IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

C.O.140 of 2023
P & P Business Private Limited
VS.
Marco Francesco Shoes (India) Private Limited

For the petitioner :Mr. Partha Pratim Roy, Adv.
Mr. Srijib Chakraborty, Adv.
Mr. Sunny Nandy, Adv.

For the Opposite Party :Mr. Sayak Ranjan Ganguly, Adv.
Ms. Srijani Ghosh, Adv.
Ms. Indrani Majumdar, Adv.

Last Heard On :11.03.2025

Judgement On :29.04.2024

Bibhas Ranjan De, J. :

1. The instant revision application is directed against merits of the arbitration dated 22.03.2022 and 11.12.2022 passed by the Ld. Sole arbitrator in the arbitral proceedings between Marco Francesco Shoes (India) Private Limited and P & P

Business Private Limited by invoking Article 227 of the Constitution of India.

2. Pursuant to some disputes and differences that cropped up between the parties, with regard to running of sand block situated at Gopalpur, Bankura wherein the opposite party who had the tender to run the said sand block granted the petitioner lease to mine the sand block in exchange of a monetary consideration, claimed non-payment of fees by the petitioner. As per the agreement dated 23.05.2018, an arbitral proceeding took place before the Ld. Arbitrator. During pendency of such proceeding, the claimant filed one statement of claim amounting to Rs. 2,56,26,000/- along with interest whereas the respondent filed a counterclaim to the tune of Rs. 6,90,98,132/- along with interest. The Ld. Arbitrator allegedly claimed a lumpsum amount of Rs. 30,00,000/- as his fees in violation of the Forth Schedule envisaged in the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act of 1996) which was to be borne by the parties equally (i.e. Rs.15,00,000/- each). Being aggrieved by and dissatisfied with such decision of the Ld. Arbitrator, the petitioners have filed the instant revision application.

At the Bar:-

3. Ld. Counsel, Mr. Partha Pratim Roy, appearing on behalf of the petitioner by relying on the specific provisions of Section 11(3)(A) and Section 11(14) of the Act of 1996, has vehemently argued that the unilateral fixation of fees goes against the principle of party autonomy, which is central of the resolution to the disputes through arbitration. Thus, there is no enabling provision under the Act of 1996 which empowers the Arbitrators to unilaterally issue a binding or an enforceable order regarding their fees, therefore, they cannot fix their fees unilaterally which *de hors* the agreement between the parties and therefore the fees of the Arbitrator should be fixed in accordance with the Fourth Schedule of the Act of 1996.

4. In support of this submission, Mr. Roy has claimed that in terms of the Fourth Schedule of the Act, the total claim and counter-claim comes to around Rs. 5,57,24,132/-, which would be governed by the 4th row of the schedule and the total remuneration thus, would be Rs. 3,37,500+1 per cent of the claim amount over and above Rs. 1,00,00,000/- which comes to about Rs. 4,57,241/- and thus the total remuneration of the Learned Arbitrator stands at Rs. 7,94,741/- and in addition to

that as in the instant case, the arbitral tribunal consists of a sole arbitrator, he is allowed to an additional amount of 25 per cent on the fee payable i.e., 25% of Rs. 7,94,741/- which comes to around Rs. 1,98,685.25/- and thus the total fee payable by both the parties in terms of the Fourth Schedule of the Act would be Rs.7,49,741+1,98,685.25= Rs. 9,93,426.25/-. But, the Ld. Arbitrator had charged Rs.30,00,000/- (Thirty Lakhs) which is not permissible.

5. Last but not the least, Mr. Roy regarding the issue of maintainability of the instant revision application has contended that the petitioner has no through remedy under the Arbitration Act. As neither through Section 37 nor Section 34 of the Act of 1996 any remedy is available to the petitioner. It is well settled that where there is a wrong, there is a remedy and the petitioner cannot be left remediless. Therefore, in the absence of any remedy under the Arbitration Act, Article 227 is indeed applicable.

