

NATIONAL HIGHWAYS AUTHORITY OF INDIA

A

v.

GAYATRI JHANSI ROADWAYS LIMITED

(Civil Appeal No. 5383 of 2019)

JULY 10, 2019

B

[R.F. NARIMAN AND SURYA KANT, JJ.]

Arbitration:

Fee of Arbitrator – Whether to be governed by Fourth Schedule of the Arbitration Act dehors the agreement between the parties – Held: The fee schedule fixed by the agreement between the parties would govern the fee of Arbitrator and not Fourth Schedule to the Arbitration Act – Arbitration and Conciliation Act, 1996 [As amended by Arbitration and Conciliation (Amendment) Act, 2015] – Fourth Schedule.

C

D

Arbitration and Conciliation Act, 1996:

s. 31(8) r/w. s. 31A – Scope of – Held: Section 31(8) r/w s.31A deals only with the costs generally and not with arbitrator's fee – It is true that the arbitrator's fees may be a component of costs to be paid, but it is not correct to say that s. 31(8) and 31A directly govern contracts in which fee structure has already been laid down.

E

Disposing of the appeals, the Court

HELD: 1. In the facts of the present case, the fee schedule was 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. Therefore, 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. [Para 12] [1007-A-C]

F

G

H

The Judgment of the Court was delivered by A

R. F. NARIMAN, J.

CIVIL APPEAL NO. 5384 OF 2019

(Arising out of SLP (C) No. 22099 of 2018)

1. Leave granted. B

2. The brief facts of the present appeal are as follows:

3. A contract dated 07.02.2006 was entered into between the appellant and the respondent. It is sufficient to state, for the purpose of this case, that insofar as the dispute resolution is concerned, the arbitration clause referred the parties to the arbitration of three learned arbitrators - one to be appointed by each party and the third arbitrator to be appointed by the two arbitrators so appointed. The aforesaid contract contained paragraph 5 which reads as follows: C

“5. The parties are desirous that the remuneration and other expenses payable to the Arbitrators as per arbitration clause for referring the dispute between the parties arising out of the said Contract to the Arbitral Tribunal for resolution in accordance with the procedure laid down therein, shall be as follows: D

I. That the maximum limit for fee payable to each Arbitrator per day shall be Rs.5000/- subject to a maximum of Rs.1.5 lakh per case. E

II That each Arbitrator shall be paid a reading fees of Rs.6000/- per case.

III That each Arbitrator shall be paid Rs.5000/- by way of secretarial assistant per case. F

IV. That each Arbitrator shall be paid Rs.6000/- per case towards incidental charges like telephone, FAX, postage etc.

V. That other expenses based on actual against presentation of bills, shall also be reimbursed to each Arbitrator subject to the following ceiling (applicable for the days of hearing only) G

(a) Travelling expenses – Economy class (By Air), First class AC (By train) and AC car (By road).

H

- A (b) Lodging and boarding – Rs.8000/- per day in Metro cities (Delhi, Mumbai, Chennai & Kolkata), Rs.5000/- per day in other cities OR Rs.2000/- per day if any Arbitrator makes his own arrangement.
- (c) Local travel – Rs.700/- per day
- B VI Charges for publishing the Award – Maximum of Rs.10,000/-
- VII That in exceptional cases, such as cases involving major legal implication/wider ramification/higher financial stakes etc. a special fees structure could be fixed in consultation with the Contractor/Supervisoir consultant and with the specific approval of the Chairman, NHAI before appointment of the Arbitrator.”
- C
4. Mr. P. S. Narasimha, learned senior counsel appearing on behalf of the respondent, has informed us that the fee schedule that was so fixed, was fixed under a policy decision dated 31.05.2004 of the National Highways Authority of India (hereinafter referred to as ‘NHAI’ of brevity), a perusal of which would show that, this is, in fact, so.
- D
5. As disputes arose between the parties, arbitration was invoked by the appellant long after the contract was entered into, i.e., on 23.05.2017. The respondent wrote a letter dated 14.07.2017 appointing Shri Sudesh Dhiman as its nominee arbitrator in which it reminded the arbitrator that the fee applicable is to be considered as per the policy circular of the NHAI dated 01.06.2017. This circular substituted amounts payable to the arbitrator as per the circular of 2004, whereby the arbitrators would now get for any claim under Rs.100 crores, Rs.25,000 per day together with enhanced other charges or a lumpsum fee of Rs.5 lakhs per case which includes counter claims, in place of the original fee structure.
- E
- F
6. The matter then came up before the Arbitral Tribunal, which was by then constituted, in which the Tribunal passed an order dated 23.08.2017, in which it stated as follows:
- G
- “1.12.1 Fees:
- (a) The Claimant informed that there is no agreement between the parties regarding the fees of the AT.
- H

(b) The Respondent requested that fees of the AT may be fixed in terms of the instructions issued by NHAI vide their circular dated 01.06.2017. A

