

I. Case Reference

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| Case Citation | : | [2020] ibclaw.in 16 HC |
| Case Name | : | M/S Janapriya Engineerss Syndicate Pvt. Ltd Vs. Union of India |
| Petitioner(s) | : | M/S Janapriya Engineerss Syndicate Pvt. Ltd |
| Respondent(s) | : | Union of India |
| Writ No. | : | O.M.P.(Misc.)(Comm.) 377-378/2019 |
| Date of Judgment | : | 05-Jun-20 |
| Court | : | High Court of Delhi |
| Act | : | Arbitration & Conciliation Act 1996 |
| Present for Petitioner | : | Mr.Sudhir Nandrajog, Sr. Adv. with Mr.Ananga Bhattacharya, Ms. Devahuti Tamuli and Ms.Sonia Parween, Advs. |
| Present for Respondents | : | Mr.Gaurav Varma, Adv. for R-1 in O.M.P.(MISC.)(COMM.) 377/2019 Mr.Ruchir Mishra, Mr.Sanjay Kr. Saxena, Mr.Mukesh Kr. Tiwari, Mr. Ramneek Mishra and Mr.Abhishek Rana, Advs. with Mr.Manu Chaturvedi, Govt. pleader for UOI in O.M.P.(MISC.)(COMM.) 378/2019 |
| Coram | : | Justice V. Kameswar Rao |

II. Brief about the decision

Facts of the case

On May 06, 2010, the respondent issued an NIT for a Project Bangalore. The contract price for Project Bangalore was Rs. 163.27 crores and the period of completion was 25 months in five phases, from the date of handing over of the site. The scheduled date for handing over of the site and the date of commencement as per Work Order No. 1 was September 15, 2010.

Owing to certain disputes that arose between the parties, the respondent terminated the contract for Project Bangalore on September 25, 2013. Thereafter, in terms of Clause 60 of the General Conditions of Contract ('GCC'), respondent No.1 appointed Mr. K. K. Gupta, Chief Engineer, Standing Panel of Arbitrators as the sole arbitrator to adjudicate upon the disputes between the parties vide Letter of Appointment dated December 26, 2014.

Thereafter, the sole arbitrator vide its order in proceedings dated October 16, 2018 informed the parties that he was due for superannuation on November 30, 2018 and that it may not be feasible for him to publish the Award before November 30, 2018, however, he expressed his willingness to continue as the arbitrator in case the parties agree and give their consent on or before November 05, 2018.

Consent for the sole arbitrator to continue even after his superannuation was conveyed by the petitioner vide letter dated November 08, 2018. The respondent No.1 also vide letter dated November 30, 2018 gave consent to the sole arbitrator for enlargement of time beyond November 30, 2018 to render and publish the Award.

Subsequently, the sole arbitrator in the proceedings dated February 08, 2019 advised the parties to pay Rs. 27,00,000/- on or before April 26, 2019 towards the arbitration fee, to be shared equally by the parties. It is stated by the petitioner that vide letter dated April 10, 2019, the petitioner informed the sole arbitrator that they were ready to pay their 50% share of the arbitration fee amounting to Rs. 13,50,000/- and that upon confirmation from respondent No.1, they would remit their share of the amount immediately. Respondent No.1, however, issued a letter dated May 20, 2019 to the sole arbitrator that while in service he kept the subject matter pending for a long duration prior to superannuation and at the time of asking for consent for continuing as the sole arbitrator also he never disclosed the fact that he would be charging arbitration fees post his superannuation, hence no fee was payable to the sole arbitrator. Respondent No.1 vide the aforesaid letter also requested the arbitrator to continue without claiming any fees or else resign in terms of Section 14 (1) (a) of the Act.

Further in the proceedings dated June 27, 2019, the petitioner offered to pay the arbitration fee in the interest of early finalization of the matter and the respondents in response to the said offer made by the petitioner, sought two weeks time to obtain legal opinion regarding implication of paying total fees towards arbitration by the petitioner to safeguard government interest. The sole arbitrator, thereafter, adjourned the matter without fixing a date for next hearing. It is stated by the petitioner that after the expiry of around two months, the petitioner issued a letter dated August 26, 2019 to the respondent requesting them to expedite the decision with regard to payment of total arbitration fees by the petitioner. It is at this juncture that the present petition under Section 39 has been filed by the petitioner.

Question before the High Court

Whether the petitions filed by the petitioner under Section 39 (2) of the Act are maintainable or not?

Contentions of the petitioner

- It is the case of the petitioner that an arbitrator cannot be expected to continue with arbitral proceedings without the parties paying reasonable fees and expenses of the arbitrator and that the parties to the arbitration cannot avoid complying with the order of fee/deposit when the arbitrator has determined his fee and passed an order to that effect. Further, it is the case that Section 39 (1) of the Act envisages a situation where there may be dispute between arbitral tribunal and the party/parties with regard to costs of arbitration and under the said Section the arbitral tribunal has

the right to exercise lien on the Award for any unpaid costs of arbitration

- It is further the case of the petitioner that, if in case one party refuses to pay its share of fees/ deposit, Section 38 of the Act permits the other party to pay the share of the defaulting party and thereafter, the arbitrator shall debit the amount after determination of costs under Section 31 of the Act at the time of making the Award. In case the other party refuses to pay the share of defaulting party in respect of the claim/ counterclaim, the arbitrator is empowered to suspend or terminate the arbitral proceedings in respect of such claim/counterclaim.
- It is stated by the petitioner that it had expressed its willingness to pay the total fee of the arbitrator, i.e. its own share as well as the share of respondent No.1 and that there is no justification for the action of the sole arbitrator to retain the possession of the Award in view of the Section 38 of the Act. It is also submitted that refusal on part of respondent No.1 to pay fees of the arbitrator and further the demand put forth to the arbitrator, either to continue with the proceedings without fees or resign under Section 14 (1) (a), is nothing but an effort to delay the completion of the arbitration proceedings, as respondent No.1 had, vide letter dated November 30, 2018, given its written consent for the arbitrator to continue till the completion of the proceedings.

Contentions of the Respondent

A preliminary objection to the maintainability of this petition under Section 39 of the Act has been raised by the respondent.

