IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.14355 of 2019

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1. The State of Bihar through The Principal Secretary, Sugarcane Cane Industry Department, New Secretariat, Vikash Bhawan, Bailey Road, Patna-800015
2. The Cane Commissioner Department of Sugarcane Industry, Govt. of Bihar, New Secretariat, Vikas Bhawan, 2nd Floor, Bailey Road, Patna-800015

... ... Petitioners

Versus

1. The Bihar State Sugarcane Corporation Ltd., New Secretariat, Vikash Bhawan, Bailey Road, Patna
2. The Hon'ble Sole Arbitrator, Hon'ble Mr. Justice R.K. Dutta (Retd.), Residing at - S.P. Verma Road, Patna-800001
3. M/s Pristine Magadh Infrastructure Pvt. Ltd., a Company Incorporated under Companies Act, 1956 having its registered office at 3rd Floor, Wing B, Commercial Plaza, Hotel Radison, Mahipalpur, N.H. - 8, New Secretariat, Delhi-11003, through its Senior Regional Manager, Rakesh Kumar
4. The Union of India, through the Secretary, Ministry of Law, New Delhi.

... ... Respondents

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with

Civil Writ Jurisdiction Case No. 23934 of 2018

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1. The Bihar State Electronics Development Corporation Limited, through its Managing Director, registered office at Beltron Bhwan, Shastri Nagar, Patna
2. The Managing Director, Bihar State Electronics Development Corporation Limited, Beltron Bhawan, Shastri Nagar, Patna

... ... Petitioners

Versus

1. The State Of Bihar through the Principal Secretary, Department of Information and Technology, Government of Bihar, Patna
2. The Principal Secretary, Department of Information and Technology Government of Bihar, Patna.
3. M/s SREI Infrastructure Finance Limited, a company registered under the Company Act, 1956, having its registered office at Viswakarma 86C, Topisa Road (South), Kolkata
4. The Secretary, Hon'ble Arbitral Tribunal Headed by Hon'ble Mr. Justice Jayanandan Singh (Retd.), Sole Arbitrator, Flat No. 302, Amba Residency Apartments, East Boring Canal Road, P.S.-Budha Colony, Patna-800001
5. Union of India, Ministry of Law through Secretary

... ... Respondents

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Appearance :
(In Civil Writ Jurisdiction Case No. 14355 of 2019)
For the Petitioner/s : Md. Zakir Haidar, Adv.
For the State : Mr. Kinkar Kumar, SC-9
Ms. Deepika Sharma, AC to SC-9
For the UOI : Mr. Rajesh Kumar Verma, ASG
For the BSSCL : Mr. Gyan Shankar, Adv.
(In Civil Writ Jurisdiction Case No. 23934 of 2018)
For the Petitioner/s : Mr. P.K.Sahi, Sr. Adv.
Mr. Girijish Kumar, Adv.
Mr. Vikas Kumar, Adv.
For the State : Mr. Prashant Pratap, GP-2
For the UOI : Mr. Rajesh Kumar Verma, ASG
For the BSSCL : Mr. Gyan Shankar, Adv.

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
ORAL JUDGMENT
Date : 05-03-2020

Heard Sri P. K. Sahi, Senior Advocate, assisted by Sri Girijish Kumar and Sri Vikas Kumar, Advocates, appearing for the petitioners in CWJC No. 23934 of 2018, Sri Prashant Pratap (GP-2), appearing for the State, Sri Rajesh Kumar Verma, Assistant Solicitor General, appearing for the Union of India and Sri Gyan Shankar, appearing for the Bihar State Sugar Corporation Ltd., apart from other Ld. Counsels, appearing in CWJC No. 14355 of 2019, whose appearance has been noted above.

