

Before Sanjay Kishan Kaul, CJ & Augustine George Masih, J.

H.C. ARORA—*Petitioner*

versus

UNION OF INDIA AND OTHERS—*Respondents*

CWP No. 20157 of 2012

October 11, 2013

Arbitration and Conciliation Act, 1996 - Ss. 2(4), 31(8), 40, 41 and 43 - All India Services (Conduct) Rules, 1968 - Rl. 13(1), (2), (3), (4) - All India Services (Conditions of Service - Residuary Matters) Rules, 1960 - R. 2(b) - National Highways Act, 1956 - Ss. 3G(5) & 3G(6) - NHAI Circular dated 24-12-2012 - Notifications dated 17-12-2009, 3-2-2010, 26-12-2011 - Arbitrator's fee - Divisional Commissioner (Respondent No. 4) belonging to All India Service cadre was appointed as an Arbitrator - It was alleged that he charged exorbitant amount as arbitration fee without prior permission of either State or Central Government - Held, that - Divisional Commissioner was performing his duties of an Arbitrator as part of his duties - He was appointed arbitrator by designation not by name - He is governed by relevant Service Rule 13(4) of Conduct Rules 1968 - Fee could not be charged without prior sanction of competent authority - Respondent No.4 directed to deposit the fee collected in the account of the Arbitrator and State Government ordered to ensure remittance of arbitration fees to land-owners along with interest as may have been recovered from said officer.

Held, that the respondent no. 4 is a member of the AIS and is governed by the rules arising from course of his employment. It is not his whim and fancy to generate income from other sources in the course of his employment, if the same is not permitted by the Central Government or the State Government depending on where he is posted. The respondent no. 4 was posted at the relevant time with the State of Punjab. It is interesting to note that apart from respondent no. 4, no one else has claimed any fee whatsoever for performing the duties of an Arbitrator in pursuance to the appointment under section 3G(5) of the NHA Act. It has been a unique endeavour of respondent no. 4 to aggrandize and enrich

himself by this method. The sad part is that even when both the State authorities have made their stand clear, the said respondent refused to follow rules unbending. Possibly, the amount being huge appears to have caused the said respondent to take an obdurate stand in this behalf.

(Para 29)

Further held, that we fail to appreciate as to how respondent no. 4 can go outside the rigours of sub-rule (4) of Rule 13 of the Conduct Rules which requires prior sanction of the Government. It is not as if any permission has been obtained by respondent no. 4, but, on the other hand, the permission has been specifically declined. Respondent no. 4 cannot hide himself behind the plea of performing a statutory function under the NHA Act read with the Arbitration Act.

(Para 31)

Further held, that we are unable to accept the plea of senior counsel for respondent no. 4 that appointment of respondent no. 4 was not by designation merely because a notification was issued every time. The notifications did not mention the name of any officer including of respondent no. 4. It only referred to the post held by him. It is, thus, clearly a case of an appointment of Arbitrator by designation and the person so appointed has to perform the task as part of his overall duties. In the teeth of the Rule 13(4) of the Conduct Rules, the respondent no. 4 cannot be permitted to fall back on the effort to carve out a distinction between fee and honorarium and then try to plead that a separate fee is chargeable because there is a provision under section 31(8) of the Arbitration Act. No doubt, the mode and manner of providing for costs of arbitration including fee of the Arbitrator has been provided in the said section, but that is for a normal situation where some fee has to be fixed and not where a person like respondent no. 4 is performing his duties of an Arbitrator in the capacity of an Officer to whom the work has been assigned as part of his duties.

(Para 32)

Further held, that respondent No.4 is duty bound to adhere to the advice/directions contained in the letter of the Department of Personnel of the Government of Punjab dated 11-10-2012 which have been quoted aforesaid, requiring respondent No.4 to deposit the complete amount of arbitration fee charged along with interest earned/received from the bank

on this amount in the arbitration account and the Government be informed accordingly. The refund of the amount deposited as income tax on the amount charged as arbitration fee should be claimed forthwith and as soon as the refund is received the same should also be deposited in the arbitration account. The details as required in the remaining paragraph of the said letter should also be provided and all the needful be done by respondent No.4 within a period of one month from today.