- It is the case of the respondent that Section 39 of the Act is not applicable in the present case as the petitioner has not only accepted the demand made by the arbitrator but also has shown its willingness to deposit the entire fees to the arbitrator and, therefore, no circumstance exists to invoke the said provision.
- that the petition is not maintainable as the arbitration proceedings are on-going and yet to be concluded and both the arbitration proceedings are not at the stage of pronouncement of Award, hence clearly outside the ambit of Section 39.
- Mr. K. K. Gupta, Chief Engineer, was appointed as an arbitrator by the Appointing Authority on December 26, 2014 from the Standing Panel of Arbitrators, in terms of Clause 60 of the GCC. That after entering upon reference on January 14, 2015, in respect of disputes arising out of both the contracts, the exclusive job of Mr. K. K. Gupta was to conduct arbitration proceedings assigned to him by the Appointing Authority. No fees were payable to him by any parties other than the normal salary payable by the respondent.
- It is averred by respondent No.1 that the arbitrator raised his demand for fees vide letter February 08, 2019, only after obtaining consent of the parties for his continuation as an arbitrator. It is further averred by respondent No.1 that despite having sufficient time in hand, the learned arbitrator took no reasonable steps to complete the arbitration proceedings expeditiously and it is only after obtaining the consent from the parties that he has raised a new demand for payment of fees. This action of the learned arbitrator to keep the proceedings pending until superannuation and the sudden demand of fees in all arbitration proceedings, including the present case, raises serious doubts on the *bona fide* of

the arbitrator.

- It is stated by respondent No.1 that neither the terms of the arbitration clause nor the terms of reference/appointment of the arbitrator stipulates payment of fees and the arbitrator cannot be permitted to act contrary to the scheme of the Act by delaying the proceedings.

Contention of the Sole Arbitrator

- that since it was not feasible for him to complete the proceedings before his superannuation on November 30, 2018, owing to the delay on part of the parties to submit their submissions, the same was informed to the parties and both petitioner and the respondent No.1 gave unconditional consent for him to continue as the arbitrator even after superannuation. It is stated that nowhere in the appointment letter / consent letter or arbitration clause, it is mentioned that the Arbitrator will not be paid and moreover, the Act under which the proceedings are held contain certain provisions which exclusively deal with payment of arbitrator's fees without differentiating whether the arbitrator is a serving or non-serving personnel.
- that consequent to his superannuation, salary, privileges and facilities, secretarial service etc. as enjoyed by him have ceased and therefore to continue with the arbitral proceedings and publishing the Award, he has to refer to certain legal / technical books, study case laws, hire secretarial services etc. and also spend time, effort and money in resolving the dispute which needs to be compensated.

Reliance placed

- Mr. Guarav Varma, Mr. Ruchir Mishra, learned counsels appearing on behalf of respondent no.1, Union of India, has taken a preliminary objection with regard to the maintainability of the present petition in view of the scheme of Section 39 of the Act. They have drawn the attention of this Court to a distinction made by the legislature in the usage of "make / made" and "deliver / delivery" under the various provisions of the Act. It was submitted by them that Section 39 of the Act contemplates exercise of lien by the arbitrator on the arbitral Award which pre-supposes that (a) an Award has been "made"; (b) the arbitrator has exercised lien on an Award made – but not delivered to the parties, as opposed to the scheme contemplated in Sections 31, 29, 29A of the Act which deals with "making" of an Award, prior to its "delivery". In other words, it is their submission that it is only when an award has been made but not delivered to the parties that a party is entitled to approach the Court under Section 39 (2), to obtain the Award subject to deposit of fees as demanded by the Arbitrator and Section 39 does not get triggered at any time before an Award is made.
- To substantiate their submission that Section 39 of the Act was yet to be triggered and that respondent no.2 was yet to "make" the Award till the filing of the petition, they have relied upon the minutes of the proceedings dated February 7, 2019 (Project Gwalior, OMP(MISC.)(COMM) 378/2019), February 8, 2019 (Project Bangalore, OMP(MISC.)(COMM) 377/2019) as well as the minutes of the proceedings dated June 27, 2019 (in both proceedings), wherein it was noted that the arbitration proceedings in one case the hearing is concluded and in another it was at the stage of final arguments and hearing was yet to be concluded. They have also relied upon a judgment of the Calcutta High

Court in the case of **Assam State Weaving & Man. Ltd. v. Vinny Engineering Enterprises Pvt. Ltd., 2010 (4) RJ 609**; wherein it was held that the delivery of Award under Section 39 of the Act speaks of the physical delivery of the document embodying the Award and not merely the pronouncement of the Award and that it is the physical receipt of the document that would entitle a party to apply for setting aside or implementing the Award.

- It was further submitted by Mr. Varma and Mr. Mishra that the intent / scheme of Section 31 of the Act is to protect the interest of the Arbitrator, which states that unless agreed between the parties, the costs of arbitration shall be fixed by the Arbitral Tribunal which includes “the fees and expenses of the arbitrators”. In the event of refusal for payment by both the parties, sole discretion is vested with the Arbitrator / Arbitral Tribunal as per Section 38 of the Act to suspend or terminate the proceedings or continue with the proceedings until the making of the award and after making the Award exercise lien under Section 39 (1) of the Act and give notice to that effect to the parties for unpaid costs. However, in the present case the proceedings are at the stage for final arguments / arguments have been heard and the Arbitrator is not in a position to exercise lien on the award prior to its “making” as per the Scheme of the Act. In support of this submission, they have relied upon the case of **Gammon India Ltd. v. Trenchless Engineering Services, MANU/MH/2130/2013**, wherein it was held that when a party has been directed to deposit an advance towards cost and fails to do so, and the other party also does not deposit his share, the Arbitrator would be justified in taking recourse to power conferred in Section 38 (2) of the Act to terminate the claim of the defaulting party and that neither the arbitral tribunal nor Court can compel a party to deposit the share of fees and expenses of both parties.
- Reliance was also placed on an Apex Court judgment in the case of **Union of India & Ors. v. Prabhat Kumar & Bros. and Anr., 1995 Supp (4) SCC 525**; wherein it was held that an Arbitrator appointed by Government of India ceased to be the Arbitrator on his retirement from government service, as the arbitration clause mandated reference of disputes to CWC/Engineer officer.