2. The petitioner of the first case i.e. CWJC No. 14355 of 2019 is the State of Bihar, which has challenged the order dated 26.03.2019 (Annexure-

3) and the order dated 08.05.2019 (Annexure-4) passed by the learned sole Arbitrator in Arbitration Case No. 34 of 2018. By the impugned orders, the learned Arbitrator has fixed his fee to the tune of Rs. 31,83,125/- for consideration and adjudication of the counter claim of the State of Bihar and has also dismissed the review petition filed by the State of Bihar. The petitioners of the first case has also prayed for directing the learned Arbitrator to charge and accept the consolidated fee of Rs. 30,00,000/-, both for the claim and counter claim to be shared equally by both the parties.

3. As far as the second case i.e. CWJC No. 23934 of 2018 is concerned, the petitioners therein i.e. the Bihar State Electronics Development Corporation Ltd. & Anr. has challenged the order dated 16.09.2018 (Annexure-2) whereby and whereunder the learned Arbitrator has interpreted that the legislature has laid down a ceiling of Rs. 30,00,000/-, as per the 6th slab of the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015, only on the variable

amount of fees to be calculated at the rate of 0.5% of the claim amount, hence, the same does not include the fixed amount of Rs. 19,87,500/-, thus has directed the petitioners to make payment of a further sum of Rs. 10,00,000/- by way of fee to the Arbitral Tribunal. The petitioners of the second case have also prayed for quashing of the order dated 03.11.2018 (Annexure-4 to the writ petition) whereby and whereunder the review application filed before the learned Arbitral Tribunal has been dismissed with a cost of Rs. 25,000/-.

4. The learned Senior Counsel for the petitioners of the second case has submitted that the learned sole Arbitrator, by the impugned order dated 16.09.2018, passed in the ongoing arbitral proceedings in-between Srei Infrastructure Finance Limited, Kolkata and The State of Bihar, BELTRON & others, has relied upon the 4th Schedule to the Arbitration and Conciliation Act, 1996, particularly 6th slab, to mean that the cap of Rs. 30 lacs is exclusive of the sum of Rs. 19,87,500/- and puts ceiling only on the variable amount of fees to be

calculated @ 0.5% of the claim amount over and above Rs. 20 crore.

5. It is contended by the learned Senior Counsel appearing for the petitioners that if the cap of Rs. 30 lacs is not adhered to, the arbitral fees would amount to around Rs. 62 lacs an odd however, if the cap mentioned in the 4th Schedule to the Arbitration and Conciliation Act, 1996 is applied, the maximum amount of arbitral fees would be a sum of Rs. 30 lacs plus an additional sum of 25% since the arbitral tribunal consists of a sole arbitrator. Thus, in the present case, the arbitral fees would total up to a sum of Rs. 37.50 lacs approximately, out of which 50% has to be paid by the claimant and 50% by the respondents/ petitioners herein.

6. The learned Senior Counsel for the petitioners has submitted that the petitioners have got no other alternative and efficacious remedy under the Arbitration and Conciliation Act, 1996, as amended up-to-date, for the purpose of assailing the

impugned order passed by the learned sole Arbitrator, save and except by way of filing the present writ petition under Article 226 of the Constitution of India.

7. The learned Senior Counsel for the petitioners has further submitted that Section 11(14) of the Arbitration and Conciliation Act, 1996, as amended by the Arbitration and Conciliation (Amendment) Act, 2015, provides for fixation of fees of the arbitral tribunal and the fee schedule has been prescribed in the Fourth Schedule. It would be apt to reproduce the "Fourth Schedule" herein below:-

“The FOURTH SCHEDULE

“ [See section 11(14)]

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

upto Rs. 20,00,00,000	*and above Rs. 10,00,00,000*
Above Rs. 20,00,00,000	*Rs. 19,87,500 plus 0.5 per cent. of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000*

