IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: November 3, 2020

\+ OMP (T)(COMM) 13/2020, IAs 2342/2020, 2344/2020

NTPC LTD. ..... Petitioner

Through: Mr. Puneet Taneja and Mr. Manmohan Singh Narula, Advs.

Versus

AMAR INDIA LTD. ..... Respondent

Through: Mr. Brijesh Kumar Goel, Adv.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed with the following prayers:

> *"It is, therefore, most respectfully prayed that this Hon'ble Court may kindly be pleased to:-*
>
> *A) Terminate the mandate of the Sole Arbitrator Shri V.N. Singh in the arbitration matter between M/s. AMR India Ltd. Vs. NTPC Ltd. relating to the work of site levelling and infrastructure package for NTPC Lara project;*
>
> *B) Pass such order(s) or direction(s) which the Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

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.

3. Before dealing with the issue, I shall, in brief, state the facts leading to the present dispute. The petitioner vide letter of award dated February 20, 2013 had awarded the work of Site Levelling & Infrastructures Package for NTPC Lara Project in favour of the respondent, M/s AMR India Ltd. Hyderabad. Owing to various breaches as alleged by the petitioner, the Contract was terminated vide a letter date December 12, 2016. Subsequently, dispute resolution clause, Clause 7 under the GCC, was invoked by the respondent on January 02, 2017. Respondent by means of another letter dated February 06, 2017 specifically requested the petitioner for appointment of Sole Arbitrator as provided under Section 29B of the Act as against Clause 7 which mandated for constitution of an Arbitral Tribunal consisting of three Arbitrators. A sole Arbitrator, from the list of approved Arbitrators maintained by the petitioner, was appointed by the Chairman and Managing Director of petitioner for adjudicating the disputes and differences vide a letter dated March 03, 2017 ('Appointment Letter', for short), stipulating that the same shall be conducted in terms of the 'Fast Track Procedure' under Section 29B of the Act and that the fees to be governed as per the

Circular.

4. The appointment was accepted by the sole Arbitrator as per the Appointment Letter and entered upon reference on March 07, 2017. The first procedural hearing was held on March 25, 2017, wherein along with settling the Schedule for filing the pleading, the Ld. Arbitrator also accepted the Fee Schedule, as per the Circular, forming part of his Appointment Letter and the same has been recorded in the procedural order of same date.

5. Since the proceedings could not be completed within the initial stipulated period of six months, extension was agreed upon by both the parties and on the expiry of the further 6 months, parties approached this Court. Pursuant thereto this Court, owing to non-completion of proceedings, on two petitions (OMP (Misc.) (Comm) No. 60/2018 OMP (Misc.) (Comm.) No.2/2019) filed for extension of time, extended the time for making the Award twice, till September 30, 2019. While the time was to expire further on September 30, 2019, respondent filed a third petition (OMP (Misc.) (Comm) No. 389/2019) under Section 29A before this Court on September 16, 2019. In the meanwhile, during the hearing before the arbitrator on September 29, 2019, the Ld. Arbitrator revised his fee from the NTPC Schedule of Fees for Arbitrators as stipulated in his Appointment Letter to the fee provided under the Fourth Schedule to the Act. The order dated September 29, 2019 passed by the Ld. Arbitrator reads as under:

> *"3. This arbitration matter was initially a fast-track arbitration under Section 29B of Arbitration & Conciliation Act, 1996 and it was started in right earnest by fixing schedule dates for completion of pleadings and*

hearing of the matter without any oral evidence. However, as the matter progressed it has turned out to be full-fledged arbitration matter running into voluminous pleadings, supporting evidences lengthy cross-examination and Counter Claims by Respondents. The Claims and Counter Claims, both have been amended during pendency of the matter. Apart from this there has been certain applications in between the proceedings including one u/s 17 for interim protection and one u/s 19 (4) of the Act after cross-examination for production of documents. In its 51st meeting, now oral submissions of Respondent Counsel has started. The time to make the award has been extended twice and third time parties are required to move for another extension. With this background now that the present arbitration is no more a fast-track arbitration but full-fledged arbitration, it is appropriate to fix the Arbitration fees of the Arbitral Tribunal in terms of Fourth Schedule of Arbitration & Conciliation Act, 1996. Accordingly, parties are directed to deposit half of fees now fixed as Rs.37,50,000/(Rupees Thirty Seven Lacs Fifty Thousand only), as per Fourth Schedule before next date in the matter, after adjusting the amount already deposited earlier." ·