Decision of the Court

Hon'ble High Court held that the plea of the learned counsels for the respondent No.1 is that the arbitration proceedings are going on and had not reached the stage where the award has been made and pronounced and is required to be delivered by the learned Arbitrator, hence clearly outside the ambit of Section 39 of the Act. They have drawn the attention of the Court to the words like *delivery; refuses to deliver its award*; in Section 39 of the Act to contend that the presence of the words in the said Section pre-supposes that an arbitration Award has been made, on which the learned Arbitrator has exercised lien and not delivered the Award. According to them, it is in that eventuality, that a party is entitled to approach the Court under Section 39(2) of the Act to obtain the Award, subject to deposit of the costs as demanded by the learned arbitrator.

On the other hand, Mr. Nandrajog has contested the plea by stating as under:

- The petitioner is deeply prejudiced by the award not being published on respondent no.1's refusal to pay to the learned arbitrator.

- Section 39(2) of the Act contemplates a situation where in case an Arbitral Tribunal (learned arbitrator in the present case) refuses to deliver its award except on payment of costs, an application can be preferred by any party before the Court and the Court while adjudicating the application can order the Tribunal to deliver the award to the applicant on its depositing in the Court costs so demanded by the Tribunal.
- On a plain reading of Section 39 (2) of the Act, it is clear that the entitlement of the arbitrator to the amount can be decided by the Court at later stage after an enquiry.
- The only pre-requisite for a direction to the arbitrator to publish / deliver the Award is payment of costs as demanded by the arbitrator before the Court, which the petitioner in the instant case is ready and willing to pay.
- The intimation by the learned arbitrator that drafting of the award will commence only after full payment of the fee is indicative of the fact that the Arbitration Proceedings had reached the final stage.

I am not in agreement with the submissions made by Mr. Nandrajog, for the simple reason, the stand of the learned arbitrator that drafting of the Award shall commence on payment of the fee, does not suggest, that the Award has been made and is ready to be delivered. Perusal of Section 39 (2) of the Act clearly contemplates that the application is maintainable when the Award is made, but not delivered to the parties as a party has not paid the fee demanded by the learned arbitrator. The said situation has not arisen in the case in hand and the same is clear from perusal of the proceedings dated February 7, 2019; February 8, 2019 in both the petitions respectively, as there is no indication that the proceedings have been reserved for Award. Even it is not the case of the petitioner or the learned Arbitrator that the Awards have been prepared/pronounced in both the cases and are ready for delivery. There is a purpose for delivery of the Award as the delivery of Award shall entitle a party to either challenge the Award or seek execution of the same. It is in such a situation a party can invoke the provision of Section 39(2) of the Act. As the aforesaid facts clearly demonstrate that since the position as contemplated in Section 39 has not arisen, the present petitions are not maintainable. In this regard, I may refer to the judgment as relied by the counsels for respondent No.1/UOI, of the Calcutta High Court in ***Assam State Weaving & Manufacturing Co. Ltd. v. Vinny Engineering Enterprises (P) Ltd. and Anr., 2010 (4) R.A.J. 609 (Cal)***

In view of my aforesaid conclusion, without going into the other submissions made by the counsels, the petitions being premature are not maintainable and are dismissed. No costs.

III. Full text of the judgement

JUDGMENT

V. KAMESWAR RAO, J

1. These petitions have been filed by the petitioner under Section 39 of the Arbitration and Conciliation Act, 1996 ('Act', for short) with the following common prayers:

“In the light of the aforementioned facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to;

a) allow the present Petition by directing the sole arbitrator Mr. K.K. Gupta to pass/deliver the arbitral Award as expeditiously as possible on payment by the petitioner of the costs demanded by the sole arbitrator;

b) pass any such other and further orders as this Hon'ble Court may deem fit and proper, in the facts and circumstances of the case and in the interest of justice.”

2. Before delving into the controversy in question it is pertinent to note the facts in brief. As the issue in both the petitions being identical, the facts of OMP (MISC.) (COMM) 377/2019 are being narrated. It is also clarified, the facts which are specific to OMP(MISC.) (COMM) 378/2019 shall be narrated separately. It is stated by the petitioner that on May 06, 2010, the respondent issued an NIT for a project titled “Construction on dwelling units including allied services for Officers, JCOs and Ors at Bangalore” (‘Project Bangalore’, for short). The contract price for Project Bangalore was Rs. 163.27 crores and the period of completion was 25 months in five phases, from the date of handing over of the site. The scheduled date for handing over of the site and the date of commencement as per Work Order No. 1 was September 15, 2010.

3. It is stated by the petitioner that the respondent accepted the tender of the petitioner, vide Letter of Acceptance dated August 31, 2010, for a lump sum amount of Rs. 163.27 crores and allotted contract No. “CA NO. DGMAP/PH-II/PKG-21/03/04 of 2010-2011”, in favour of the petitioner for Project Bangalore.

4. Owing to certain disputes that arose between the parties, the respondent terminated the contract for Project Bangalore on September 25, 2013. Thereafter, in terms of Clause 60 of the General Conditions of Contract (‘GCC’, for short), respondent No.1 appointed Mr. K. K. Gupta, Chief Engineer, Standing Panel of Arbitrators as the sole arbitrator to adjudicate upon the disputes between the parties vide Letter of Appointment dated December 26, 2014 (‘Letter of Appointment’, for short).

5. The sole arbitrator entered upon reference on January 14, 2015 and called upon the parties to submit documents as per the time scheduled laid down by him. Subsequently, the petitioner on August 12, 2015 filed its Statement of Claim, claiming an amount of Rs. 64,65,50,514/-. The petitioner on January 14, 2016 also submitted its rejoinder to Pleading in Defence. The respondent No.1 filed its Pleading in Defence to the Statement of Claim on February 16, 2016 as well as reply to the rejoinder of the petitioner was filed on August 23, 2016.

6. Later, on June 21, 2018, the sole arbitrator issued a letter to the parties stating that the arbitration proceedings were held up due to certain administrative issues with the designated appointing authority and that the sole arbitrator now intended to complete the arbitration proceedings in case both parties have no objection to it. Since respondent No.1 did not reply to the aforesaid letter, the sole arbitrator on August 06, 2018 issued another letter to the parties requesting the respondent to submit their consent or dissent to continue with the subject arbitration.