6. Before parting with, Mr. Roy has tried to make this Court understand that in the present case, the Learned Arbitrator has fixed the fees by an order without assigning any reasons. It is well settled that any order passed without reasons is a nullity

and non-assigning of reasons is a violation of the principles of natural justice. This is all the more relevant since at the time of fixing the fees, the pleadings had not been completed and therefore the Learned Arbitrator in any event had no basis to fix any fee. In addition to that by a further order dated 22.12.2022, Ld. Sole Arbitrator had rejected the counter claim of the petitioners due to non-payment. Neither of them are awards and thus, the instant Civil Revisional Application under Article 227 of the Constitution of India is maintainable both in fact and in law as the Arbitrator exceeded his jurisdiction.

7. In support of his contention, Mr. Roy has cited the following cases:-

- ***Oil and Natural Gas Corporation Ltd. vs. Afcons Gunanusa JV.*** reported in ***2022 SCC OnLine SC 1122***
- ***Srei Infrastructural Limited vs. Tuff Drilling Private Limited*** reported in ***2018 (11) SCC 470***
- ***Bhaven Constructions vs. Executive Engineer Sardar Sarobor Narmada Nigam & Anr.*** reported in ***(2022) 1 SCC 75***

- ***Deep Industries Limited vs. Oil and Natural Gas Corporation Limited and Anr.*** reported in ***(2020) 15 SCC 706***

8. Through the above referred judgments, Mr. Roy has made an attempt to take assistance of the following observations of the Hon'ble Apex Court in order to strengthen his side of argument:-

- An arbitrator will not be usually entitled to increase his fee and expenses unless his agreement with the parties allows him to do so. The arbitrators should not exceed their authority, either under the terms of the arbitration agreement fixing their fee, or under their powers in law, which does not permit them to rewrite the agreement or ignore the court order fixing the fee. It is further observed that the arbitral tribunal, during the proceedings, is not entitled to unilaterally increase its fee, unless the agreement on which it is constituted allows it to do so, or all parties voluntarily agree to enhancement. Where fee is fixed by a court order, the arbitral tribunal may approach the court for modification/increase in the fee by giving reasons justifying the same. Unilateral increase is unacceptable.

- There is no doubt whatsoever that if petitions were to be filed under Article 226/227 of the Constitution against orders passed in appeals under Section 36 of the Act of 1996, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, one cannot forget that Article 227 is a constitutional provision which remains untouched by the non obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated hereinabove.
- Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum.

9. In opposition to that, Ld. Counsel, Mr. Sayak Ranjan Ganguly, appearing on behalf of the opposite party has contended that the

Arbitration and Conciliation Act 1996 is a complete Code, which deals with defining the rules of procedure, powers of the arbitrator, rights of the parties, consequences of defaults by the parties and statutory remedies available to any aggrieved parties by any order or award determined by the arbitrator. The scheme of the Act continues its position to effectual expeditious disposal of matters through arbitration, with minimal interference of the Court. Section 37 of the Act of 1996 specifies order passed by the arbitrator which are permitted by the statute to be preferred under appeal. Determination of costs, fees and expenses relatable to arbitration is not appealable. Moreover, the Calcutta High Court has not framed any applicable rule for fixation of fees of the arbitrator. Hence, the Fourth Schedule remains to be a model and is neither binding on the parties nor the arbitrator.

10. Mr. Ganguly has further stated that the Ld. Arbitrator is moreover free to decide upon and fix his own fees. The Fourth Schedule read with Section 11(14) of the said Act of 1996 is only a Model Fee Structure and its applicability is not mandatory, especially in the absence of rules to be framed by the High Court at Calcutta, regarding fees of Arbitrator. Section 38 (2) of the Act of 1996 empowers the arbitral Tribunal to suspend or terminate

the proceedings if the parties fail to pay the deposit. Therefore, the Arbitrator is duly empowered and has exercised its statutory provision. There is no impunity it in the said minutes and there is no scope for judicial intervention of this Hon'ble Court under Article 227 of the Constitution, at this stage.