6. This Court vide order dated September 30, 2019 extended the time for passing the Award till June 30, 2020. The petitioner being aggrieved by the order passed by the Ld. Arbitrator on September 29, 2019, filed an application before the Ld. Arbitrator for recall of the direction for revision of the fees and the same was rejected vide order dated December 06, 2019 by the Ld. Arbitrator. Order dated December 06, 2019 reads as under:

" For the facts obtaining in the matter, the agreement for fees under 29B (6) is no more applicable being a special provision exclusive for Fast Track arbitration (under 29B). Now that matter is no more under section 298 the

fees of arbitration Tribunal is to be fixed by tribunal only in terms of provisions of section 31 (8) read with Section 38 and not by the parties as against earlier Agreement between the arbitrator and the parties under 29B (6).

To my understanding the Arbitration Agreement (having composition of three member tribunal) of the Contract was changed to sole arbitrator keeping in view the requirement of Section 29B. Parties have not terminated the mandate of sole arbitrator and have continued to participate for the present full-fledged arbitration. The fast track arbitration agreement lost its validity after expiry of period allowed under 298 and a new arbitration agreement has happened by conduct.

TIME is precious and valuable. The Tribunals time cannot be taken for granted. Mere patience of Tribunal expecting parties to finish the matter expeditiously cannot be treated as waiver. The tribunal feels fully justified in holding that provisions of Section 29B are special provisions meant for culmination of proceedings as per procedural outlined in Section 29B and fees is also specific to fast track arbitration agreement applicable only to proceedings under section 29B

(6). It will not subsist if award is not made under fast track procedure within the period provided under 29B. Any contrary view against this would mean that there is no sanctity to agreed procedure of fast track under 298. Alternatively, in case it is assumed that fast track arbitration is merely a procedure which can be changed to other procedure generally agreed for full- fledged arbitration, then it again fails to logic to have a separate provision for fees for fast track under Section 29B (6). To me legislature has purposely kept a separate provision for fees to be agreed between arbitrator and parties as against provisions of Section 31 (8) where arbitral tribunal has to fix its fees as part of cost. The case law filed along with the Application does not apply to facts of this case."

7. Thereafter the petitioner formally notified its stand regarding non-acceptance to pay the revised fees by way of an application of dated January 17, 2020 and the Ld. Arbitrator recorded the statement of the petitioner on the refusal to pay the revised fee and invoked Section 38 (2) of the Act directing respondent /Claimant to pay the petitioner's share of revised fee as well, to which the respondent/claimant made a statement in affirmation to comply.

8. It is the case of the petitioner and contended by Mr. Puneet Taneja that as per the Circular there is only one schedule of fees for Arbitrators with no special schedule for Fast Track Arbitration or full-fledged arbitration and that the said schedule as per the Circular, forming part of the Appointment Letter, nowhere links the fees payable with the time in which the arbitration proceedings needs to concluded.

9. It is submitted by Mr. Taneja that the Ld.Arbitrator had accepted the terms of the Appointment Letter and the same being a binding document/agreement between the arbitrator and the parties, it shall not be within the jurisdiction of the Ld.Arbitrator to revise his fees on the ground that fast track arbitration has become full fledged arbitration in the fag end of the proceedings, nearly after two years since the proceedings became full-fledged. Moreover, the petitioner having not accepted the revised fee, the Ld.Arbitrator could not have invoked Section 38 (2) of the Act and the said action was wholly contrary to law, having rendered himself incapable of continuing as the Sole Arbitrator.

10. It is also submitted that there is no provision under the

Act for increase of fees by the Ld.Arbitrator in case the Fast Track Arbitration is not completed in Fast Track Mode and is converted to regular Mode.