7. In response to the aforesaid letter dated June 21, 2018 and August 06, 2018, respondent No.1 vide letter

dated August 21, 2018 stated that it never objected to the sole arbitrator in continuing with the arbitration proceedings and further requested the sole arbitrator to proceed in the matter expeditiously and publish the final award by or before November 30, 2018.

8. Thereafter, it is stated by the petitioner that the sole arbitrator vide its order in proceedings dated October 16, 2018 informed the parties that he was due for superannuation on November 30, 2018 and that it may not be feasible for him to publish the Award before November 30, 2018, however, he expressed his willingness to continue as the arbitrator in case the parties agree and give their consent on or before November 05, 2018.

9. Consent for the sole arbitrator to continue even after his superannuation was conveyed by the petitioner vide letter dated November 08, 2018. The respondent No.1 also vide letter dated November 30, 2018 gave consent to the sole arbitrator for enlargement of time beyond November 30, 2018 to render and publish the Award.

10. Subsequently, the sole arbitrator in the proceedings dated February 08, 2019 advised the parties to pay Rs. 27,00,000/- on or before April 26, 2019 towards the arbitration fee, to be shared equally by the parties. It is stated by the petitioner that vide letter dated April 10, 2019, the petitioner informed the sole arbitrator that they were ready to pay their 50% share of the arbitration fee amounting to Rs. 13,50,000/- and that upon confirmation from respondent No.1, they would remit their share of the amount immediately. Respondent No.1, however, issued a letter dated May 20, 2019 to the sole arbitrator that while in service he kept the subject matter pending for a long duration prior to superannuation and at the time of asking for consent for continuing as the sole arbitrator also he never disclosed the fact that he would be charging arbitration fees post his superannuation, hence no fee was payable to the sole arbitrator. Respondent No.1 vide the aforesaid letter also requested the arbitrator to continue without claiming any fees or else resign in terms of Section 14 (1) (a) of the Act.

11. Thereafter, on May 29, 2019 the sole arbitrator issued a letter advising both the parties to submit written submissions/documents/evidence in view of issues raised by the respondent vide its letter dated May 20, 2019. In response to the same, the petitioner vide letter dated June 21, 2019 issued to the sole arbitrator, stated reasons as to why they do not agree with the stand of respondent No.1, asking the arbitrator to continue without fees or resign from his position. The petitioner also stated that the demand made by respondent No.1 under Section 14 (1) (a) is outside the ambit of the said provision as well as there is no provision in the Act under which parties can demand for the resignation of the arbitrator. The petitioner further in the letter stated that the arbitrator is eligible to claim compensation for services rendered, under Section 70 of the Indian Contract Act, 1872 for the period beyond his superannuation, i.e., November 30, 2018.

12. Further in the proceedings dated June 27, 2019, the petitioner offered to pay the arbitration fee in the interest of early finalization of the matter and the respondents in response to the said offer made by the petitioner, sought two weeks time to obtain legal opinion regarding implication of paying total fees towards arbitration by the petitioner to safeguard government interest. The sole arbitrator, thereafter, adjourned the

matter without fixing a date for next hearing. It is stated by the petitioner that after the expiry of around two months, the petitioner issued a letter dated August 26, 2019 to the respondent requesting them to expedite the decision with regard to payment of total arbitration fees by the petitioner. It is at this juncture that the present petition under Section 39 has been filed by the petitioner.

13. Insofar as OMP(MISC.)(COMM) 378/2019 is concerned, the facts are at variance as stated below:

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| 1. | Project | “Construction on dwelling units including allied services for Officers, JCOs and Ors at Gwalior and Talbahat” (‘Project Gwalior, for short) |
| 2. | February 15, 2011 | Date of allotment of contract bearing contract No. “CA NO. DGMAP/PH-II/PKG-26/G/T/05 of 2010-2011”; for amended lumpsum of Rs. 87.3 crores |
| 3. | October 08, 2013 | Date of termination of contract for Project Gwalior. |
| 4. | December 22, 2014 | Date of appointment of Mr. K.K. Gupta as sole Arbitrator. |
| 5. | January 15, 2015 | Date of entering upon reference by the Arbitrator. |
| 6. | October 15, 2018 | Mr. K.K. Gupta informed parties he was due for superannuation on November 30, 2011 and also expressed his willingness to continue as the Arbitrator, if given consent by the parties. |
| 7. | November 5, 2018 | Respondent gave its consent for the Arbitrator to continue and publish the Award even after superannuation |
| 8. | February 7, 2019 | Arbitrator recorded parties finished oral/written submissions and directed parties to pay Rs. 25 lakhs towards his fee on or before March 7, 2019. |
| 9. | March 15, 2019 | Petitioner informed its willingness to pay 50% of its share towards Arbitrator’s fee subject to confirmation and payment by respondent No.1 |
| 10. | May 10, 2019 | Letter issued by respondent No.1 to continue without fees or resign in terms of Section 14 of the Act. |
| 11. | June 27, 2019 | Matter adjourned without date for next hearing. |

14. It is the case of the petitioner that an arbitrator cannot be expected to continue with arbitral proceedings without the parties paying reasonable fees and expenses of the arbitrator and that the parties to the arbitration cannot avoid complying with the order of fee/deposit when the arbitrator has determined his fee and passed an order to that effect. Further, it is the case that Section 39 (1) of the Act envisages a situation where there may be dispute between arbitral tribunal and the party/parties with regard to costs of arbitration and under the said Section the arbitral tribunal has the right to exercise lien on the Award for any unpaid costs of arbitration. Section 39 of the Act reads as under:

39. Lien on arbitral award and deposits as to costs.—

(1) Subject to the provisions of sub-section (2) and to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

(2) If in any case an arbitral tribunal refuses to deliver its award except on payment of the costs

demanding by it, the Court may, on an application in this behalf, order that the arbitral tribunal shall deliver the arbitral award to the applicant on payment into Court by the applicant of the costs demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitral tribunal by way of costs such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(3) An application under sub-section (2) may be made by any party unless the fees demanded have been fixed by written agreement between him and the arbitral tribunal, and the arbitral tribunal shall be entitled to appear and be heard on any such application.