11. In support of this argument, Mr. Ganguly has given a brief outline of the sequence of events which are to the effect that on 08.11. 2022, the Ld. Arbitrator had directed both the parties to pay their respective one-half shares of the Arbitrator's fees and further held that in case of failure / default, the Tribunal shall have the liberty to terminate the claims of the claimant or the counter-claim of the respondent as the case may be owing to such default, committed by any defaulting party. It was further specified that the Ld. Arbitrator shall invoke the provisions of Section 38(2) of the Act of 1996 against such defaulting party and as the petitioners made a default in payment, their counter-claim was rightly suspended.

12. In support of his submission, Mr. Ganguly has relied on the following cases:-

- ***Fuerst Day Lawson Limited vs. Jindal Exports Limited*** reported in ***(2011) 8 SCC 333***

- ***Union of India vs. Sing Builders Syndicate*** reported in ***(2009) 4 SCC 523***
- ***Nivedita Sharma vs. Cellular Operators Association of India,*** reported in ***(2011) 14 SCC 337***
- ***Deep Industries Limited vs. Oil and Natural Gas Corporation Limited & Anr.*** reported in ***(2020) 15 SCC 706***
- ***Bhabel Construction vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited & Anr.*** reported in ***(2022) 1 SCC 75***

13. Mr. Ganguly through the ratio of the above referred cases has tried to substantiate his plea in the following manner:-

- The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternate remedy is available to the aggrieved person or when the statute under which the action complained of has been taken, itself contains a mechanism for redressal of grievance.
- The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every

order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

- It is settled law that when a statutory forum is created by law for rederssal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. It is therefore prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment.

Issues:-

14. As a preliminary measure, it is judicious to commence by framing the following pertinent issues that form the foundation of our discussion thereby providing a comprehensive framework for ensuing analysis:-

A. Whether the Ld. Arbitrator can fix his own remuneration in violation of Schedule IV of the Act of 1996.

B. Whether an arbitrator can refuse counter claim of the party which refuses to pay its share of the remuneration of the Ld. Arbitrator.

C. Whether the petitioner who is aggrieved with the order of the arbitrator with respect to quantum of remuneration can prefer application invoking jurisdiction under Article 227 of the Constitution of India.

Analysis:-

15. Having heard the Ld. Counsel appearing on behalf of the parties as well as after going through the specific cases relied on, it has come to the notice of this Court that Mr. Roy has taken assistance of some cases of the Hon'ble Apex Court which dealt with issues that are neither identical nor applicable to the factual matrix of the case at hand. As the power conferred under Article 227 are extra ordinary in nature but the Hon'ble Apex Court has time again reminded us all that such power should only be used with extreme circumspection so that the interference is only restricted to orders which are patently lacking in inherent jurisdiction.

Issue A

16. In response to the issue involved, a careful scrutiny of the Act of 1996 would suggest that arbitrators indeed have the liberty to fix their own remuneration and other terms and

conditions. However, the arbitrator is required to fix remuneration upon deliberation and consultation with the parties. This suggests that while the arbitrator has the authority to set fees, there is an expectation of communication and agreement with the involved parties. It is well settled that arbitrators can charge fees as agreed by the parties rather than strictly adhering to the Fourth Schedule. The Courts have constantly held that when parties have fixed a fee schedule, then Fourth Schedule to the Act of 1996 does not apply. This indicates that the contractual agreement between the parties takes precedence over the statutory fee structure. Based on the legal precedents connected with this issue, it would be safe to conclude that an arbitrator can indeed fix his own remuneration, and this can be done in a manner that may not comply with the Fourth Schedule of the Act of 1996, provided that such a decision is made in consultation with the parties involved. The contractual agreement regarding fees takes precedence over the statutory provisions of the Fourth Schedule, allowing for flexibility in remuneration as long as it aligns with the parties agreement.

