1996 Act, the learned Arbitral Tribunal held, in paras 5 and 7 to 11 of the order thus:

> "5. It may be noted that the instance case was one of *ad-hoc* arbitration wherein the court's intervention was sought for a limited purpose u/s 11 for appointment of the Presiding Arbitrator on which the two nominated Arbitrators could not agree. Accordingly, the Arbitral Tribunal was to determine its own fee and there was no fetter or restriction on the quantum of Arbitral fee to be fixed. Nevertheless, the Tribunal did not fix any "reading fee" or "per session or per hearing fee" but proceeded to fix the Arbitral fee at the rates given in the Fourth Schedule of the Act for the quantum of Claim and Counter-claim. Initially, during the course of Arbitral proceedings, since Counter-claims had not been filed, only directions for deposit of interim Arbitral fee were given from

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time to time. In the Eighth hearing on 13.07.2019, it was noted that the claims as per the Statement of Claim were INR 37,54,04,137/-. Respondent had preferred Counter-claims of INR 19,01,48,785/-. The Tribunal, thereupon, considering the nature of controversy before it and in accordance with the proviso to Section 38(1) of the Act, proceeded to fix separate fee for the Claims and Counter-claims. Section 38(1) of the Act is reproduced for facility of reference:

> "**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."

The applicable fee worked out to INR 28,64,520/- for the Claims and lNR 19,13,615/- for the Counter-claims, for each Member of the Tribunal. Directions for deposit of further interim Arbitral fee of Rs.5 lakhs each were given. Parties were directed to give the Statement of Account of the interim fee remitted, which was adjustable against the Arbitral fee payable. The abovementioned Order dated 13.07.2019, was dictated in the presence of the parties and their Counsel, members of the Tribunal and was issued with their consent.

Respondent did not raise any objection up to next date of hearing i.e. 02.09.2019. It was however, only on the 21.09.2019, that an application was moved by the Respondent seeking modification of the Order dated 13.072019. It was duly noted that the Order had been passed after hearing the Counsel and in their presence. No objection had been raised thereafter or on the next date of hearing till the present application. The Tribunal vide its Order dated 08.11.2019, held that the Arbitral fee had been fixed in accordance with the statutory provisions separately for Claims and Counter-claims, which were independent of each other. Counsel for the Claimant, Mr. Mukhopadhya had submitted that Claims and

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Counter-claims were independent of each other, for which separate fee was required to be fixed, and these ought not to be combined for the purposes of calculation of Arbitral fee. Besides the Fourth Schedule of the Act only served as a guiding principle. The application was dismissed as being without any merit. Reference was also invited to ***Chandok Machineries v. M/s. S.N. Sunderson and co. (2018 SCC OnLine Del 11000)*** and a Division Bench of the Bombay High Court in ***Rehmat Ali Baig v. Minocher M.Deboo*** (***2012 SCC OnLine Bom 914***).

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7. We have heard Ld. Counsel for the Respondent, Mr. Tarkeshwar Nath in support of the application and Ld. Counsel for the Claimant Mr. Bimal Mukhopadhyay in opposition. Mr. Tarkeshwar Nath submits that, once the Tribunal has decided to fix the Arbitral fee as per the Fourth Schedule, then it ought to have taken the sum total of claims and Counter-claims as required under Fourth Schedule, with an upper ceiling of Rs. 30 lakhs. It could not have taken resort to proviso to Section 38(1) for assessing the Arbitral fee separately for Claim and Counter claim. He urges that the Fourth Schedule mentions "sum in dispute' which means the sum total of Claims and counter-claims. It is his submissions that the Fourth Schedule fixes the upper ceiling of Rs.30 lakhs for "sum in dispute" i.e. claim and counter-claim. Hence, there was no occasion to fix separate fee for Claims and Counter-claims.

8. Learned Counsel for the Respondent emphasized on the desirability of Arbitral fee being reasonable and the need for rationalization of Arbitral fees. Reliance was placed on the decision of the Learned Single Judge in ***DSIIDC vs. Bawana Infrastructure Pvt. Ltd. 2008 SCC Online Del 9241***, wherein it was held that "sum in dispute" in the Fourth Schedule to the Act included claims well as the counter-claims. He further held that the legislative intent was that "sum in dispute" represented the cumulative sum of Claim and Counter-claim. Further, that had the legislative intent been to charge separate fee for Claim and Counter-claim it would have been so provided in the Fourth Schedule. Further, that proviso to Section 38(1) of the Act enabling separate fee to be fixed for Claim and Counter-claim would be inapplicable when the fee is being determined under the Fourth Schedule.

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9. It may be noted that ***M/s Chandok Machinety v. S.N. Sunderson and Co. (supra) and Rehmat Ali Baig v. Minocher M Deboo (supra)***, were cases where separate Arbitral fee being fixed for claims and counter-claims was upheld. The Learned Single Judge in ***M/s Chandok Machinety v. S.N. Sunderson and Co. (supra)*** observed as under:

> "39. A reading of Section 38 would show that the Arbitral Tribunal may fix separate amounts of deposit for the claims and counter claims. Though the deposit is payable in equal shares by the parties, on the failure of a party to pay its share of the deposit, the other party may pay that share and in case of failure of the other party to pay the aforesaid share in respect of the claims or the counter claims, the Arbitral Tribunal may suspend or terminate the arbitration proceedings in respect of such claims or counter claims.
>
> 40. In view of the above provision, no fault can be found in the direction issued by the Arbitral Tribunal with respect to its fee. A party cannot lay exorbitant claims on the premise that the cost would be shared by the opposite party, and when the opposite party refuses to share such cost, claim bias as it has been made to share the entire cost of such exorbitant claim."