(4) The Court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.

15. It is further the case of the petitioner that, if in case one party refuses to pay its share of fees/ deposit, Section 38 of the Act permits the other party to pay the share of the defaulting party and thereafter, the arbitrator shall debit the amount after determination of costs under Section 31 of the Act at the time of making the Award. In case the other party refuses to pay the share of defaulting party in respect of the claim/ counterclaim, the arbitrator is empowered to suspend or terminate the arbitral proceedings in respect of such claim/counterclaim. Section 38 of the Act reads as under:

“38. Deposits. –

(1) The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs referred to in sub-section (8) of section 31, which it expects will be incurred in respect of the claim submitted to it: Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal, it may fix separate amount of deposit for the claim and counter-claim.

(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties: Provided that where one party fails to pay his share of the deposit, the other party may pay that share: Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter-claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter-claim, as the case may be.

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the party or parties, as the case may be.”

16. It is stated by the petitioner that it had expressed its willingness to pay the total fee of the arbitrator, i.e. its own share as well as the share of respondent No.1 and that there is no justification for the action of the sole arbitrator to retain the possession of the Award in view of the Section 38 of the Act. It is also submitted that refusal on part of respondent No.1 to pay fees of the arbitrator and further the demand put forth to the arbitrator, either to continue with the proceedings without fees or resign under Section 14 (1) (a), is nothing

but an effort to delay the completion of the arbitration proceedings, as respondent No.1 had, vide letter dated November 30, 2018, given its written consent for the arbitrator to continue till the completion of the proceedings.

17. Reply to this petition was duly filed by the respondent No.1. A preliminary objection to the maintainability of this petition under Section 39 of the Act has been raised by the respondent. It is the case of the respondent that Section 39 of the Act is not applicable in the present case as the petitioner has not only accepted the demand made by the arbitrator but also has shown its willingness to deposit the entire fees to the arbitrator and, therefore, no circumstance exists to invoke the said provision.

18. It is the case of respondent No.1 that the petition is not maintainable as the arbitration proceedings are on-going and yet to be concluded and both the arbitration proceedings are not at the stage of pronouncement of Award, hence clearly outside the ambit of Section 39.

19. On merits, it is submitted by respondent No.1 that Mr. K. K. Gupta, Chief Engineer, was appointed as an arbitrator by the Appointing Authority on December 26, 2014 from the Standing Panel of Arbitrators, in terms of Clause 60 of the GCC. That after entering upon reference on January 14, 2015, in respect of disputes arising out of both the contracts, the exclusive job of Mr. K. K. Gupta was to conduct arbitration proceedings assigned to him by the Appointing Authority. No fees were payable to him by any parties other than the normal salary payable by the respondent.

20. It is also submitted by respondent No.1 that, Mr. K. K. Gupta, during his tenure while being posted at the Office of Standing Panel of Arbitrators, Lucknow, has kept nine proceedings pending in addition to the proceedings relating to the present case and subsequently, in July 2017 he was posted out from the Standing Panel of Arbitrators' Office, Lucknow, to E-in- C's Branch, New Delhi as Jt. Director General (Army). However, he did not resign from proceedings involved in the present matter and decided to continue as the sole arbitrator.

21. It is the case of the respondent No.1 that it is only before five months to his superannuation that vide letters dated June 21, 2018 and August 06, 2018, he sought consent from both parties to continue the arbitration proceedings as the same was held up due to certain administrative reasons. Respondent No.1 had given its consent to the arbitrator for continuing with the proceedings as well as publishing the Award till November 30, 2018 i.e. the date of his superannuation. It is further the case of respondent No.1 that the arbitrator vide its letter date October 16, 2018 had expressed his willingness to continue as an arbitrator as due to personal and official commitments he would not be able to publish the award before November 30, 2018 and there was no intimation from the arbitrator in any of these communications about his intention to charge fees for continuing as an arbitrator post his superannuation.

22. It is averred by respondent No.1 that the arbitrator raised his demand for fees vide letter February 08, 2019, only after obtaining consent of the parties for his continuation as an arbitrator. It is further averred by respondent No.1 that despite having sufficient time in hand, the learned arbitrator took no reasonable steps to complete the arbitration proceedings expeditiously and it is only after obtaining the consent from the parties that he has raised a new demand for payment of fees. This action of the learned arbitrator to keep

the proceedings pending until superannuation and the sudden demand of fees in all arbitration proceedings, including the present case, raises serious doubts on the *bona fide* of the arbitrator.

23. It is stated by respondent No.1 that neither the terms of the arbitration clause nor the terms of reference/appointment of the arbitrator stipulates payment of fees and the arbitrator cannot be permitted to act contrary to the scheme of the Act by delaying the proceedings. It is also the apprehension of respondent No.1 that if the demand of payment of fees of Mr. K. K. Gupta is allowed, all the arbitrators in service shall tend to delay the proceedings to continue as arbitrators after their superannuation and claim fees.

24. Pursuant to the objections taken by respondent No.1 that the Arbitrator is not made a party in the present petition, this Court vide order dated October 21, 2019 issued notice to the Arbitrator in view of the fact that the issue which arises for consideration is whether the Arbitrator is entitled to payment of fee or not and directed the petitioner to file amended memo of parties.

25. Subsequently, Mr. K.K. Gupta was arrayed as respondent no.2 and reply on his behalf was taken on record by this Court vide order dated November 8, 2019.

26. It is stated by respondent No.2 in his reply /submission that he was appointed as the Sole Arbitrator by the designated authority specified in Clause 60 of the GCC on December 22, 2014 and this was prior to him joining the Office of Standing Panel of Arbitrators, Lucknow. It is his case that in July, 2017 he was posted out of the Office of Standing Panel of Arbitrators, Lucknow and joined as Joint Director General (Army) in the Office of Engineer-in-Chief, Military Engineer Services, New Delhi. It is further stated that it was on the request of the parties that he continued as the Arbitrator even at the new place of posting, despite change in his charter of duty and deep involvement in other administrative issues.