***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."*

8. It is thus submitted that a harmonious reading of Section 11(14), Section 38 along with the Fourth Schedule to the Arbitration and Conciliation Act, 1996 makes it abundantly clear that the sum in dispute has to necessarily include the amount of claim as also the counter claim raised by the respondents and moreover, the maximum limit of the arbitral fee cannot exceed the upper limit of Rs. 30,00,000/-. In this connection, the learned counsels for the petitioners have referred to a judgment rendered by the Hon'ble Delhi High Court dated 15.05.2018 passed in O.M.P. (MISC) 05 of 2018 (***Delhi State Industrial Infrastructure Development Corporation Ltd. v. Bawana Infra Development (P) Ltd.***), paragraphs no. 7 to 17 whereof are reproduced herein below:-

“7. I have considered the submissions made by the counsels and the learned Amicus. The Fourth Schedule to the Act has been added in the Act by way of amendment carried out in 2015. The object behind such amendment can be gathered from the 246 Law Commission Report, relevant portion whereof is quoted herein below-

“FEES OF ARBITRATORS

10. One of the main complaints against arbitration in India, especially ad hoc arbitration, is the high costs associated with the same - including the arbitrary, unilateral and disproportionate fixation of fees by several arbitrators. The Commission believes that if arbitration is really to become a cost effective solution for dispute resolution in the domestic context, there should be some mechanism to rationalise the fee structure for arbitrations. The subject of fees of arbitrators has been the subject of the lament of the Supreme Court in Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523 where it was observed:

“The cost of arbitration can be high

if the arbitral tribunal consists of retired Judges... There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judges are arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or

objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee."

11. In order to provide a workable solution to this problem, the Commission has recommended a model schedule of fees and has empowered the High Court to frame appropriate rules for fixation of fees for arbitrators and for which purpose it may take the said model schedule of fees into account. The model schedule of fees are based on the fee schedule set by the Delhi High Court International Arbitration Centre, which are over 5 years old, and which have been suitably revised. The schedule of fees would require regular updating, and must be reviewed every 3-4 years to ensure that they continue to stay realistic.

12. The Commission notes that International Commercial arbitrations involve foreign parties who might have different values and standards for fees for arbitrators; similarly, institutional

> rules might have their own schedule of fees; and in both cases greater deference must be accorded to party autonomy. The Commission has, therefore, expressly restricted its recommendations in the context of purely domestic, ad hoc, arbitrations."

8. As would be evident from a bare reading of the above report, the object behind the introduction of the Fourth Schedule to the Act was the belief of the Commission that if arbitration is to really become a cost effective solution for dispute resolution in the domestic context, there should be some mechanism to rationalise fee structure for arbitration. The Law Commission states that the model schedule of fee recommended by it is based on the fee set by the DIAC. As noted above, the fee schedule set by the DIAC specifically provides that the "Sum in dispute" shall include the counter claim made by any party. Therefore, the intent of the legislature and the purpose sought to be achieved clearly points to the conclusion that "Sum in dispute" would be a cumulative value of the claim and counter claim.

9. In Mithilesh Kumari v. Prem Behari Khare,

(1989) 2 SCC 95, the Supreme Court observed as under:

> "15.....It is permissible to refer to the Law Commission's Report to ascertain the legislative intent behind the provision? We are of the view that where a particular enactment or amendment is the result of the recommendation of the Law Commission of India, it may be permissible to refer to the relevant law report as in this case. What importance can be given to it will depend on the facts and circumstances of each case."

10. Learned Amicus in his note has also drawn reference to the Rules of various institutions which conduct arbitration proceedings in India and in other countries. The rules as to fee charged by them are summarised in form of the chart as under:—

INDIAN ARBITRAL INSTITUTIONS

Institute	**Provision**	**Relevant Clause/Term**
Indian Council of Arbitration Rules of Domestic Commercial Arbitration	Rule 31(2)	"Amount of Claim & Counter Claim"
Mumbai Centre for	Schedule of Fees	"*Amounts in dispute

International Arbitration		refers to total claim and counter claim.”
Construction Industry	Schedule of Fees	“Sum in Dispute (Claim + Counter Claim)”
Delhi International Arbitration Centre (Administrative Cost Arbitrators' Fees) Rules ***(“DAC Rules***”)	Schedule C	“*Sums in dispute mentioned in the Schedule B and C above shall include any counter-claim made by a party.”