We may also notice that it is the same Learned Single Judge who has authored the judgment in ***DSIIDC (supra).*** Accordingly, in our view, the bar of separately assessing the Claims and Counter Claims for determining Arbitral fee under the 4th Schedule would result in inequitable situations which also run counter to express language of the Statute in Section 38.

We may further note that the very nature and character of a Counter-claim, in civil law, is of a suit. Counter-Claim would mostly have an independent cause of action. In fact, separate court fee is required to be paid on the amount of Counter-claim. Even if the main suit fails, counterclaim would continue against the Claimant-petition. This is in contradiction to an "adjustment" which can be claimed in a suit for the same transaction which partakes the same

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character, without payment of any Court Fee. Therefore, in an Arbitration between the same parties, a counter-claim may have a different purchase order or agreement or or terms requiring separate evidence to be led, raising different issues and questions of law to be determined. In a particular case, there may be a claim with regard to supplies under some purchase orders while there are Counter-claims in respect of other purchase orders. Adjudication of these claims and Counter-claims may require additional or separate evidence and arguments, for that matter.

Having noted the above, let us examine and consider the effect of, firstly, taking together the sum total of Claims and Counter-claims for the purpose of fixation of Arbitral fee under Fourth Schedule to the Act. Claims in a particular case may cross the ceiling. Hence, maximum permissible Arbitral fee under the Fourth Schedule has been reached. Counter-claims are thereafter filed, taking them together, the net result would be that though the Arbitral Tribunal would be burdened with the task of adjudicating the Counter-claims in addition to the claims, which may require separate evidence etc., without any additional fee. In fact, the fee would stand reduced proportionately. This could not have been the intendment, either based on the recommendations of the Law Commission or for that matter a consideration for advancing the cause and course of speedy and effective justice. Let us take another example, where the claim filed is either a modest, realistic one, the Respondent in an attempt to, either deter or by way of counter-blast, makes and exorbitant counter-claim. In case the Arbitral fee is determined by taking together the amounts of the Claim and Counter-claim and then being shared by the parties, the net result would be that the genuine Claimant would be burdened with exorbitant cost of funding a reckless Counter-claim. Again a result not advancing the cause of justice.

10. We are of the view that sub section 8 of Section 31 provides for cost of an arbitration being fixed by the Arbitral Tribunal. Section 31A of the Act provides for the regime of cost. The explanation to Section 31(A) makes it clear that cost, for the purpose of Section 31A, means and includes the costs relating to the fee and expenses of Arbitrators. The above provisions are categorical and leave no doubt that the Arbitral fee and expenses are to be fixed by the Arbitral

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Tribunal separately for Claims and Counter-claims. We do not find any fetter, either in the Fourth Schedule or in the DIAC Rules which have been referred to, which impose a restriction on the exercise of the statutory mandate as given in the proviso to Section 38(1), of fixing separate amount of deposit for claim and counter-claim. It has already been noticed that deposit includes Arbitral fee. It is worth noticing that apart from the proviso to Section 38(1) enabling separate amount of deposit or Arbitral fee for claims and counter-claims, even Proviso to Rule 3 of the DIAC Rules contemplates a situation where claims and counter-claims are assessed separately for calculating Arbitral fee and determining the amount payable by the concerned party. The same is reproduced hereunder, for ready reference:

> "3. **Arbitrators' Fees**
>
> (ii) The fee shall be determined and assessed on the aggregate amount of the claim(s) and counter-claim(s).
>
> Provided that in the event of failure of party to arbitration to pay its share as determined by the centre, on the aggregation of claim(s) and counter claim(s), the Centre may assess the claim(s) and counter claim(s) separately and demand the same from the parties concerned.

11. The language of the proviso to Section on 38 is clear and unambiguous. It requires no further exercise in interpretation or construction. It would not be permissible to preclude its application, without there being a specific bar, to cases covered under Fourth Schedule. We are further of the view that this being an *ad-hoc* arbitration, without the intervention of the Court, except to the extent of appointment of the Presiding Arbitrator and having regard to the nature of the disputes before us including the quantum of claims and counter-claims and the extent of documentary evidence in the claims and counter-claims, the fee being fixed separately at the rates prescribed in the Fourth Schedule with the ceiling in terms of the decision in ***Rail Vikas Nigam Ltd. vs. Simplex Infrastructure Ltd (O.M.P.(T) (COMM) 28/2020)*** would be apposite**.** There is no ground made out for review of the Orders dated 13.07.2019 and 08.11.2019. The application moved by the Respondent has no merit and is accordingly

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> dismissed. This order issues with the consent and approval of the Learned Co-Arbitrators, Mr. Santanu Basu Rai Chaudhuri and Mr. Krishna Mohan Singh, to whom the draft of the order was sent and they have conveyed their consent and approval in writing."