27. It is also stated by respondent No.2 that since it was not feasible for him to complete the proceedings before his superannuation on November 30, 2018, owing to the delay on part of the parties to submit their submissions, the same was informed to the parties and both petitioner and the respondent No.1 gave unconditional consent for him to continue as the arbitrator even after superannuation. It is stated that nowhere in the appointment letter / consent letter or arbitration clause, it is mentioned that the Arbitrator will not be paid and moreover, the Act under which the proceedings are held contain certain provisions which exclusively deal with payment of arbitrator's fees without differentiating whether the arbitrator is a serving or non-serving personnel.

28. It is averred by respondent No.2 that consequent to his superannuation, salary, privileges and facilities, secretarial service etc. as enjoyed by him have ceased and therefore to continue with the arbitral proceedings and publishing the Award, he has to refer to certain legal / technical books, study case laws, hire secretarial services etc. and also spend time, effort and money in resolving the dispute which needs to be compensated.

29. It is duly stated by respondent No.2 that during the arbitration proceeding held on February 7, 2019, discussions / decisions were taken about the arbitrator's fee. Representatives of both parties had given their consent to the fees fixed and have even signed the minutes of the proceedings as well as record of hearing.

30. It is further stated by respondent No.2 that the issue of entitlement of Arbitrator's fee and expenses was never brought or made an issue before him during the time of adjudication of the matter and the stand taken by respondent no.1 that the Arbitrator is not entitled for arbitration fee is illegal. Section 31(8) of the Act empowers the sole arbitrator to fix fees and expenses. It is also submitted that one of colleagues of respondent No.2 who was similarly superannuated and appointed as arbitrator before superannuation, continued to remain as arbitrator even after superannuation and has been paid arbitrator's fee and expenses. A violation of Article 14 and 16 of the Constitution is also pointed out by respondent No.2 stating that all retired persons / Judges acting as arbitrators are paid / compensated.

31. Response filed by respondent No.1 to the reply filed by respondent No.2 was taken on record by this Court vide order dated December 18, 2019. It is stated by respondent no.1 that respondent no.2 was appointed as an arbitrator by the Appointing Authority from the Standing Panel of Arbitrators, and that is immaterial as to whether the arbitrator had joined or not at that point of time. It is further denied by respondent No.1 that any request was advanced by respondent No.1 to respondent No.2 for continuing as the arbitrator, instead it is stated that it was respondent No.2 who requested both the parties to agree to his appointment as arbitrator.

32. It is also stated by respondent No.1 in its response that neither the terms of contract nor the terms of appointment contemplated continuation of the serving officer as an arbitrator after superannuation and for the said reason, neither the contract, terms of appointment nor any correspondence exchanged with the arbitrator suggested in any manner that the arbitrator shall be entitled to any fees. Respondent no.1 also reiterated its stand taken in its reply to this petition that the arbitrator / respondent No.2 was duty bound to complete the arbitration proceedings before his superannuation and that at the time of seeking consent of the parties, did not disclose his intention to claim fees and the same was disclosed only after obtaining consent from the parties.

33. Respondent no.1 also categorically denied the claim of the arbitrator / respondent No.2 that respondent No.1 in any way prompted or requested the arbitrator / respondent No. 2 to fix his fees and expenses, on the contrary it is stated that it is a matter of record that the fees was demanded by the arbitrator / respondent No.2 and respondent no.1 had objected to the same. The claim for fees was made by the arbitrator / respondent No.2 for the first time on February 7, 2019 which was specifically denied by respondent No.1 vide its letter dated May 5, 2019. It is stated that signing of the minutes of arbitral hearing dated February 8, 2019 by representatives of respondent no.1 was only to mark their presence and the same can in no way construed as agreeing to the terms of payment of fees to the arbitrator / respondent No.2.

34. Respondent No.1 has also specifically stated that no colleague of respondent No.2 or any arbitrator has been paid by respondent No.1 for continuing as an arbitrator after his/her superannuation and Section 31 (8) of the Act does not come to the aid of the arbitrator / respondent no.2 in the facts and circumstances of the present case.

35. Sudhir Nandrajog, learned Sr. Counsel appearing on behalf of the petitioner submitted that the petitioner is being deeply prejudiced by the Award not being published on respondent no.1's blatant refusal

to pay the fee of the arbitrator. He stated that Section 39 of the Act contemplates the very situation, where in case an Arbitral Tribunal refuses to deliver its award except on payment of costs, an application can be preferred by any party before the Court and the Court while adjudicating upon such an application can order the Tribunal to deliver the award to the applicant on its deposit to the Court the costs so demanded by the Tribunal.

36. He further stated that the only grievance of the petitioner is with regard to the fee demanded by the arbitrator. However, according to him, a plain reading of Section 39 (2) makes it clear that the entitlement of the arbitrator to such amount claimed can be decided by the Court at a later stage and the Court can pass further orders to that effect after an inquiry. The only pre-requisite for a direction to the arbitrator to publish / deliver the Award is payment of costs as demanded by the Arbitrator before the Court which the petitioner in the instant case is ready and willing to do. Hence, he strongly refuted the stand taken by the respondent No.1 that the instant petition is not maintainable under Section 39 of the Act.

37. He vehemently contested the stand taken by the respondent No.1 that proceedings before the sole arbitrator are pending and the present petition is preferred at a premature stage by stating that the intimation of the arbitrator that the drafting of the Award will commence only after full payment of the fees was indicative of the fact that the arbitration proceedings had reached the final stage.

38. He further drew the attention of this court to arbitral proceedings dated June 12, 2019 wherein it was noted that written submissions, record of hearings and correspondence considered necessary for pronouncement of Award were already over on February 2019 and signed by both the parties without reservation. No plea / application was also preferred by the respondent No.1 for termination of the arbitrator's mandate before the arbitrator during proceedings dated June 27, 2019. In short, it is submitted by Mr. Nandrajog that even after having adequate opportunity to terminate the mandate of the arbitrator, the respondent gave consent as well as continued the arbitration proceedings.

39. Similarly, it was averred by Mr. Nandrajog that the plea taken by the respondent No.1 in their reply seeking termination of the proceedings owing to undue delay of arbitral proceedings by the arbitrator is ill-conceived inasmuch as respondent ought to have moved a separate petition raising their grievance much prior to this petition, for termination of the arbitral proceedings and even otherwise a bare perusal of the letter dated June 21, 2019 clearly depicts that the delay would be attributable to the respondent.