NON-INDIAN ARBITRAL INSTITUTIONS

Institute	**Provision**	**Relevant Clause/Term**
Singapore International Arbitration Centre	Estimate Your Fees, 2016	“Amount in Dispute refers to Total Claim and Counter Claim amount.”
Hong Kong International Arbitration Centre, 2013 Administered Arbitration Rules	Schedule 3, Article 6.3	“Claims and counterclaims are added for the determination of the amount in disputes.”
Stockholm Chamber of Commerce Arbitration Rules	Appendix IV, Article 2(3)	“The amount in dispute shall be the aggregate value of all claims, counterclaims and set-offs.”
European Court of	Appendix 3	“For the purposes of the

Arbitration, Arbitration Rules-2015 Edition		application of the scale range the amount to be taken into account to apply this scale will be the total of the claims made by the parties, i.e. of the claims and counterclaims.”

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.

12. As noted in Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523 and reiterated in Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust, (2012) 1 SCC 455, high costs are seriously hampering the growth of arbitration as an effective dispute resolution process. Sometimes arbitration becomes disproportionately expensive. Reasonableness and certainty about total costs are the key to the development of arbitration.

13. If India is to emerge as a preferred place of arbitration and the arbitration culture is to grow in India, it is imperative that such fee structure be rationalised so as to make it cost effective. This, as noted, was the intent of the legislature for bringing about the amendment to the Act. Therefore, there is no reason for the Fourth Schedule to the Act to be given a meaning which is different from usage by various institutions conducting arbitration proceedings in India and abroad.

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.

15. Proviso to Section 38(1) of the Act can only apply when the Arbitral Tribunal is not to fix its fee in terms of the Fourth Schedule to the Act. It would not have any bearing on the interpretation to be put to the Fourth Schedule. It is noted that as regards fee even under the Amended Act, the Arbitral Tribunal is free to fix its schedule of fee in

an ad-hoc arbitration which is conducted without the intervention of the Court. Even where the Arbitral Tribunal is appointed by the Court under Section 11 of the Act, in absence of rules framed under Section 11 (14) of the Act, it is not in every case that the Arbitral Tribunal has to fix its fee in accordance with the Fourth Schedule to the Act. Therefore, the proviso to Section 38(1) of the Act would have no bearing on the interpretation being put to the Fourth Schedule and the phrase “Sum in dispute” therein.

16. An argument was made that the adjudication of counter claim would require extra effort from the Arbitrator and therefore, the Arbitrator should be entitled to charge a separate fee for the same. I cannot agree with this argument. The object of providing for counter claim is to avoid multiplicity of proceedings and to avoid divergent findings. Keeping the object of the amendment in view, the ceiling on fee as prescribed in the Fourth Schedule of the Act cannot be allowed to be breached.

17. In view of the above, the Sole Arbitrator is requested to withdraw his order claiming separate fee for the amounts claimed in the

> Statement of Claim and the counter claim. The amount of Rs. 13,15,250/- deposited by the petitioner with the Registry of this Court in compliance with the order dated 22.02.2018 passed in I.A. No. 2549/2018 in Arb. P.420/2016 shall be refunded by the Registry of this Court to the petitioner along with any interest accrued thereon."