(Para 35)

Further held, that since the private landowners have paid the share of the fee of the NHAI to get their awards released, wherever such fee has been paid, the same along with the share of fee of the private landowners be refunded in toto along with proportionate interest as may be remitted by respondent No.4. The private landowners, thus, should not be deprived of this benefit as a large amount of arbitration fee has to be really recovered and, therefore, it is the bounden duty of the State Government to ensure the remittance back of this amount to the individual landowners of whatever fee they may have paid for arbitration along with proportionate interest as may have been recovered and deposited by respondent No.4.

(Para 36)

H.C. Arora, Advocate/*petitioner-in-person*.

O.S. Batalvi, Special Senior Standing Counsel for respondent No.1/Union of India with Maya Prakash Deputy Secretary (LA) M/Road Transport and Highways.

J.S. Sidhu, Additional Advocate General, Punjab for respondent No.2.

Roopak Bansal, Advocate for respondent No.3.

M.L. Sarin, Senior Advocate with Nitin Sarin, Advocate for respondent No.4.

Vivek Aditya, Intervener-in-person.

SANJAY KISHAN KAUL, CJ.

(1) Shri Suchha Ram Ladhar/respondent No.4 belongs to the Indian Administrative Service cadre and seeks to substantively augment

his income by claiming the entitlement to an arbitrator's fee while performing the task of an Arbitrator under Section 3G(5) of the National Highways Act, 1956 (hereinafter referred to as "the NHA Act") while holding the post of the Divisional Commissioner in Jalandhar and Patiala Divisions. It is this act of respondent No.4 which gave rise to some adverse publicity in the media that an exorbitant amount is being charged as arbitration fee without prior permission of either the State or Central Government in violation of the service rules. This culminated in filing of a public interest litigation by the petitioner, an Advocate, seeking appropriate criminal/departmental action against respondent No.4 for his conduct and for recovery of the entire amount of arbitration fee charged.

(2) The petitioner states that the respondent No.4 claims entitlement to the arbitration fee on the basis of own interpretation of Section 31(8) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act"). In terms of the said provisions, unless otherwise agreed to by the parties, the cost of an arbitration is to be fixed by an arbitral tribunal and such "costs" relate to the fee and expenses of the Arbitrator and witnesses, legal fee and expenses, administration fee and any other expenses incurred in arbitral proceedings. It is the case of respondent No.4 that he is, thus, entitled in law to charge such fee.

(3) The petitioner has stated that there is prohibition as per Rule 13(4) of the All India Services (Conduct) Rules, 1968 (hereinafter referred to as "the Conduct Rules") as it prohibits a member of the All India Service (AIS) from accepting fee for any work done for any public body or private person without the sanction of the Government. This rule, the petitioner pleads, has to be read with the provisions contained in Supplementary Rule 12 of the Fundamental and Supplementary Rules (hereinafter referred to as "the FR") which permits that one-third of any fee in excess of ₹ 400/- or a recurring fee of ₹ 250/- a year, paid to a government servant, would be credited to the general revenues unless the President, by special order, otherwise directs. There are, however, certain exceptions to the same.

(4) The petitioner alleges that respondent No.4 was appointed as an Arbitrator under the provisions of Section 3G(5) of the NHA Act and was required to conduct the arbitration proceedings by following the provisions of the Arbitration Act. The respondent No.4 was posted as a Divisional Commissioner, Jalandhar and thereafter as Divisional Commissioner, Patiala when such fee is stated to have been charged. This was protested to by the NHAI/respondent No.3 in terms of a letter of Chief General Manager dated 1.3.2012, as what was being claimed was ₹ 12,000/- per case aggregating to ₹ 1.2 crores. The respondent No.4 denied its obligation to pay 50 per cent of the total arbitration fee sought to be charged by him by contending that there was no provision under the NHA Act for payment of arbitration fee to an Arbitrator appointed under Section 3G(5) of the NHA Act.