40. He also opposed the stand taken by respondent No.1 that upon non-payment of costs, the arbitrator can suspend or terminate the proceedings under Section 38 (2) of the Act by submitting that Section 38 (2) is applicable only in a case where party / parties to the arbitral proceedings default in paying the costs determined by the Arbitral Tribunal and that Section 38 (2) does not contemplate a situation where a party challenges the entitlement of the arbitrator to receive fees for conducting the arbitration proceedings and the only forum for deciding the question of entitlement of fee when the arbitral proceedings have come to a standstill would be as per the scheme laid down under Section 39, which is the issue in the present case. In support of his contention he has relied upon a judgment of the co-ordinate bench of this Court, ***Chemical Sales Corporation & Ors. v. M/s. A & A Laxmi Sales and Service Private limited & Ors., 2011 SCC Online Del***

3847; wherein the Court had distinguished between the termination of mandate of the arbitrator as well as the termination of the proceedings of arbitral proceedings.

41. Further, he has relied upon judgments of Apex Court in **Himalayan Construction Co. v. Executive Engineer, Irrigation Division, J & K and Anr, (2001) 9 SCC 359**; to contend that Award passed by an Arbitrator even after his retirement initially appointed by designation is valid and **M/s. Construction India v. Secretary, Works Department, Govt. of Orissa and Ors., (1998) 2 SCC 89**; to contest that when an appointment has been made by name of the arbitrator and not by designation, it is difficult to hold that the arbitrator who was named to act as an arbitrator ceases to have jurisdiction on demitting the office/position/designation he holds. Reliance is also placed on a co-ordinate bench judgment of this Court in the case of **M/s Woodfun v. Union of India, (2009) 160 DLT 339**; wherein the appointing authority, Union of India, appointed a retired personnel as an arbitrator subsequent to resignation of initially appointed arbitrators and the arbitration clause mandated payment for expenses to the arbitration in case the same is conducted by a retired officer. It was held that since the arbitrator can always make an order qua costs, the mandate of the arbitrator cannot be terminated on the ground of charging exorbitant fee, as the same does not find reference in the grounds for termination laid down in Section 14 and 15 of the Act.

42. It was also his submission that in the instant case, the petitioner is ready and willing to pay the entire fee demanded by the arbitrator and that the arbitrator has clearly refused to deliver / publish the Award until the payment of his fees, therefore, it is immaterial as to whether the Award is at the stage of making or drafting.

43. Mr. Guarav Varma, Mr. Ruchir Mishra, learned counsels appearing on behalf of respondent no.1, Union of India, has taken a preliminary objection with regard to the maintainability of the present petition in view of the scheme of Section 39 of the Act. They have drawn the attention of this Court to a distinction made by the legislature in the usage of “make / made” and “deliver / delivery” under the various provisions of the Act. It was submitted by them that Section 39 of the Act contemplates exercise of lien by the arbitrator on the arbitral Award which pre-supposes that (a) an Award has been “made”; (b) the arbitrator has exercised lien on an Award made – but not delivered to the parties, as opposed to the scheme contemplated in Sections 31, 29, 29A of the Act which deals with “making” of an Award, prior to its “delivery”. In other words, it is their submission that it is only when an award has been made but not delivered to the parties that a party is entitled to approach the Court under Section 39 (2), to obtain the Award subject to deposit of fees as demanded by the Arbitrator and Section 39 does not get triggered at any time before an Award is made.

44. To substantiate their submission that Section 39 of the Act was yet to be triggered and that respondent no.2 was yet to “make” the Award till the filing of the petition, they have relied upon the minutes of the proceedings dated February 7, 2019 (Project Gwalior, OMP(MISC.)(COMM) 378/2019), February 8, 2019 (Project Bangalore, OMP(MISC.)(COMM) 377/2019) as well as the minutes of the proceedings dated June 27, 2019 (in both proceedings), wherein it was noted that the arbitration proceedings in one case the hearing is concluded and in another it was at the stage of final arguments and hearing was yet to be concluded. They have also relied upon a judgment of the Calcutta High Court in the case of **Assam State Weaving & Man. Ltd. v. Vinny Engineering Enterprises Pvt. Ltd., 2010 (4) RJ 609**; wherein it was held that the delivery of Award

under Section 39 of the Act speaks of the physical delivery of the document embodying the Award and not merely the pronouncement of the Award and that it is the physical receipt of the document that would entitle a party to apply for setting aside or implementing the Award.

45. It was further submitted by Mr. Varma and Mr. Mishra that the intent / scheme of Section 31 of the Act is to protect the interest of the Arbitrator, which states that unless agreed between the parties, the costs of arbitration shall be fixed by the Arbitral Tribunal which includes “the fees and expenses of the arbitrators”. In the event of refusal for payment by both the parties, sole discretion is vested with the Arbitrator / Arbitral Tribunal as per Section 38 of the Act to suspend or terminate the proceedings or continue with the proceedings until the making of the award and after making the Award exercise lien under Section 39 (1) of the Act and give notice to that effect to the parties for unpaid costs. However, in the present case the proceedings are at the stage for final arguments / arguments have been heard and the Arbitrator is not in a position to exercise lien on the award prior to its “making” as per the Scheme of the Act. In support of this submission, they have relied upon the case of **Gammon India Ltd. v. Tenchless Engineering Services, MANU/MH/2130/2013**, wherein it was held that when a party has been directed to deposit an advance towards cost and fails to do so, and the other party also does not deposit his share, the Arbitrator would be justified in taking recourse to power conferred in Section 38 (2) of the Act to terminate the claim of the defaulting party and that neither the arbitral tribunal nor Court can compel a party to deposit the share of fees and expenses of both parties.

46. Reliance was also placed on an Apex Court judgment in the case of **Union of India & Ors. v. Prabhat Kumar & Bros. and Anr., 1995 Supp (4) SCC 525**; wherein it was held that an Arbitrator appointed by Government of India ceased to be the Arbitrator on his retirement from government service, as the arbitration clause mandated reference of disputes to CWC/Engineer officer.