18. It is in these circumstances that the petitioner has approached this Court.

Rival Submissions

Petitioner's Submissions

19. This petition, as originally filed under Section 14 of the 1996 Act, sought termination of the mandate of the learned Arbitral Tribunal on the ground that, by reason of the fixation, by it, of fees which were not legally payable to it, the learned Arbitral Tribunal had rendered itself *de jure* incapable to continue to act in the matter. However, subsequently, in view of the decision of the Supreme Court in ***NHAI v. Gayatri Jhansi Roadways Ltd.***[1]**,** which held that perceived irregularity with the matter of fees cannot constitute a ground to seek termination of the mandate of the learned Arbitral Tribunal. Mr. Upadhyay restricted his case to adjudication, by the court, regarding the correctness of the decision of the learned Arbitral Tribunal about the fees payable to it.

20. I may note that, though Mr. Seshadri, learned Counsel for the respondent, questioned the maintainability of the petition under

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[1] **2019 SCC Online SC 906**

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Section 14 of the 1996 Act solely for adjudication on the aspect of fees, I am not inclined to non-suit the petitioner on that ground. Mr. Upadhyay, meeting the point, drew my attention to various provisions of the 1996 Act and also submits that, if such a view were to be taken, there would be no remedy available to a party before the learned Arbitral Tribunal who might be aggrieved by the fees fixed by the learned Arbitral Tribunal.

21. There is some substance in the submission of Mr. Upadhyay. That apart, as detailed submissions have been advanced on the aspect of fees, and as this issue is of some importance, I proceed to decide it on merits.

22. Mr. Upadhyay, arguing on behalf of the petitioner, submitted that the reliance, by the learned Arbitral Tribunal, on Section 38(1) read with Section 31(8) and 31A of the 1996 Act was thoroughly misplaced. In his submission, once the parties had agreed to abide by the Fourth Schedule to the 1996 Act, there could be no question of re-visiting the matter by resort to Section 38(1), 31(8) or 31A. The Fourth Schedule, in his submission, is clear and categorical. It does not contemplate separate payment of fees for claims and counter-claims. It refers to one "sum in dispute". "The sum in dispute", according to him, has to represent the totality of the claims in dispute by the learned Arbitral Tribunal. He relies, for this purpose, on the decision of a learned Single Judge of this Court in ***DSIIDC v. Bawana Infra Development Pvt. Ltd***[2], specifically on paras 2, 11 and

[2] **2018 SCC Online Del 9241**

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14 thereof, which read thus:

> "2. The petitioner submits that in the Fourth Schedule to the Act, the fee prescribed is on basis of "Sum in dispute". She submits that the "Sum in dispute" has to necessarily include the amount of claim as also the counter claim raised by the respondent(s).
>
> *****
>
> 11. A reading of the above would show that the concept prevailing around the world is that the fee of the Arbitral Tribunal is fixed on the cumulative value of the claim and counter claim.
>
> *****
>
> 14. Even in the general parlance, "Sum in dispute" shall include both claim and counter claim amounts. If the legislature intended to have the Arbitral Tribunal exceed the ceiling limit by charging separate fee for claim and counter claim amounts, it would have provided so in the Fourth Schedule."

23. Specifically on the applicability of Section 31(8) and 31A, Mr. Upadhyay has drawn my attention to the decision of a learned Single Judge of this Court in ***NHAI v. Gammon Engineers & Contractors Pvt Ltd.***[3] which was carried to the Supreme Court and upheld in ***NHAI v. Gayatri Jhansi Roadways Ltd.***[1]. He has drawn my attention in this context to paras 23 and 25 of the former decision and paras 12 and 15 of the latter, which may, therefore, be reproduced as under:

From ***NHAI v. Gammon Engineers & Contractors***[3]

> "23. Reliance of the counsel for the respondent on Section 31A read with Section 31(8) of the Act cannot be accepted as Section 31(8) of the Act forms part of the "terms and

[3] Judgement dated 20th July, 2018 in OMP (T) (Comm) 39/2018

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conditions of the Arbitral Award". In the Award the Arbitral Tribunal can fix the "costs" that are payable by one party to another in the arbitration proceedings. Section 31A of the Act provides for various aspects of such "costs" that the Arbitral Tribunal has to bear in mind while passing its Award. It is true that one such criterion is of the fees of the Arbitrator, however, as noted above, this is only one of the aspects to be considered while determining the costs payable by one party to another in terms of the Arbitration Award.

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25. A reading of the above would clearly show that the "costs" under Section 31(8) and 31A of the Act are the costs which are awarded by the Arbitral Tribunal as part of its award in favour of one party to the proceedings and against the other."

From ***NHAI v. Gayatri Jhansi Roadways Ltd.***[1]

"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.

*****

15. However, the learned Single Judge's conclusion that the change in language of section 31(8) read with Section 31A which deals only with the costs generally and not with arbitrator's fees is correct in law. *It is true that the arbitrator's fees may be a component of costs to be paid but it is a far cry thereafter to state that section 31(8) and 31A*

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would directly govern contracts in which a fee structure has already been laid down. To this extent, the learned Single Judge is correct. We may also state that the declaration of law by the learned Single Judge in ***Gayatri Jhansi Roadways Limited*** is not a correct view of the law."