11. Further, Mr. Taneja submitted that demanding of fees in terms of the fourth Schedule of the Act as against the earlier fee agreed as per the Appointment Letter by the Arbitrator is contrary to the law laid down by the Apex Court in ***National Highways Authority of India v. Gayatri Jhansi Roadways Limited, 2019 SCCOnline SC 906***

12. He stated that the appointing authority for the Arbitrator, can not only nominate/designate the person who will act as an arbitrator but can also stipulate the terms of appointment, including the time period within which the award has to be made as well as the fee which shall be payable and after having accepted the reference/appointment, the Arbitrator cannot resile of the terms except with the consent of the parties. In the present case, the Arbitrator has revised his terms of appointment and the petitioner having not given its consent, the mandate of the Arbitrator is liable to be terminated as per Section 14 of the Act as he has become *de jure* incapable of performing his functions as an Arbitrator. On the scope of the term 'appoint', he has relied upon the Apex Court Judgment in ***Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust, 2012 (1) SCC 455***.

13. It is also contended by Mr. Taneja, the observation of the Ld.Arbitrator in his order dated December 06, 2019 that after the expiry of the period under Section 29B, a new Arbitration Agreement or a full-fledged Arbitration Agreement has been

entered upon by conduct is totally contrary to law and without jurisdiction, as the extensions of time were always taken under Section 29B (4) and (5) read with sub-section (3) to (9) of Section 29A. It is, thus, his submission that the Arbitration Agreement remained the same and it is only the extension of time which has taken place for making the award, with the fees of the Arbitrator in no manner linked to the procedure to be followed for conducting the arbitration.

14. Reliance is also placed on ***NHAI Vs. Gammon Engineers and Contractor Ltd. 2018 SCC Online Del 10183***, however I may note here that the said judgment has been overruled by the Apex Court in ***Jhansi (Supra).***

15. He also relied upon the judgment of this Court in ***Entertainment City Ltd. Vs. Aspect Media Ltd. OMP (T) (Comm) No. 24/2020*** decided on 03.06.2020, to submit that if the fees charged by an Arbitrator is contravention of the provisions of the Act, the Arbitrator may be regarded as having become de jure unable to perform his functions.

16. It is further submitted by Mr. Taneja that the Arbitrator has in law, *de jure*, rendered himself incapable of performing his functions, as by charging a revised fee of Rs. 37.50 lakhs as per fourth schedule of the Act, the Arbitrator has acted contrary to the terms of his appointment, thus losing his mandate. In this regard he has relied upon a Madras High Court judgment in ***Madras Fertilizers Ltd. Vs. SICGIL India Ltd. 2007 SCC Online Mad 748***.

17. Mr. Brijesh Kumar Goel, learned Counsel appearing for

the respondent, primarily submitted as the Arbitrator was appointed under Section 29B of the Act with fees payable as per the Circular, there exists no agreement on the fees to be payable to the Arbitrator in the Contract Agreement or in the Arbitration clause or by way of any other separate agreement. The fees as payable under the Circular was never informed or provided by the petitioner to the respondent to obtain any agreement nor was the Circular part of the underlying Contract. In other words, it is his submission that the fees payable to the Arbitrator was fixed unilaterally by the petitioner in guise of its internal Circular and the respondent/claimant is only following the directions/Order issued by the Arbitrator in respect of his fees. Reliance has been placed on a judgment of this Court in ***Entertainment City Ltd.(supra).***

18. Mr. Goel stated that the Circular was issued after the parties entered into the underlying Contract.

19. Mr. Goel submitted that the reliance placed by the petitioner on word 'appoint' based upon the judgment in ***Sanjeev Kumar Jain (supra)*** is misplaced. It is his submission that the word 'appoint' appearing in the Appointment Letter cannot have the same legal effect as interpreted by the Apex Court strictly in the context of Section 11 of the Act.

20. It is pointed out by Mr. Goel that in several other arbitration matters, fees of the arbitrator appointed under the Circular, has been revised by the petitioner as either on per sitting basis or as per the Fourth Schedule of the Act, as ordered by those Tribunals owing to voluminous records. Relevant document

of one such arbitration is filed by Mr. Goel with the written submissions.