(c) The Tribunal considered the matter and decided that the fees of the AT shall be regulated as per provisions of the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015.” B

7. The respondent, against this order, moved an application dated 13.10.2017 before the Tribunal in which it sought to remind the Tribunal that the arbitral fees has been fixed by the agreement and that, therefore, they may be fixed in terms of the policy of 2017 and not as per the Fourth Schedule of the Arbitration and Conciliation Act, 1996. The matter came up before the Tribunal yet again on 30.01.2018. The Tribunal then passed the following order: C

“3.8 The respondent had filed an application for review of fees fixed by the AT and to modify the same in terms of the NHAI circular dated 01.06.2017. D

It was brought out that the Claimant had inadvertently informed the AT as per para 1.12.1(a) that there was no agreement between the parties regarding the fees of the AT. In fact, the agreement provides for a fixed rate of fee of the AT as agreed by the parties. E

Oral submissions on this matter were made by both the parties. The AT deliberated on the matter and has decided that in view of the latest provision in the amended Act, the AT is competent to fix the fees regardless of the agreement of the parties. This is as per judgment dated 11.09.2017 of the Hon’ble High Court in the matter of NHAI vs Gayatri Jhansi Roadways. The AT reiterated that the fees fixed in the 1st hearing shall be followed. Accordingly, fees shall be regulated as per provisions of ‘the fourth schedule of the amended Arbitration and Conciliation Act, 1996.’ F

8. Faced with this order, the respondent moved an application on 08.05.2018 under Section 14 of the Arbitration and Conciliation Act, 1996, to terminate the mandate of the arbitrators, inasmuch as, according to the respondent, the arbitrators had wilfully disregarded the agreement between the parties and were, therefore, *de jure* unable to act any further in the proceedings. G

H

A 9. Meanwhile, the Arbitral Tribunal passed yet another order dated 19.07.2018 in which the Tribunal stated it had no objection to payment of any fees as would be decided in the pending proceedings by the High Court of Delhi.

B 10. The learned Single Judge, by the impugned judgment, set out clause 5 of the agreement between the parties and then stated that the Fourth Schedule of the Arbitration Act not being mandatory, whatever terms are laid down as to arbitrator's fees in the agreement, must needs be followed. In so doing, he disagreed with the another learned Single Judge Bench judgment dated 11.09.2017 in *National Highways Authority of India v. Gayatri Jhansi Roadways Limited* in which, the
C learned Single Judge had held that Section 31(8) and Section 31A of the Arbitration Act would govern matters such as this and since the expression 'unless otherwise agreed by the parties' had been omitted from Section 31A by the Amendment Act of 2015, arbitrator's fees would have to be
D *dehors* the agreement between the parties.

11. The impugned judgment violently disagreed with this view holding the said judgment as *per incuriam* stating that:

E "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.

F 26. The deletion of words "unless otherwise agreed by the parties" in Section 31A only signifies that the parties, by an agreement, cannot contract out of payment of 'costs' and denude the Arbitral Tribunal to award 'costs' of arbitration in favour of the successful party. The Judgment of this Court in *Gayatri Jhansi Roadways Limited* (Supra) relied upon by the counsel for the respondent does not take note of the above decisions or the report of the Law Commission. The said judgment is, therefore, *per incuriam*. I
G am informed that the said decision is pending challenge before the Supreme Court by way of a Special Leave Petition. In any case, the said Judgment was passed on an appeal under Section 37 of the Act and did not consider the contours of Section 14 of the Act."

H

12. We have heard learned counsel for the both the sides. In our view, Shri Narasimha, learned senior counsel, is right in stating that in the facts of this case, the fee schedule was, in fact, fixed by the agreement between the parties. This fee schedule, being based on an earlier circular of 2004, was now liable to be amended from time to time in view of the long passage of time that has ensued between the date of the agreement and the date of the disputes that have arisen under the agreement. We, therefore, hold that the fee schedule that is contained in the Circular dated 01.06.2017, substituting the earlier fee schedule, will now operate and the arbitrators will be entitled to charge their fees in accordance with this schedule and not in accordance with the Fourth Schedule to the Arbitration Act.

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

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

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 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.

A
B
C
D
E
F
G
H

A 16. With these observations, this appeal is allowed, the impugned judgment is set aside and the arbitrators are directed to proceed with the arbitration as expeditiously as possible.

 17. We extend the time, with the consent of the parties, to a period of one year from today in which the arbitrators must deliver the Arbitral
B Award in the present case.

CIVIL APPEAL NO. 5383 OF 2019

(Arising out of SLP (C)No. 3211 of 2018)

C 1. Regard being had to the judgment just pronounced in the
aforementioned Civil Appeal No. 5384 of 2019, we set aside the impugned
judgment dated 11.09.2017 in the present case. However, the setting
aside of this judgment will not, in any way, come in the way of the final
Award between the parties which has been upheld finally by this Court.

 2. The appeal stands disposed of accordingly.

Kalpana K. Tripathy

Appeals disposed of.