(Emphasis supplied)

24. Mr. Upadhyay has also placed reliance on paras 2 and 33 of the judgment of a coordinate single bench of this Court in ***NTPC v. Amar India Ltd.***[4], which read as under:

> "2. The short legal issue that arises for consideration in this petition is, whether the Arbitrator has become *de jure* unable to perform his functions as he having revised his fee from the agreed fee as per the NTPC Schedule of fees for Arbitrators fixed by Circular No. 689, dated April 04, 2014 ('Circular', for short), as mentioned in the appointment letter dated March 03, 2017, to the fee provided under Fourth Schedule to the Arbitration and Conciliation Act, 1996 ('Act', for short), by his order dated September 29, 2019. The arbitrator also dismissed the petitioner's application for recall of the said order vide a subsequent order dated December 06, 2019.
>
> *****
>
> 33. Suffice would it be to state, that the learned Arbitrator could not have relied upon the said Sections for charging the higher fee under Fourth Schedule to the Act because the Supreme Court in the case of ***National Highways Authority v. Gayatri Jhansi Roadways Ltd.(supra)*** has upheld the conclusion of this Court in ***NHAI Vs. Gammon Engineers and Contractor Ltd. (supra)*** to the extent that Section 31(8) read with Section 31A of the Act only deals with cost generally and not with Arbitrator's fee. In other words, as the said Sections do not deal with the aspect of fee he could not have increased it by relying on these Sections."

25. Having submitted that the fees payable to the learned Arbitral

[4] **2020(6) RAJ 409 (Del)**

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Tribunal would have to be reckoned on the total of the claim and counter-claims, and not individually on each, Mr. Upadhyay also advanced submissions in respect of Serial No. 6 of the table contained in the Fourth Schedule to the 1996 Act. A reading of the said entry reveals that, where the "sum in dispute" in the arbitration is "above ₹ 20,00,00,000", the model fee payable – which, Mr. Upadhyay submits, is binding on the parties in the present case, as they had agreed to abide by the Fourth Schedule – is "₹ 19,87,500 plus 0.5 percent of the claim amount over and above ₹ 20,00,00,000 with a ceiling of ₹ 30,00,000". Mr. Upadhyay submits that there is some discrepancy between the corresponding entry in the Devanagari version of the Fourth Schedule to the 1996 Act, which may also be, therefore, be reproduced thus:

"चौथी अनुसूची

[धारा 11(3A) देखिए]

कर्म सं	ववादित राशि	निदर्श फीस
(1)	(2)	(3)
1.	5,00,000/- रुपए तक	45,000/- रुपए
2.	5,00,000/- रुपए से ऊपर और 20,00,000/- रुपए तक	45,000/- रुपए + 5,00,000/ रुपए से अधिक की दावा रकम का 3.5 प्रतिशत
3.	20,00,000/- रुपए से ऊपर और 1,00,00,000/- तक	97,500/- रुपए + 20,00,000/- रुपए से अधिक की दावा रकम का 3 प्रतिशत
4.	1,00,00,000/- रुपए से ऊपर और 10,00,00,000/- रुपए तक	3,37,500/- रुपए + 1,00,00,000/- रुपए से अधिक की दावा रकम का एक प्रतिशत
5.	10,00,00,000/- रुपए से ऊपर और 20,00,00,000/- रुपए तक	12,37,500/- रुपए + 10,00,00,000/- रुपए से अधिक की दावा रकम का 0.75 प्रतिशत

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6.	20,00,00,000/- रुपए से ऊपर	19,87,500/- रुपए + 20,00,00,000/- रुपए से अधिक की दावा रकम का 0.5 प्रतिशत, 30,00,00,000/- रुपए की अधिकतम सीमा सहित

टिप्पणः यदि माध्यस्थम् अधिकरण एकल मध्यस्थ है, तो वह ऊपर वर्णित सारणी के अनुसार संदेय फीस पर पच्चीस प्रतिशत अतिरिक्त रकम का हकदार होगा।"

26. Mr. Upadhyay submits that the comma, before the figure "30,00,000" in Serial No. 6 of the Table in the Fourth Schedule to the 1996 Act, as contained in the Devanagari text version, indicates that the upper limit of ₹ 30,00,000/- applies *to the total of ₹ 19,87,500/- and 0.5% of the claim amount to the extent it is above ₹ 20,00,00,000/-*, and *not merely to 0.5% of the claim amount to the extent it is above ₹ 20,00,00,000/-*. The absence, in Serial No. 6 in the English text of the Fourth Schedule to the 1996 Act, of a corresponding comma, he submits, is misleading, as it makes it appear that the upper cap of ₹ 30,00,000/- applies only to the latter part of the preceding part of the provision, i.e. to 0.5% of the claim amount to the extent it exceeds ₹ 20,00,00,000/-. This, he submits, is incorrect, as is evident from the Devanagari version of the Fourth Schedule. Mr Upadhyay submits, therefore, that, *if the total fees worked out by adding ₹ 19,87,500/- and 0.5% the claim amount in excess of ₹ 20,00,00,000/-*, exceeds ₹ 30,00,000/-, the fees would have to be capped at ₹ 30,00,000/-.

27. Applying this argument to the facts of the present case, Mr Upadhyay submits that, if the claim and counter-claims are combined and, on the total amount thereof, the fees payable to the learned

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Arbitral Tribunal are reckoned as per the Fourth Schedule, they would work out to more than ₹ 30 lakhs and that the learned Arbitral Tribunal would, therefore, by virtue of Serial No. 6 contained in the Fourth Schedule, be entitled to charge a maximum of ₹ 30 lakhs and not more.