9. The learned counsel for the Respondent-Union of India, by referring to the counter affidavit filed on behalf of the Respondent No. 4 in the first case, has submitted that the Fourth Schedule to the Act, as aforesaid, has been added in the Act by way of amendment made in the year, 2015 and the object behind adding the Fourth Schedule to the Act can be gathered by the 246th Report of the Law Commission of India, relevant paragraphs whereof are reproduced herein below:-

> "10. One of the main complaints against arbitration in India, especially ad hoc arbitration, is the high costs associated with the same - including the arbitrary, unilateral and disproportionate fixation of fees by several arbitrators. The Commission believes that if arbitration is

really to become a cost effective solution for dispute resolution in the domestic context, there should be some mechanism to rationalise the fee structure for arbitrations. The subject of fees of arbitrators has been the subject of the lament of the Supreme Court in *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523 where it was observed:

> "[T]he cost of arbitration can be high if the arbitral tribunal consists of retired Judges.... There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judges are arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel

> constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee."

11. In order to provide a workable solution to this problem, the Commission has recommended a model schedule of fees and has empowered the High Court to frame appropriate rules for fixation of fees for arbitrators and for which purpose it may take the said model schedule of fees into account. The model schedule of fees are based on the fee schedule set by the Delhi High Court International Arbitration Centre, which

> are over 5 years old, and which have been suitably revised.
> The schedule of fees would require regular updating, and must be reviewed every 3-4 years to ensure that they continue to stay realistic.
>
> 12. The Commission notes that International Commercial arbitrations involve foreign parties who might have different values and standards for fees for arbitrators, similarly, institutional rules might have their own schedule of fees; and in both cases greater deference must be accorded to party autonomy. The Commission has, therefore, expressly restricted its recommendations in the context of purely domestic, ad hoc, arbitrations."

10. The learned counsel for the Union of India has also relied on a Judgement rendered by the Hon'ble Delhi High Court in the case of ***Bawana Infra Development Pvt. Ltd.*** (supra).

11. I have heard the learned counsel for the parties and gone through the materials on record. This Court finds that in India, a major bone of

contention in arbitral proceedings has been the high cost associated with it. The arbitrators often fix fees in an arbitrary, unilateral and disproportionate manner. This aspect of the matter is apparent from the relevant extract quoted hereinabove from the 246th Report of the Law Commission of India. Thus, apparently, the legislature thought it proper to amend the Arbitration and Conciliation Act, 1996 and a fee schedule, as provided for in the Fourth Schedule to the Act, was introduced by way of the Arbitration and Conciliation (Amendment) Act, 2015.

12. This Court further finds that a conjoint reading of the provisions contained in Section 11(14), Section 38 and Fourth Schedule of the Arbitration and Conciliation Act, 1996 along with the 246th Law Commission Report, which has addressed the issue of fees of arbitrators and has suggested a model schedule of fees as a mechanism to rationalize the fee structure, leading to coming into being of the Arbitration and Conciliation (Amendment) Act, 2015, which has

been passed with a view to make the arbitral process costs effective and has thus inserted Schedule Fourth to the Act, providing therein a model fee schedule for domestic arbitration, for the purposes of determination of fees of the arbitral tribunal, would definitely demonstrate that the intention of the legislature was/is to provide a upper cap to the fee of the arbitrator in order to make the arbitral process costs effective. In case, the legislature intended to permit the arbitrator(s) of the arbitral tribunal to fix a fee exceeding the ceiling amount by charging a base amount and a percentage of the claim amount, which would be subject to ceiling separately, it would have provided so in the "Fourth Schedule". Now coming back to the phrase used in the "Fourth Schedule", with regard to the "sum in dispute", it would be appropriate to reproduce the model fees prescribed for claim above Rs. 20,00,00,000/-, herein below:- “Rs. 19,87,500 plus 0.5 per cent. of the claim amount over and above Rs. 20,00,00,000 ***with a ceiling*** of Rs. 30,00,000". It

is apparent from a bare reading of the phrase "***with a ceiling of Rs. 30,00,000/-***", that the same cannot be considered as a modifying phrase at the end, which would only refer to the ceiling being applicable to "plus 0.5% of the claim amount over and above Rs. 20,00,00,000". Thus, it would be seen that the afore-said provision is to be read conjunctively and not in a disjointed manner inasmuch as doing so would defeat the intention of the legislature, resulting in exorbitant amount of fees being fixed by the learned arbitrators. At this juncture, it would be apt to refer to a judgment rendered by the Hon'ble Apex Court, reported in (2012) 1 SCC 455 (***Sanjeev Kumar Jain vs. Raghubir Saran Charitable Trust & Ors.***), paragraphs no. 37 to 44 whereof are reproduced herein below:-