(5) The Union of India/respondent no.1 through Department of Personnel and Training is stated to have determined the fee payable to Government officials working as Arbitrator in terms of its letter dated 27.10.2008. This would be in the form of an honorarium payable to an Arbitrator at the rate of ₹ 500/- per day subject to a maximum of ₹ 10,000/- per case. Notwithstanding these instructions, the respondent No.4 is stated to have determined his own fee as ₹ 12,000/- per case to be shared in the ratio of 50:50 by both the parties. Respondent No.4, in fact, directed that a copy of the award be given to both the parties through counsel for compliance after deposit of arbitration fee and on non-payment, the award would stand suspended automatically. This is stated to have been followed by a further stipulation while making the award that the arbitration fee for the National Highway Authority of India (hereinafter referred to as "the NHAI") would also be paid by the land owners at the time of release of amount which the owners can recover from the NHAI at the time of taking award money as per the award.

(6) The NHAI/respondent No.3 protested vide letter dated 21.6.2011 to the Chief Secretary, Government of Punjab/respondent No.2. It was pointed out that due to delay in disbursement of compensation to land owners, the NHAI is not in a position to take over possession of the land resulting in delay in completion of projects as per the target fixed by the Government of India.

(7) The petitioner avers that there was a single common order deciding 629 cases dated 4.3.2009. The award had been passed on 28.1.2009, but vide order dated 4.3.2009, respondent No.4 directed fee at the rate of ₹ 4,100/- per case which included secretarial charges and stationery expenses, etc. at the rate of ₹ 600/- per case to be recovered from parties in each of 629 cases. Thus, for a single common order, an aggregate fee of ₹ 25.79 lacs was charged by the respondent no.4.

(8) The petitioner claims that despite wide adverse publicity no action has been taken by the State Government, even though the Advocate General, Punjab had, apparently, opined that the conduct of respondent No.4 amounted to misconduct on his part. Respondent No.4. is stated to have made approximately ₹ 1.58 crores in all by charging the arbitration fee without the State Government's approval during the two tenures of his posting.

(9) On the aforesaid averments, notice was issued on the petition and pleadings were completed. The interim orders were passed on 8.2.2013 read with the order dated 15.2.2013 calling upon respondent No.4 to deposit one-third of the fee, charged by him in the account of the Arbitrator of cases decided earlier and of those cases which he was still conducting, the entire fee would be deposited in the account of the Arbitrator.

(10) On 8.5.2013, it was noticed on the basis of record that vide letter dated 17.12.2009 the Commissioner, Jalandhar Division, Jalandhar was appointed to act as an Arbitrator to adjudicate upon the claims of the landowners filed for enhancement of compensation for the land acquired within the district of Kapurthala. Similar notifications were issued as far as other districts are concerned. Thus, the appointment was made by designation. The Secretary, Ministry of Road Transport and Highways of Union of India was directed to file an affidavit answering the following questions:-

- “(i) what is the fee payable to the Arbitrator so appointed and by whom?”*
- “(ii) whether the Arbitrator has power to fix his own fee at his own or what are the norms laid down by the Central Government in this regard;*

(iii) *What is the procedure adopted for payment of honorarium or fee to the Arbitrator?*

(iv) *Insofar as the case under National Highways in respect of other State is concerned, whether or not, it is required that the Arbitrator so appointed would deposit the fee or part of the fee with the government treasury.”*

It was also directed that if such norms did not exist, then norms regarding payment of honorarium and fee to the Arbitrators, who were serving Government officials, be made available.

(11) On 17.7.2013, this Court took up the pending applications in the writ petition. A direction had been sought by respondent No.3 for vacation/suspension of the order dated 28.2.2011 passed by respondent No.4 in terms whereof on account of non-payment of arbitration fee, the implementation of award had been suspended. This Court opined that as to whether respondent No.4 could recover any fee was an act itself called into question and, thus, respondent No.4 should not be permitted to suspend the arbitration award on account of alleged non-payment of fee. The order suspending the implementation of the award on account of non-payment of fee was held not to operate. On the merits of the controversy, it was opined that the affidavit filed was not of the Secretary of the Ministry concerned, but of the Regional Officer which only communicated certain circulars and did not answer to the queries raised in the order dated 8.5.2013. The Secretary concerned was, thus, called upon to answer those questions. We observed as under:-