28. For the proposition that the Devanagri version of the statute should be preferred over the English version, in the absence of any controversy between them, Mr. Upadhyay relies on ***CIT v. Associated Distributors Ltd.***[5]**,** specifically on para 7 thereof, which reads as under:

> "7. It is pertinent to mention here that the official language of the State of Uttar Pradesh is Hindi. If any difference is found between the notifications in English and Hindi, the notification issued in Hindi will be applicable. On the said notification, the courts have decided that confectionery comes within sweets (*mithai*) and sweetmeat, but it has not been mentioned that Bubble-gum comes within the category of a Sweet."

29. Mr. Upadhyay also placed reliance on Article 343 of the Constitution of India which reads thus:

> "**343. Official language of the Union:**
>
> (1) The official language of the Union shall be Hindi in Devanagari script.
>
> The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals
>
> (2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be

[5] **2008 (7) SCC 409**

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used for all the official purposes of the Union for which it was being used immediately before such commencement:

Provided that the president may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union

(3) Notwithstanding anything in this article, Parliament may by law provide for the use, after the said period of fifteen years, of

(a) the English language, or

(b) the Devanagari form of numerals, for such purposes as may be specified in the law"

30. The controversy raised by Mr Upadhyay regarding the interpretation of Serial No. 6 of the Fourth Schedule to the 1996 Act, in fact, stands decided by a coordinate Single Bench of this Court in ***Rail Vikas Nigam Ltd v. Simplex Infrastructure Ltd*** [6], which held that the upper cap of ₹ 30 lakhs applies only to the second part of the preceding words in Serial No. 6 i.e. to 0.5% of the claimed amount over and above ₹ 20 crores. In other words, this Court, in ***Rail Vikas Nigam Ltd***[6], has already taken the view that the Arbitral Tribunal would, at any rate, be entitled to charge ₹ 19,87,500/-. In addition, it would be entitled to 0.5% of the claimed amount over and above ₹ 20 crores, subject to the condition that the said amount of 0.5% would be restricted to ₹ 30 lakhs. The maximum payable under Serial No. 6 would, therefore, according to this decision, be, not ₹ 30 lakhs, but ₹

[6] **(2021) 1 RAJ 411 (Del)**

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49,87,500/-.

31. Mr. Upadhyay, however, submits that the said decision is *per incuriam* and does not take into consideration the Devanagari version of Serial No. 6 of the Fourth Schedule to the 1996 Act, which, he submits, does not leave any room for doubt regarding the correct interpretation of Serial No. 6. I may note that, even if the submission of Mr Upadhyay regarding the acceptability of the view taken in ***Rail Vikas Nigam Ltd***[6] were to be accepted, the decision would not be rendered *per incuriam*, as it is in line, at least, with the English text of the Fourth Schedule. What Mr Upadhyay would, therefore, essentially exhort this Court to do, is to take a view contrary to ***Rail Vikas Nigam Ltd***[6]. Were I to accede to this request, the matter would, needless to say, have to be referred to a Larger Bench.

Respondent's Submissions

32. Responding to the submissions of Mr. Upadhyay, Mr. Seshadri, learned Counsel for the respondent, initially sought to highlight the fact that the present case was one of an *ad hoc* arbitration, which was not bound by the statutory compulsions regarding fees payable to the learned Arbitral Tribunal as contained in the 1996 Act. That aspect, in my view, is not of much significance, as the parties had agreed to fixing of fees in accordance with the Fourth Schedule to the 1996 Act and were, therefore, bound by such agreement.

33. What requires consideration, by this Court is whether the

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learned Arbitral Tribunal was correct in interpreting the Fourth Schedule along with Sections 38(1), 31(8) and 31A of the 1996 Act, as entitling it to work out the fees payable to it separately on the claims and counter-claims. Additionally, the court would also have to analyze the expression "sum in dispute", as contained in the Fourth Schedule, in the wake of judgment in ***DSIIDC***[2] on which Mr. Upadhyay places reliance.

34. Apropos the submission of Mr. Upadhyay regarding the perceived inconsistency between the entries in Serial No. 6 of the table in the Fourth Schedule to the 1996 Act, as contained in Devanagari and English versions, Mr. Seshadri relies on Article 348 of the Constitution of India, which reads as under:

> "**348. Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc. –**
>
> (1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides
>
> (a) all proceedings in the Supreme Court and in every High Court,
>
> (b) the authoritative texts
>
> (i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,
>
> (ii) of all Acts passed by Parliament or the Legislature of a State and of all

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Ordinances promulgated by the President or the Governor of a State, and

(iii) of all orders, rules, regulations and bye laws issued under this Constitution or under any law made by Parliament or the Legislature of a State,

shall be in the English language

(2) Notwithstanding anything in sub clause (a) of clause (1), the Governor of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State:

Provided that nothing in this clause shall apply to any judgment, decree or order passed or made by such High Court.

(3) Notwithstanding anything in sub clause (b) of clause (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor of the State or in any order, rule, regulation or bye law referred to in paragraph (iii) of that sub clause, a translation of the same in the English language published under the authority of the Governor of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article."