> "37. We have referred to the effect of absence of provisions for award of actual costs on civil litigation. At the other end of the spectrum is an area where award of actual but unrealistic costs and delay in disposal is affecting the credibility of an alternative dispute resolution process. We

are referring to arbitration proceedings where usually huge costs are awarded (with reference to actual unregulated fees of Arbitrators and Advocates).

38. Clause (a) of section 31(8) of the Arbitration and Conciliation Act, 1996 (“the Act”, for short) deals with costs. It provides that unless otherwise agreed by the parties, the costs of an arbitration shall be fixed by the arbitral tribunal. The explanation to sub-section (8) of section 31 makes it clear that “costs” means reasonable costs relating to (i) the fees and expenses of the arbitrators and witnesses, (ii) legal fees and expenses, (iii) any administration fees of the institution supervising the arbitration, and (iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award. Clause (b) of section 31(8) of the Act provides that unless otherwise agreed to by parties, the Arbitral Tribunal shall specify (i) the party entitled to costs, (ii) the party who shall pay the costs, (iii) the amount of costs or method of determining the amount, and (iv) the manner in which the costs shall be paid. This shows that what is awardable is not “actual” expenditure but “reasonable” costs.

39. Arbitrators can be appointed by the parties directly without the intervention of the court, or by an institution specified in the arbitration agreement. Where there is no consensus in regard to the appointment of arbitrator(s), or if the specified institution fails to perform its functions, the party who seeks arbitration can file an application under section 11 of the Act for appointment of arbitrators. Section 11 speaks of the Chief Justice or his designate "appointing" an arbitrator. The word "appoint" means not only nominating or designating the person who will act as an arbitrator, but is wide enough to include stipulating the terms on which he is appointed. For example, when we refer to an employer issuing a letter of appointment, it not only refers to the actual act of appointment, but includes the stipulation of the terms subject to which such appointment is made. The word "appoint" in section 11 of the Act, therefore, refers not only to the actual designation or nomination as an arbitrator, but includes specifying the terms and conditions, which the Chief Justice or his designate may lay down on the facts and circumstances of the case. Whenever the Chief Justice or his

designate appoint arbitrator(s), it will be open to him to stipulate the fees payable to the arbitrator(s), after hearing the parties and if necessary after ascertaining the fee structure from the prospective arbitrator(s). This will avoid the embarrassment of parties having to negotiate with the arbitrators, the fee payable to them, after their appointment.

40. This Court in Union of India v. Singh Builders Syndicate, dealt with the complaints about the arbitration cost in India: (SCC pp. 527-28, paras 20-24)

> "20. Another aspect referred to by the appellant, however requires serious consideration. When the arbitration is by a tribunal consisting of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of retired Judge(s).
>
> 21. When a retired Judge is appointed as arbitrator in place of serving officers, the Government is forced to bear the high cost of arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical, non-serving persons as arbitrator(s). There is

no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judge(s) are arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award.

22. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or cre-

ate a bias in favour of the other party which readily agreed to pay the high fee.

23. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the arbitrators' fees is not fixed by the arbitrators themselves on case to case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the arbitration is held. Another solution is for the court to fix the fees at the time of appointing the arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned. Third is for the retired Judges offering to serve as arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an arbitrator whose fees are in their `range' having regard to the stakes involved.