21. Mr. Goel has in fact submitted that Arbitrator does not become *de jure* ineligible to continue as the Arbitrator upon issuance of any procedural order on his fees revision and therefore the petition is *prima-facie* not maintainable. In regard he has relied upon a judgment of this Court in ***NHPC v. Larsen and Toubro, OMP(T)(COMM.) No. 81/2018***. He has also relied upon the judgments Apex Court in ***NHAI(supra),*** wherein *inter-alia* it was held that the arbitrators are bound with the fees prescribed in the Contract Agreement signed between parties as well as on the other hand laid the law with seminal force that an arbitrator does not became *de jure* unable to perform his functions, if any procedural order is issued by him for fixation of his fees in consonance with law or the Fourth Schedule of the Act,1996. Mr. Goel also stated that the reliance placed by Mr. Taneja on ***NHAI (supra)*** is totally misplaced.

22. Reliance has been placed by Mr. Goel on the judgment of this Court in ***Paschimanchal Vidyut Vitran Nigam Ltd. v. M/s IL&FS Engineering & Construction Co. Ltd., OMP(MISC)(COMM.) No. 164/2018,*** wherein it is *inter-alia* held that the Court having not appointed the Arbitral Tribunal, would have no role to play in fixing the fees of the Tribunal.

23. Further anchorage has been made on ***G.S Developers v. Alpha Corp. Development [OMP(T) (COMM.) No. 54/2019],*** wherein the petition preferred under Section 14 was dismissed, having been filed on the Arbitrator raising his per session fees as

it was *inter-alia* held by the Court the number of hearings having exceeded the desired limit, the arbitrator is entitled to charge additional fee. Mr. Goel contended that the present matter is a case where the Arbitrator is justified in increasing/revising his fees owing to the change in nature of the proceedings with three extensions of 9 months each.

24. In view of the judgment of this Court in ***Rail Vikas Nigam Ltd. v. Simplex Infrastructure Ltd., OMP(T)(COMM.) No. 28/2020,*** Mr. Goel has also submitted that the Arbitrator having made the revision in consonance with Fourth Schedule, a petition for termination of mandate of the arbitrator is not maintainable.

25. On the conduct of the petitioner, after the Arbitrator having revised his fees vide order dated September 29, 2019, which was the 52nd proceedings, it is stated by Mr. Goel that the petitioner continued to make its oral arguments/submissions before the Arbitrator till the 65th proceedings dated January 17, 2020 when the petitioner informed its unwillingness to comply with the directions regarding the revised fees. The delay of more than three months to convey its unwillingness, as well as the belated filing of this Section 14 petition along with filing of applications for adjournment of arbitral proceedings clearly depict that an attempt is being made by the petitioner to defeat the rights of the respondent and delay the adjudication of disputes.

26. Having heard the learned counsel for the parties, the only issue which arises for consideration is whether the mandate of the

learned Arbitrator needs to be terminated on the ground that the learned Arbitrator has fixed his fee under the Fourth Schedule of the Act contrary to the Circular of the petitioner, NTPC, with regard to fee and as such *de-jure* unable to function as an Arbitrator.

27. It is the conceded position that pursuant to the disputes having arisen between the parties, on a request made by the respondent, the learned Arbitrator was appointed by the petitioner vide its letter dated March 03, 2017 stipulating as under:

> *"……You are therefore requested to kindly enter upon reference and commence the arbitration proceedings in terms of the said contract and to adjudicate upon the disputes, claims and counter claims relating to the subject contract as may be raised by the parties during the Arbitration Proceedings which shall be governed by the Arbitration and Conciliation Act 1996 as amended. The proceedings shall be conducted in terms of the "Fast Track Procedure" as provided under Section 29B of The Arbitration and Conciliation Act, 1996 as amended. The Arbitration Fees shall be governed as per the Circular No. 689 dated 16.04.2014 regarding Fees Schedule of Arbitrators applicable in NTPC arbitration matters (Copy enclosed) please. ·*
> *You are also requested to kindly give reasoned and speaking award."*

28. From the above, it is seen that the proceedings were to be conducted in terms of fast track procedure under Section 29B of the Act and the fee was to be governed as per the Circular. It is also a conceded position that the Arbitrator had accepted the terms of appointment including the fee schedule. The proceedings could not be completed within six months and as such extension was sought on two occasions which extensions were granted by

this Court.