“We may notice that one of the controversies which has been raised is whether the reference in the office memorandum dated 27.10.2008 to the maximum payment of ₹10,000/- ‘per case’ is a reference to the particular fee before the Arbitrator or does it refer to the total amount payable to an officer irrespective of the number of cases. This is more so in view of the annexures filed by the intervenor alongwith his applications. This in turn may arise from the two phrases used ‘honorarium’ & ‘fee’. The office memorandum dated 27.10.2008 while referring to the office memorandum dated 29.09.1981 refers to grant of ‘honorarium/fee’. However, thereafter, reference is only to ‘honorarium’. It

is the say of the learned counsel for the State of Punjab that in the present case it is 'honorarium' which is not liable to be retained by the officer concerned and not a 'fee'. Learned senior counsel for respondent No. 4 naturally disputes this position and states that it is payment of fee which is in consonance with the NH Act, 1956 and the Arbitration and Conciliation Act, 1996. Learned counsel for the State of Punjab has also made a reference to the second annexure filed with the affidavit today by the Union of India dated 24.12.2002. This annexure, however, pertains to what may be categorized as other expenses to set up the infrastructure for the arbitration and would apply only for an initial period of six months. These aspects would also have to be answered by the Union of India in the affidavit."

(12) Now coming to the stands taken by the respective respondents. The State of Punjab/respondent No.2 has stated in its affidavit that the State Government vide its letter dated 8.5.2007 had conveyed its concurrence to the Department of Public Works (B&R) to appoint the Commissioner, Jalandhar Division by designation as Arbitrator qua the claims for enhancement of landowners whose land was required for improvement and widening of Jalandhar–Pathankot Section of National Highway-1A. When it was brought to the notice of the Department of Personnel of the State that respondent No.4 while acting as Arbitrator was accepting arbitration fee, he was asked to explain his position by the State Government vide a memo dated 24.5.2012 on the following issues:

- “(a) As, Arbitrator for NHAI or any other project of any other organisation in your capacity as Divisional Commissioner, Jalandhar/Patiala, have you received any fee/honorarium/charges?”*
- “(b) If so, was the prior permission of Government obtained under Rule 13(4) of the AIS (Conduct) Rules, 1968 for accepting this fee/honorarium/charges?”*
- “(c) How much amount has been received in this regard till date?”*

On receipt of reply from respondent No.4, the matter was examined and vide letter dated 20.6.2012 respondent No.4 was directed not to charge

any arbitration fee in lieu of arbitration work till the final decision in the matter was taken by the Government, as the arbitration work was part of his official duties. An opinion was also obtained from the office of Advocate General, Punjab and a detailed opinion was received. In view of this opinion, a Memo dated 11.10.2012 was issued to respondent No.4 advising him as under:

“2. After examining the matter, you are advised as under:-

- (I) Amount retained out of the amount charged as arbitration fee, along with the interest earned/received from bank on this amount, be deposited in the bank in the Arbitration Account and the Govt. be informed accordingly.*
- (II) Refund of the amount deposited as income tax, on the amount charged as arbitration fee, be claimed immediately and as soon as the refund is received, the same be deposited in the Arbitration Account and the Govt. be informed accordingly.*
- (III) The details/vouchers of honorarium paid to official staff in lieu of arbitration work be furnished immediately and in respect of the part time staff engaged for this work, following details be given:-*
 - (a) Name of the person engaged;*
 - (b) Copy of appointment letter issued to the concerned person;*
 - (c) Detail of period for which he worked;*
 - (d) How much payment was made to him and receipts regarding this payment etc.*
- (vi) Receipts for purchase of stationery etc. consumed for*
(sic) arbitration work.
- (vii) In future no arbitration fee be charged because as Divisional Commissioner, arbitration work is part of your duty.”*

(13) The affidavit goes on to state that the competent authority decided that after completion of action by respondent No.4, further action would be taken, but, quite to the contrary, the said respondent instead of complying with the direction, requested vide letter dated 23.10.2012 that the matter be kept pending till a final decision was rendered in the present writ petition. Another advisory letter was issued on 22.11.2012 stating that the earlier memo should be complied with, as no interim orders were operating in the present writ petition and delay in compliance of the order of the State Government would be viewed seriously.

(14) The written statement of respondent No.3/NHAI more or less sets forth the aforesaid facts set out hereinabove including the communications with the Chief Secretary, Government of Punjab requesting for suitable directions including vide letter dated 21.6.2011 raising the problem of delay in completion of project.