24. What is found to be objectionable is parties being forced to go to an arbitrator appointed by the court and then being forced to agree for a fee fixed by such arbitrator. It is unfortunate that

> delays, high costs, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process. Delay and high costs are two areas where the arbitrators by self-regulation can bring about marked improvement."
>
> (emphasis supplied)

41. There is a general feeling among consumers of arbitration (parties settling disputes by arbitration) that ad hoc arbitrations in India - either international or domestic, are time consuming and disproportionately expensive. Frequent complaints are made about two sessions in a day being treated as two hearings for the purpose of charging fee; or about a session of two hours being treated as full session for purposes of fee; or about non-productive sittings being treated as fully chargeable hearings. It is pointed out that if there is an Arbitral Tribunal with three arbitrators and if the arbitrators are from different cities and the arbitrations are to be held and the arbitrators are accommodated in five star hotels, the cost per hearing, (arbitrator's fee, lawyer's fee, cost of travel,

cost of accommodation etc.) may easily run into rupees one Million to one and half million per sitting. Where the stakes are very high, that kind of expenditure is not commented upon. But if the number of hearings become too many, the cost factor and efficiency/effectiveness factor is commented. That is why this Court in Singh Builders Syndicate observed that the arbitration will have to be saved from the arbitration cost.

42. Though what is stated above about arbitrations in India, may appear rather harsh, or as a universalisation of stray aberrations, we have ventured to refer to these aspects in the interest of ensuring that arbitration survives in India as an effective alternative forum for disputes resolution in India. Examples are not wanting where arbitrations are being shifted to neighbouring Singapore, Kuala Lumpur, etc. on the ground that more professionalized or institutionalized arbitrations, which get concluded expeditiously at a lesser cost, are available there. The remedy for healthy development of arbitration in India is to disclose the fees structure before the appointment of arbitrators so that any party who is unwilling to bear such ex-

penses can express his unwillingness. Another remedy is Institutional Arbitration where the Arbitrator's fee is pre-fixed. The third is for each High Court to have a scale of Arbitrator's fee suitably calibrated with reference to the amount involved in the dispute. This will also avoid different designates prescribing different fee structures. By these methods, there may be a reasonable check on the fees and the cost of arbitration, thereby making arbitration, both national and international, attractive to the litigant public. Reasonableness and certainty about total costs are the key to the development of arbitration. Be that as it may.

Conclusion

43. In view of the above, the order dated 20.1.2010 of the High Court, to the extent it levies costs of Rs. 45,28,000 on the appellant is set aside and in its place it is directed that the appellant shall pay the costs of the appeal before the High Court as per Rules plus Rs. 3000/- as exemplary costs to the respondents.

44. We suggest appropriate changes in the provisions relating to costs contained as per paras 28 to 43 above to the Law Commission of India, Parliament and the re-

spective High Courts for making appropriate changes."

13. It would also be apropos to refer to a judgment dated 21.07.2017, rendered by the learned Division Bench of the Hon'ble High Court of Punjab and Haryana, Chandigarh in CWJC No. 3962 of 2017 (O&M) (***Punjab State Power Corporation Ltd. Vs. Union of India & Others***), relevant paragraphs whereof are reproduced herein below:-

> "Upon hearing learned counsel for the parties on this issue, we are of the opinion that Tribunal has gone wrong in interpreting the note in the manner reflected in the award which we may extract herein below:-
>
> > "With regard to submissions of the respondent No.1 as to whether the fee is payable to each Arbitrator or all the Members of the Arbitral Tribunal as per the detailed calculations already given in the 13th hearing, it is clarified that each Member of the Arbitral Tribunal is entitled to receive the amount already intimated to the

> parties. The Note below the Fourth Schedule clearly states that if the Arbitral Tribunal comprises of a Sole Arbitrator, he shall be entitled to an additional amount of 25% on the fee payable as per the Fourth Schedule. This leads to the obvious interpretation that the fee set out in the Fourth Schedule is for each individual Member of the Arbitral Tribunal."