29. During the hearing on September 29, 2019, the learned Arbitrator revised his fee from the NTPC Schedule of fee for Arbitrator as per the Circular to as under Fourth Schedule of the Act (reproduced at Para 5 above). This order of the learned Arbitrator was challenged by the petitioner by filing an application before the learned Arbitrator for recall of the said order which was rejected and the arbitrator *inter-alia* held that the agreement for fee under Section 29B(6) is no more applicable as the provision being a special provision exclusively for fast track arbitration (order reproduced at Para 6 above). Now the matter is no more under Section 29B, the fee of the Arbitral Tribunal is to be fixed by the Tribunal only in terms of Section 31(8) read with Section 38 and not by the parties as against earlier agreement between the Arbitrator and the parties under Section 29B (6).

30. The aforesaid conclusion of the learned Arbitrator may not be a correct appreciation of law, inasmuch as the Supreme Court in the case of ***Sanjeev Kumar Jain (supra)***, *inter-alia* has defined the term 'appoint' under Section 11 of the Act to mean, not only nominating or designating the person who will act as an Arbitrator, but also include, stipulating the terms on which he is appointed including the fee. The Arbitrator on his appointment as per the Appointment Letter had accepted the fee as per the schedule notified by the NTPC vide Circular. If assuming, according to him, the said fee was only for the duration, the proceedings were on fast track under Section 29B, nothing prevented the learned Arbitrator to recuse himself from the

proceedings on the ground that he is unable to hold the proceedings, on the terms conveyed at the time of his appointment, on the expiry of the period stipulated under Section 29B but surely he could not have imposed the fee under Fourth Schedule on the parties. In fact, the Supreme Court in Para 12 of ***National Highways Authority v. Gayatri Jhansi Roadways Ltd.(supra)*** has held as under:

> *"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."*

31. From the above, it is clear that when the parties have fixed the fee by an agreement, the Arbitrator is required to charge the fee in accordance with the said agreement and not in accordance with the Fourth Schedule of the Arbitration and Conciliation Act, 1996.

32. Having said that I note, the learned Arbitrator while rejecting the application filed by the petitioner for recall of the order dated September 29, 2019 has relied upon Section 31(8) and Section 38 of the Act to justify the enhanced fee.

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) (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.

34. That apart, by fixing his fee under the Fourth Schedule of the Act, the learned Arbitrator has in fact varied the terms of his appointment by the petitioner. Mr. Taneja is justified in stating that the Arbitrator in his order dated December 06, 2019 has erroneously held that after expiry of period under Section 29B, a new arbitration agreement or full-fledged agreement has been entered upon, as the extensions granted were always under Section 29B(4) & (5) read with sub-section 3(2)(9) of 29(A) of the Act. Further the said Circular do not prescribe separate fees for fast track arbitration and normal arbitration.

35. Insofar as the plea of Mr. Goel that there existed no agreement on the fee to be payable to the Arbitrator under the contract agreement or in arbitration clause or by way of any other separate agreement is also untenable. The Clause 7 of the GCC contemplates the dispute resolution clause. There is no denial to the fact that the GCC is part of the contract which binds the

parties. Circular issued by the petitioner forms part of the relevant arbitration clause of the GCC which reads as under:

> *"……..It has been decided to add the following new provision in the Bidding documents pertaining to Arbitration Fee and Arbitration period in the existing Arbitration provision in General Conditions of Contracts through SCC for the packages invited from Corporate Contracts where Techno-commercial bids (in case of Single Stage Two Envelope bidding) and Price Bids (in case of Two Stage bidding) are yet to be opened."*

36. The terms of the Appointment Letter of the learned Arbitrator issued by the petitioner has been accepted by the respondent herein and the Arbitrator. The said terms governed the parties and the Arbitrator for the conduct of the arbitration proceedings which included the fee payable to the learned Arbitrator. Hence, this plea is liable to be rejected.

37. The submission of Mr. Goel that the Arbitrator does not become *de-jure* ineligible to continue as the Arbitrator upon issuance of any procedural order on his fee revision and therefore, the petition is *prima facie* not maintainable by relying upon the judgment in the case of ***NHPC (supra)*** is also without merit for the reason that the Supreme Court has conclusively held in para 12 of the ***National Highways Authority v. Gayatri Jhansi Roadways Ltd.(supra) (supra)*** that once the parties have agreed for payment of fee to the Arbitrator even though in terms of certain circulars, the Arbitrator could not have sought for payment of fee under the Fourth Schedule being at variance.