35. In this context, Mr. Seshadri has cited the judgment of the Supreme Court in ***Nityanand Sharma v. State of Bihar***[7], specifically in para 19 thereof, which reads as under:

"19. Article 348(1)(b) of the Constitution provides that notwithstanding anything in Part II (in Chapter II Articles 346

[7] **1996 (3) SCC 576**

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> and 347 relate to regional languages) the authoritative text of all bills to be introduced and amendments thereto to be moved in either House of Parliament.....of all ordinances promulgated by the President.......and all orders, rules, regulations and bye laws issued under the Constitution or under any law made by the Parliament, shall be in the English language. By operation of sub-article (3) thereof with a non obstante clause, where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor of the State or in any order, rule, regulation or bye-law referred to in paragraph (iii) of that sub-clause, a translation of the same in the English language published under the authority of the Governor of the State in the official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article. Therefore, the Act and the Schedule thereto are part of the Act, as enacted by the Parliament in English language. It is the authoritative text. When the Schedules were translated into Hindi, the translator wrongly translated Lohara as Lohar omitting the word 'a' while Lohra is written as mentioned in English version. It is also clear when we compare Part XVI of Second Schedule relating to the State of West Bengal, the word Lohar both in English as well as in the Hindi version was not mentioned . Court would take judicial notice of Acts of Parliament and would interpret the Schedule in the light of the English version being an authoritative text of the Act and the Second Schedule."

36. Mr. Seshadri further submits that, in the event of any inconsistency between the Schedule to a statute and its provisions, the Schedule has to subserve, for which purposes he cites ***Aphali Pharmaceuticals Ltd. v. State of Maharashtra***[8].

<u>Analysis</u>

37. Having heard learned Counsel and considered the record and

[8] **(1989) 4 SCC 378**

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the various statutory provisions and judicial authorities cited at the Bar, clearly, two distinct, though interconnected, issues arise for consideration. The first is as to whether the learned Arbitral Tribunal was correct in holding that it was entitled to charge fees separately on the claimed amount and the counter-claimed amount. The second is whether the upper cap of ₹ 30 lakhs, in Serial No. 6 to the Fourth Schedule to the 1996 Act applies to the total of ₹ 19,87,500/- *and* 0.5% of the claimed amount over and above ₹ 20 crores or *only* to 0.5% of the claimed amount over and above ₹ 20 crores.

38. It is worthwhile to reiterate that, if the former aspect is decided in favour of the respondent, i.e. if the decision of the learned Arbitral Tribunal, that it was entitled to charge fees separately on the claim and counter-claim, is found to be in order, then, perhaps, the latter aspect may not really survive for consideration as, in the present case, as the fees worked out by the learned Arbitral Tribunal on the claims and counter-claims were each less than ₹ 30 lakhs. It is only if the amounts of the claims and counter-claims were to be added and the Fourth Schedule applied to the total, that the fees payable would work out to more than ₹ 30 lakhs, in which case the issue of interpretation of Serial No. 6 of the Table in the Fourth Schedule would assume relevance.

39. Though, in the light of the view that I propose to take, this aspect may not really survive for consideration, I may observe that the submission of Mr. Upadhyay, regarding preferring the Devanagari text of the 1996 Act to the English text is, clearly, in the teeth of Article

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348(1)(b)(ii), which holds, in unequivocal terms, that the authoritative text of all acts passed by Parliament shall be in the English language. Moreover, Article 348(1) starts with a *non-obstante* clause which would entitle it to overriding effect over all other foregoing provisions in Part XVII of the Constitution, in which Articles 343 and 348 both find place.

40. That apart, Article 343 deals only with the Official Language of the Union, being the language in which the Union transacts official business, whereas Article 348(1)(b)(ii) specifically deals with the issue of the authoritative text of every Parliamentary legislation. These provisions, therefore, operate in different fields and, in view of Article 348(1)(b)(ii), there can be no question of preferring the Devanagari text of the 1996 Act to the English text thereof.

41. I may, however, once again state that, in the light of the view that I propose to take, this aspect is not of substantial significance in the present case.

42. On the issue of the fees chargeable by the learned Arbitral Tribunal, I find myself in agreement with the view taken by the learned Arbitral Tribunal, as espoused, before the court, by Mr. Seshadri, and find myself, regretfully, unable to agree with the submissions of Mr. Upadhyay.

43. In my view, the scheme of 1996 Act is such that the provisions of Section 38(1), 31(8) and 31A are inextricably interlinked. These provisions cannot be read in isolation. The proviso to Section 38(1)

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clearly states that, where there are claims and counter-claims before the arbitral tribunal, the Arbitral Tribunal may fix separate amount of *deposits* for the claim and counter-claim. Section 38(1) clarifies that the "amount of deposit" is to be directed "as an advance for the costs referred to in sub-section (8) of Section 31". Sub-section (8) of Section 31 requires the Arbitral Tribunal to fix the *costs* of arbitration in accordance with Section 31A. The explanation to Section 31A(1) clearly states that, for the purposes of Section 31A(1) the expression "costs" *means* reasonable costs relating to, *inter alia*, "the fees and expenses of the arbitrators".

44. Mr. Upadhyay also sought to contend that the word "fees" has to be segregated from the concept of "costs" in the 1996 Act. Empirically stated, this may be correct; however, for the purposes of application of Section 31A(1), it is not possible to dichotomise "fees" and "costs". This submission, in my view, would be in the teeth of Section 31(8) read with Section 31A and cannot, therefore, be accepted.