47. The second leg of submission made by Mr. Varma and Mr. Mishra was with regard to the entitlement of Arbitrator / respondent no.2 to demand fees from the petitioner and respondent no.1. It was submitted by them that owing to the non- maintainability of the present petition the Entitlement /reasonableness of fees demanded by Arbitrator/respondent no. 2 cannot be a subject matter of the present petition since the appropriate stage as contemplated under Section 39 (2) is yet to arise.

48. They also stated that in terms of Clause 60 of the GCC, the arbitrator ought to be a serving officer and there is no reference with regard to the payment of fees. Letter of Appointment as well as the letter issued by the Arbitrator/respondent No. 2 for entering upon reference on January 14, 2015, does not stipulate payment of fees to the arbitrator. Further, it was stated that it was only after his superannuation as well as obtaining consent from both parties to continue as the sole arbitrator in the proceedings that the Arbitrator / respondent No. 2 for the first time raised a demand for payment of fees which has been duly noted in the minutes of the meeting/arbitration proceedings dated February 7, 2019 and February 08, 2019.

49. They also stated that the respondent No. 1 has objected to the claim made by the Arbitrator vide letter dated May 22, 2019 and the demand made by Arbitrator/respondent No. 2 after seeking consent for extension without disclosing his intention to claim fees, also does not entitle him to any payment

particularly after superannuation when neither the arbitration clause (Clause 60 of GCC) nor the Letter of Appointment contemplates such a payment.

50. Having heard the learned counsels for the parties and perused the record, the first and foremost issue to be decided is whether the petitions filed by the petitioner under Section 39 (2) of the Act are maintainable or not. I have already reproduced Section 39 of the Act in paragraph 13 herein above.

51. The plea of the learned counsels for the respondent No.1 is that the arbitration proceedings are going on and had not reached the stage where the award has been made and pronounced and is required to be delivered by the learned Arbitrator, hence clearly outside the ambit of Section 39 of the Act. They have drawn the attention of the Court to the words like *delivery; refuses to deliver its award*; in Section 39 of the Act to contend that the presence of the words in the said Section pre-supposes that an arbitration Award has been made, on which the learned Arbitrator has exercised lien and not delivered the Award. According to them, it is in that eventuality, that a party is entitled to approach the Court under Section 39(2) of the Act to obtain the Award, subject to deposit of the costs as demanded by the learned arbitrator.

52. On the other hand, Mr. Nandrajog has contested the plea by stating as under:

(1) The petitioner is deeply prejudiced by the award not being published on respondent no.1's refusal to pay to the learned arbitrator.

(2) Section 39(2) of the Act contemplates a situation where in case an Arbitral Tribunal (learned arbitrator in the present case) refuses to deliver its award except on payment of costs, an application can be preferred by any party before the Court and the Court while adjudicating the application can order the Tribunal to deliver the award to the applicant on its depositing in the Court costs so demanded by the Tribunal.

(3) On a plain reading of Section 39 (2) of the Act, it is clear that the entitlement of the arbitrator to the amount can be decided by the Court at later stage after an enquiry.

(4) The only pre-requisite for a direction to the arbitrator to publish / deliver the Award is payment of costs as demanded by the arbitrator before the Court, which the petitioner in the instant case is ready and willing to pay.

(5) The intimation by the learned arbitrator that drafting of the award will commence only after full payment of the fee is indicative of the fact that the Arbitration Proceedings had reached the final stage.

53. I am not in agreement with the submissions made by Mr. Nandrajog, for the simple reason, the stand of the learned arbitrator that drafting of the Award shall commence on payment of the fee, does not suggest, that the Award has been made and is ready to be delivered. Perusal of Section 39 (2) of the Act clearly contemplates that the application is maintainable when the Award is made, but not delivered to the parties as a party has not paid the fee demanded by the learned arbitrator. The said situation has not arisen in the case in hand and the same is clear from perusal of the proceedings dated February 7, 2019; February 8,

2019 in both the petitions respectively, as there is no indication that the proceedings have been reserved for Award. Even it is not the case of the petitioner or the learned Arbitrator that the Awards have been prepared/pronounced in both the cases and are ready for delivery. There is a purpose for delivery of the Award as the delivery of Award shall entitle a party to either challenge the Award or seek execution of the same. It is in such a situation a party can invoke the provision of Section 39(2) of the Act. As the aforesaid facts clearly demonstrate that since the position as contemplated in Section 39 has not arisen, the present petitions are not maintainable. In this regard, I may refer to the judgment as relied by the counsels for respondent No.1/UOI, of the Calcutta High Court in **Assam State Weaving & Manufacturing Co. Ltd. v. Vinny Engineering Enterprises (P) Ltd. and Anr., 2010 (4) R.A.J. 609 (Cal)** wherein the following observations have been made in paragraphs 20 and 21. The said observations are in terms of Section 39, more particularly 39(2) of the Act.

“20. Section 39 of the 1996 Act, much like Section 38 of the old Act, recognises an arbitral tribunal's lien over the award. The section conceives of a situation where there may be a dispute between the arbitral tribunal and one or more parties to the reference as to the costs of the arbitration. Upon an arbitral tribunal refusing to deliver its award unless its demand for payment of costs were met by a party, an application may be carried to court for directing the tribunal to deliver the award to the applicant. Sub-section (2) contemplates an applicant thereunder to put into court the costs demanded by the arbitral tribunal. Upon such costs being deposited the court may order the tribunal to deliver the award to the applicant. The court can thereafter inquire into the propriety of the costs demanded and deal with the matter following the inquiry.

21. Sub-section (3) of Section 39 permits an application under sub-section (2) to be carried by any party to the reference only on condition that the fees demanded were not as fixed by written agreement between the applicant and the arbitral tribunal. The sub-section does not limit an application to be made under sub-section (2) only by a party who has been refused the delivery of the award. The delivery that Section 39 speaks of is the physical delivery of the document embodying the award and not merely the pronouncement of the award. For, it is the physical receipt of the document that would entitle a party to apply for setting aside the award or for implementing it.”

54. In view of my aforesaid conclusion, without going into the other submissions made by the counsels, the petitions being premature are not maintainable and are dismissed.

No costs.

V. KAMESWAR RAO, J

JUNE 05, 2020/aky/jg