Evidently the intent of the aforesaid is that in the eventuality of a sole Arbitrator being asked to enter upon an arbitration he would be entitled to an additional amount of 25% of the fee table, as per the table set out above (i.e Fourth Schedule). It cannot thus be interpreted that since sole arbitrator is entitled to 25% additional amount over and above the Schedule it should be construed to mean that other members of the Tribunal would be entitled to the model fee as per the Fourth Schedule with the principal Arbitrator getting 25% additional fee thereto. It means only that in the eventuality of Arbitral Tribunal consisting of a solitary member it could entitle him to additional fee of 25% of

> the model fee but if it is a multi member body then they would be entitled to a composite fee as set out in the Schedule."

14. Having considered the aforesaid aspect of the matter as also the law laid down by the Hon'ble Courts, as referred to hereinabove in the preceding paragraphs, apart from taking into account the 246th Law Commission Report and the 2015 amendment made in the Arbitration and Conciliation Act, 1996, this Court is of the considered view that a sound interpretation of the "Fourth Schedule", especially keeping in mind the legislative intent as also taking into cogitation the plain and simple understanding of the afore-mentioned provision in simple English language used for the purposes of defining the model fee, as far as sum in dispute being above Rs. 20,00,00,000/- is concerned, can only have one meaning i.e - "the ceiling of Rs. 30,00,000/- has to be applied to the summation of the base amount and the percentage of claim added together, however, in cases, where the arbitral tribunal

consists of a sole arbitrator, he would be entitled to an additional amount of 25% of the maximum amount which, in any case, cannot be more than a sum of Rs. 7,50,000/-(25% of Rs. 30,00,000/-). It is thus held that the ceiling of Rs. 30,00,000/- in the Fourth Schedule to the Arbitration and Conciliation Act, 1996 is not only on the variable amount of fees to be calculated at the rate of 0.5% of the claim amount, leaving aside the fee amount of Rs. 19,87,500/-, but also on both the base amount and the percentage of claim amount added together. It is further held that the sum in dispute, as referred to in Schedule Fourth to the Arbitration and Conciliation Act, 1996 shall include both claim and counter claim amounts, as has also been held by the Hon’ble Delhi High Court in the case of ***Bawana Infra Private Ltd.*** (supra). It is needless to state that the "Fourth Schedule", to the Arbitration and Conciliation Act, 1996, is not mandatory in determining the fee structure where the fee structure has been agreed to in the agreement between the parties. Moreover, since

no rules have been framed by the Hon’ble Patna High Court, providing for the fee schedule for domestic arbitration, the aforesaid "Fourth Schedule", to the Arbitration and Conciliation Act, 1996 shall govern the field regarding determination of fee of the arbitral tribunal. In fact, the learned arbitrators also claim to have fixed the fee as per the Fourth Schedule to the Arbitration and Conciliation Act, 1996. Thus, this Court finds that the fee fixed by the learned arbitrators in both the aforesaid cases is illegal, exorbitant, arbitrary, disproportionate and contrary to the provisions contained in the "Fourth Schedule" to the Arbitration and Conciliation Act, 1996. Consequently, the impugned orders dated 26.03.2019 and 08.05.2019 (as far as the first case i.e. CWJC No. 14355 of 2019 is concerned) and the ones dated 16.09.2018 and 03.11.2018 (as far as second case i.e. CWJC No. 23934 of 2018 is concerned) are quashed, however, with liberty to the learned arbitrators to fix their fees afresh, strictly as per the mandate of the "Fourth

Schedule" to the Arbitration and Conciliation Act, 1996, as interpreted by this Court hereinabove in the preceding paragraphs.

15. Both the aforesaid writ petitions stand allowed.

(Mohit Kumar Shah, J)

Ajay/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	29.09.2020
Transmission Date	NA