45. Section 31(8) requires the arbitral tribunal to fix the costs of the arbitration, and the explanation to Section 31A(1) clearly holds that the words "costs" *means* reasonable costs relating to, *inter alia*, "the fees and expenses of the arbitrators". Apart from this, the expression "costs", statutorily, also *means* reasonable costs relating to (i) the fees and expenses of the Courts and witnesses, (ii) legal fees and expenses, (iii) any administration fees of the institution supervising the arbitration (which does not apply in the present case) and (iv) any

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other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

46. Where a statutory definition employs the word "means", it is well settled that the words which follow delimit the expression which precedes the word "means". The definition is, in other words, exhaustive in nature. This interpretative principle is practically fossilized in law. Distinguishing between definition clauses, in statutes, which used the expression "means and includes", as opposed to those which merely use the word "means", the Supreme Court, in para 19 of the report in ***P. Kasilingam v P.S.G. College of Technology***[9], opined thus:

> "A particular expression is often defined by the Legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. *The use of the word 'means' indicates that "definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition". (See :* ***Gough v. Gough [(1891) 2 QB 665 : 60 LJ QB 726] ; Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court [(1990) 3 SCC 682, 717 : 1991 SCC (L&S) 71]*** *.)* The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words "means and includes", on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions".
>
> (Emphasis supplied)

[9] **1995 Supp (2) SCC 348**

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Perhaps even more topically, the decision in ***Indra Sarma v. V.K.V. Sarma***[10] expresses the same view, in a case where the word "means" was followed by more than one category of examples, thus (in para 35 of the report):

> "The definition clause mentions only five categories of relationships which exhausts itself since the expression "means", has been used. When a definition clause is defined to "mean" such and such, the definition is prima facie restrictive and exhaustive. Section 2(f) has not used the expression "include" so as to make the definition exhaustive."

47. The fees of the arbitrators, therefore, are an integral part of the costs to be fixed by the arbitral tribunal under Section 31(8) of the 1996 Act. The "costs" stand delimited by the four categories of amounts envisaged in clauses (i) to (iv) of the Explanation to Section 31A(1). The first of these is "the fees and expenses of the arbitrators, Courts and witnesses". The submission, of Mr Upadhyay, that "costs" and "fees" have to be dichotomised cannot, therefore, be accepted.

48. The position becomes clear when we view the proviso to Section 38(1), Section 31(8) and the Explanation to Section 31A(1) in juxtaposition. Section 31(8) mandates that the arbitral tribunal fix the costs of arbitration, in accordance with Section 31A. Clause (i) of the Explanation to Section 31A(1) specifically includes the fees and expenses of the arbitrators as an integral part of the "costs". Clearly, therefore, the arbitrator has to fix the fees payable to the arbitral tribunal, with, needless to say, consent of parties. Section 38(1) provides for advance, for such "costs" fixed, by way of "deposit".

[10] **(2013) 15 SCC 755**

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The expressions "deposit", "costs" and "fees" are, therefore, intertwined by statute, and, as the interpreter thereof, the Court can hardly extricate them from each other. The proviso to Section 38(1) provides that, where the arbitral tribunal is seized of claims and counter-claims, it may fix separate amount of deposit for each. No doubt, the use of the word "may" does involve an element of discretion; but, if the arbitral tribunal *does* fix separate fees for the claims and counter-claims, it cannot be held that it has acted irregularly, or contrary to the statutory mandate.

49. Any other interpretation, in my view, would do violence to the intent of the legislature in interlinking Section 38(1) (including proviso thereto) with Section 31(8) and Section 31A of the 1996 Act.

50. Adverting, now, to the decisions cited by Mr. Upadhyay, I may observe, at the outset, that, as the judgement of the learned Single Judge in ***NHAI v. Gammon Engineers & Contractors Pvt Ltd.***[3] was examined, in appeal, by the Supreme Court in ***NHAI v. Gayatri Jhansi Roadways Ltd.***[1], and upheld *to a specific extent*, reliance cannot, now, be placed on the judgement of the learned Single Judge. Para 15 of the report in ***NHAI v. Gayatri Jhansi Roadways Ltd.***[1] deserves, in this context, to be reproduced once more:

> "However, the learned Single Judge's conclusion that the change in language of section 31(8) read with Section 31A which deals only with the costs generally and not with arbitrator's fees is correct in law. *It is true that the arbitrator's fees may be a component of costs to be paid but it is a far cry thereafter to state that section 31(8) and 31A would directly govern contracts in which a fee structure has already been laid down. To this extent, the learned Single Judge is correct.* We may also state that the declaration of law

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> by the learned Single Judge in ***Gayatri Jhansi Roadways Limited*** is not a correct view of the law."

This paragraph has, in my view, to be read as a whole, and not by reading the sentences isolated from each other. The Supreme Court has confirmed that, under Section 31(8) read with Section 31A, the arbitrator's fees *is* a component of costs. Even so, holds the Supreme Court, "it is a far cry thereafter *to state that Section 31(8) and 31A would directly govern contract in which a fee structure has already been laid down*." The context in which these findings have been returned is, in my respectful view, of pre-eminent importance. The Supreme Court was seized with a situation in which the fee structure was *fixed* by contract and the arbitral tribunal was, in deviation therefrom, seeking to fix fees as per the Fourth Schedule to the 1996 Act. In such a situation, held the Supreme Court, even though fees *were* a part of the costs under Sections 31(8) and 31A, these provisions would not directly govern a contract in which a fee structure already stood crystallized. Neither does this judgement, nor does the judgement of the learned Single Judge of this Court in ***NTPC v. Amar India Ltd.***[4], deal with the issue of the fees payable in the event of separate claims and counter-claims being urged before the arbitral tribunal and as to whether, in such event, the fees would be payable on the consolidated amount or separately on the claims and counter claims. The issue before the Court in each of these cases was regarding a disconnect between the fees as contractually agreed upon between the parties and the fees payable under the Fourth Schedule. The Court, in these cases, was concerned with a situation in which, despite the parties having been agreed, *ad idem*, to specify fees

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payable to the arbitral tribunal, the arbitral tribunal, nonetheless, proceeded to demand fees payable under the Fourth Schedule to the 1996 Act. In these circumstances, the court held, and unexceptionably, that the arbitral tribunal could not fix fees on its own, divorced from the fees payable to the arbitral tribunal as per agreement between the parties.