17. Therefore, the plea of the petitioner against the fixed remuneration of the arbitrator which was allegedly made in violation of the statutory provision of the Fourth Schedule should have been made to the arbitrator himself during the arbitration process as the parties are generally expected to raise any objections including those related to remuneration in a timely manner during the course of the arbitration proceeding itself. The arbitrator has ample jurisdiction to decide on matters relating to his remuneration including the authority to rule on any objection raised by the parties regarding his fees. This very provision is already codified in Section 16(3) of the Act of 1996. But, in the factual matrix of the case at hand, I am unable to gather any cogent information that the petitioner actually made any substantial attempt per se to showcase his objection to the arbitrator. Rather he made no comment while the arbitrator fixed his remuneration which fact is also duly recorded in the observation of the Ld. Arbitrator. Therefore, this issue is decided against the petitioner. However, both the Ld. Counsel appearing on behalf of the parties are ad idem of the fact that the sole Ld. Arbitrator passed away during the pendency of the revision application. But, I am constrained to enter into this connected

issue as it is a settled proposition of law that death of the Arbitrator cannot be deemed to be a justification for cancellation of the entire arbitral proceeding.

Issue B

18. Now dealing with the next issue, a keen observation of the provisions of the Act of 1996 specially second proviso to Section 38 (2) would be profitable for proper adjudication. It runs as follows:-

> *"38.Deposits-*
> *(2) …*
> *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."*

19. Therefore, it is common parlance that in a given situation if the arbitrator rejects a counter claim from a party that has not paid the required remuneration then it cannot be said that the arbitrator acted beyond his jurisdiction. This is consistent with the view enshrined with the provisions of the Act of 1996 and it is not amenable to correction by the Court. In the light of the aforesaid discussion this issue just like issue A is also decided against the petitioner.

Issue C

20. Now coming to the issue of maintainability of the instant revision application filed under Article 227 of the Constitution of India, at the very outset alternatively I would like to remind one and all about the limited avenue of the supervisory jurisdiction of this Court which is there just to ensure that an inferior court or tribunal functions within its authority and does not extend to correcting errors of law or fact as the High Court in this context does not act as an Appellate Court. We also need to keep in mind that the Hon'ble Apex Court has time and again emphasized that power under Article 227 should be exercised sparingly, particularly in arbitration matters where minimal judicial intervention is the guiding principle. If there is no lack of jurisdiction or patent illegality the High Courts should refrain from intervening in arbitration matters.

21. In this regard, the main object of the Act of 1996 has to be given special importance. If I shift my attention to the specific provision of Section 37 (2) it would be crystally clear that only an **appeal shall lie** to a Court from an order of the tribunal accepting the plea referred to in Section 16(2) or 16 (3) of the Act of 1996.

22. Based on the legal principle discussed hereinabove the only available answer to this issue is that a party cannot file a revision application under Article 227 solely based on dissatisfaction with an arbitrator's order regarding quantum of remuneration as it does not fall within the scope of Section 37 (2) of the Act of 1997.

23. In my humble opinion, the appropriate recourse available to the petitioner would have been to challenge the final arbitral award passed by the arbitrator including the issue of remuneration of the arbitrator through the mechanism enshrined in Section 34 of the Act of 1996 before the Principal Civil Court of Original Jurisdiction, as defined in Section 2(1)(e) of the Act. Therefore, just like other issues involved in this application yet again the issue of maintainability is decided against the petitioner.

24. Conglomeration of discussion of all the issues pertaining to the lease at hand boils down to the sole available conclusion that the revision application being no. C.O. 140 of 2023 is liable to be dismissed.

25. At this juncture, I would like to clarify that this Court is not inclined to examine the merit of any of the contentions adduced on behalf of the parties solely because of the point of

maintainability. Both the parties are absolutely free to raise their claims /counter-claims in accordance with law. All rights and contentions of the parties are left open. The appropriate forum shall be free to taken up all objections as are available under law, including but not limited to the issue regarding fixation of quantum of remuneration of the Ld. Arbitrator. As and when such a plea is raised, the competent authority should not get influenced by any observation made by this Court which is only prima facie in nature.

26. With the aforesaid observation the instant revision application stands disposed of.

27. Interim Order, if there be any, stands vacated.

28. Connected applications, if there be, also stand disposed of accordingly.

29. Parties to act on the server copy of this order duly downloaded from the official website of this Court.

30. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]