38. Moreover, there can be no dispute to the fact that

arbitration is an alternate dispute resolution mechanism adopted/agreed upon by the parties. In fact, Section 7 of the Act mandates the arbitration agreements between parties to be in writing to overt any unilateral act of either party. The arbitration proceedings being a creation of an agreement, parties would also be bound by the agreement and its terms.

39. *De-jure* ineligibility is nothing but an impossibility in law, as held by a coordinate Bench of this Court in ***National Highways Authority of India v. K.K. Sarin & Ors., Arb. A. No. 410/2008.*** Section 11 (2) of the Act reads as under:

> ***"11 Appointment of arbitrators:***
>
> ***xxx***
>
> ***2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.***
>
> *Xxx"*

A combined reading of Section 7, Section 11(2) and the judgment in ***Sanjeev Kumar Jain (supra)***, clearly means that the parties are at liberty to agree in writing to a procedure to refer disputes to arbitration. The 'appointment' as contemplated under the procedure agreed upon by the parties is wide enough to include the fee payable to the arbitrator. This Court is also of the view that if this action of the Arbitrator is not interdicted, then it shall mean that the Arbitrator can claim any fees to his / her liking contrary to what has been agreed between the parties, even if it is as per the Fourth Schedule.

40. In the present case, the charging of fee by the learned Arbitrator in terms of Fourth Schedule of the Act deviating from

the terms of his appointment, therefore is clearly contrary to the provisions of the Act, as he has wriggled out / circumvented the fee schedule stipulated as per the Circular, which forms part of the contract entered into between the parties herein. In fact, a Coordinate Bench of this Court has in ***Entertainment City Ltd. (supra)*** held that if the fee charged by an Arbitrator is in contravention with provisions of the Act, the Arbitrator may be regarded as having become *de-jure* unable to perform her or his, functions, and the mandate of such an Arbitrator would be determinable under Section 14(1) of the Act.

41. Having said that Mr. Taneja has relied upon the judgment of the Madras High Court in the case of ***Madras Refinery (supra),*** wherein the Court has terminated the mandate of the learned Arbitrator therein; the said judgment is distinguishable on facts.

42. The plea of Mr. Goel that in several other arbitration matters the fee of the Arbitrator appointed under the circular has been revised by the petitioner either on, per sitting basis or as per Fourth Schedule of the Act as ordered by those tribunals owing to voluminous nature of the record is also without merit. It may so happen that in a given case the parties may have agreed with the request of the learned Arbitrator / Tribunal for enhancement of fee, keeping in view the voluminous nature of record. However, in the present case, the petitioner has not agreed to enhanced fees.

43. Insofar as the reliance placed by Mr. Goel in the case of ***NHPC Ltd (supra)***, is concerned the same is also not applicable in the facts of this case as the parties therein had nominated their

arbitrators without prescribing any schedule for payment of fee and the Court held that the Arbitrators are free to fix their own fee owing to the non-mandatory nature of Fourth Schedule Similar is the position in the judgments relied upon by Mr. Goel in the case of ***Pashchimanchal Vidyut Vitran Nigam Ltd. (supra)*** and ***G.S. Developers & Contractors Pvt. Ltd. (supra).***

44. Insofar as the judgment in the case of ***Rail Vikas Nigam Limited (supra)*** relied upon by Mr. Goel is concerned, the same also has no applicability in the facts of this case as the issue therein was only with regard to quantum of fee payable under the Fourth Schedule and not whether the Arbitrator having accepted to certain fee on his appointment could have deviated from the terms to claim a higher fee.

45. In view of my above discussion, this Court is of the view that the prayer of the petitioner under Section 14(1) of the Act need to be accepted and it must be held that the Arbitrator has *de-jure* unable to perform his functions as an Arbitrator and accordingly the mandate of the learned Arbitrator is terminated.

46. The petition is disposed of.

IAs. 2342/2020 & 2344/2020

Dismissed as infructuous.

V. KAMESWAR RAO, J

NOVEMBER 03, 2020*/aky/jg*