51. There can be no cavil with this proposition. In the present case, the parties had agreed, *ad idem*, to payment of fees in accordance with the Fourth Schedule to the 1996 Act. I do not find the fees, held to be payable to the learned Arbitral Tribunal, to be in any manner deviating from the mandate of the Fourth Schedule of the 1996 Act. The issue in the present case is as to whether, while determining the fees payable in the Fourth Schedule to the 1996 Act, the learned Arbitral Tribunal would be entitled to charge fees separately on claims and counter-claims. This aspect did not engage the attention of either of the Supreme Court in ***NHAI v. Gayatri Jhansi Roadways Ltd.***[1] or of this Court in ***NHAI v. Gammon Engineers & Contractors Pvt Ltd.***[3] and ***NTPC v. Amar India Ltd.***[4].

52. The Supreme Court has held, times without number, that the enunciation of the law, in a judgement, is not to be analogised to the theorems of Euclid, and that the declaration of law by the Supreme Court has to be understood in the backdrop of the controversy which was before it. One may profitably refer, in this context, to the decisions in ***U.O.I. v. Major Bahadur Singh***[11], ***BGS SGS Soma JV v.***

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[11] **(2006) 1 SCC 368**

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NHPC Ltd[12], ***Davinder Singh v State of Punjab***[13] and ***U.O.I. v. Chaman Rana***[14].

53. It is not possible, therefore, for me to accept the submission, predicated on the aforesaid decisions, that the learned Arbitral Tribunal erred in holding itself entitled to charge fees separately on the amounts claimed before it, by the petitioner and the respondent.

54. Apropos the judgment in ***DSIIDC***[2]**,** Mr. Seshadri drew my attention to a later judgment, of the same learned Single Judge, in ***Chandok Machineries v. S.N. Sunderson***[15]. The reliance is well placed. Paras 37 to 39 of the judgement in ***Chandok Machineries***[15], to the extent relevant, read as under:

> "**37.** The learned senior counsel for the petitioner further submitted that the Arbitral Tribunal, vide its order dated 13th January, 2016, had directed that the fee shall be shared by the parties equally, however, later by its order dated 19th October, 2016 directed that while claimant shall pay the arbitral fee on its claims, the respondent shall pay the arbitral fee on its counter claims. He submits that in this manner there was disparity in the fee payable by the parties to the Arbitral Tribunal.
>
> **38.** To answer the above submission, Section 38 of the Act would be relevant and is quoted hereinbelow :-
>
> > **"38. Deposits**. –
> >
> > (1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the

[12] **(2020) 4 SCC 234**
[13] **(2010) 13 SCC 88**
[14] **(2018) 5 SCC 798**
[15] **2018 SCC OnLine Del 11000**

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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. A reading of Section 38 would show that the Arbitral Tribunal may fix separate amounts of deposit for the claims and counter claims…"

55. Even it were to be assumed, *arguendo*, that there is any inconsistency between the views expressed in ***DSIIDC***[2] and ***Chandok Machineries***[15], both being judgements of learned Single Judges of this Court, it would be open to concur with the view expressed in ***Chandok Machineries***[15] as being (in my opinion) more in sync with

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the statutory scheme. That such an approach is permissible stands settled by the judgement of the Full Bench of the High Court of Punjab & Haryana in ***Indo Swiss Time Ltd. v. Umrao***[16], which was followed by a Division Bench of this Court in ***Gopa Manish Vora v. U.O.I.***[17], albeit in the context of the permissible approach to be adopted where the Court is faced in conflicting judgements of benches of co-equal strength of a superior court.

56. As such, I am of the opinion that, while reckoning the "sum in dispute" as employed in the Fourth Schedule to the 1996 Act, no exception can be taken to the decision of the learned Arbitral Tribunal to treat the amounts contained in the claims and counter-claims separately.

57. In view of the aforesaid discussion, I am unable to agree with the submissions of Mr. Upadhyay that the learned Arbitral Tribunal was in error in holding itself entitled to charge fees separately for the amounts claimed, before it, by the respondent, and the amounts contained in the counter-claim filed, before it, by the petitioner. Each of the said amounts, admittedly, was within the upper limit of ₹ 30 lakhs, envisaged by Serial No. 6 of the Fourth Schedule to the 1996 Act. I am unable to agree to the submission that the two amounts were required to be consolidated and subjected to the rigour of Serial No. 6 in the Fourth Schedule.

58. In the light of the aforesaid discussion, I am of the opinion that

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[16] **AIR 1981 P & H 213**
[17] **2009 ILR (4) Del 61**

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there is no substance in this petition, which is accordingly dismissed.

C. HARI SHANKAR, J.

AUGUST 06, 2021

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