(15) The State Government/respondent No.2 has also filed an additional affidavit affirmed on 4.3.2013 arising from the intervention permitted in the present case of one Vivek Aditya and the material placed by him before the Court. It is averred that in the proceedings of 27.2.2013, a counsel representing Union of India/respondent No.1 had produced before this Court a letter dated 22.2.2013 of the Ministry of Personnel, Public Grievances and Pensions of the Government of India which informs as under:-

“The five O.Ms dated 27.10.2008, 23.12.1985, 2.7.1960 and 17.7.1998 issued by the Department regulating the acceptance of fee/honorarium on which clarification has been sought by the Hon’ble Court, are applicable to central service officers only. The provisions of these O.Ms issued by Estt. Division of this Department have not been extended to AIS officers, who are to be regulated in such matters as per the provisions of Rule 2(b) of AIS (Conditions of Service-Residuary Matters) Rules, 1960 (copy enclosed) while they are serving in the State Cadre”.

In the aforesaid context, reference has been made to Rule 2(b) of the All India Services (Conditions of Service-Residuary Matters) Rules, 1960 which reads as under:

“2. Power of Central Government to provide for residuary matters.—*The Central Government may, after consultation with the Governments of the States concerned, make regulations to regulate any matters relating to conditions of service of persons appointed to an All India service, for which there is no provision in the rules made or deemed to have been made under the All India Services Act, 1951 (61 of 1951); and until such regulations are made, such matters shall be regulated:-*

- (a) In the case of persons serving in connection with the affairs of the Union, by the rules, regulations and orders applicable to officers of the Central Services, Class I;*
- (b) in the case of persons serving in connection with the affairs of a State, by the rules, regulations and orders applicable to officers of the State Civil Services, Class I, subject to such exceptions and modifications as the Central Government may, after consultation with the State Government concerned, by order in writing, make.”*

It has, thus, been averred that the conditions of service of persons appointed to the AIS and serving in connection with the affairs of the State (State of Punjab in the present case) are governed by rules, regulations and orders applicable to officers of the State Civil Services, Class-I subject to such exceptions and modifications as the Central Government may make by order in writing after consultation with the State Government concerned. Thus, the provisions of the Punjab Civil Services Rules as applicable to Class- I Officers would apply regarding conditions of service of respondent No.4 in addition to the rules and regulations framed under the All India Service Act, 1951 (for short “the AIS Act”) and the Conduct Rules. Thus, this clarification is stated to have taken care of the office memorandums placed on record by the Intervener qua arbitration fee charged by respondent No.4.

(16) The affidavit also goes on to clarify that the Notifications dated 17.12.2009, 3.2.2010 and 26.12.2011 issued by the Central Government in terms of Section 3G(5) of the NHA Act appointing the Commissioner, Jalandhar Division as Arbitrator, were essentially for appointments of Arbitrator by designation and not by name of respondent

No.4 and, thus, it was submitted that it was in the nature of an *ex-officio* appointment to be held by the incumbent/holder of the office. It has been clarified qua interpretation of rules and regulations framed under the AIS Act by the Government of India, Department of Personnel as far back as vide its letter dated 6.6.1972 that these are the views of the Central Government which should be placed before the Court which should also be arrayed as a party. Thus, the burden has been put on the Government of India to clarify its stand in this behalf. But insofar as the State Government is concerned, the stand is categorical that since respondent No.4 had not obtained permission of the competent authority before charging the arbitration fee as required under Rule 13(4) of the Conduct Rules, the fee was required to be remitted back along with interest and directions had already been issued vide letter dated 11.10.2012 of the State Government while directing respondent No.4 to restrain from charging fee in future.

(17) Insofar as stand of Union of India is concerned, it would suffice to refer to the affidavit filed by Ministry of Road Transport and Highways, affirmed on 27.7.2013, by reference to the four questions raised in the order dated 8.5.2013. It has been stated that the issues raised by the Court had been deliberated in the meetings at length and the answers to the four queries is as under:-

- (i)(a) The arbitration proceedings would be governed by the Arbitration Act as well as the NHA Act, but insofar as payment of fee is concerned, the Arbitrator like respondent No.4 would be governed by his own service rules and, thus, Rule 13(4) of the Conduct Rules would apply.
- (i)(b) No fee can, thus, be claimed or fixed without prior sanction of the competent authority under which the officer so appointed as Arbitrator works;
- (i)(c) NHAI has so far not paid any amount to revenue officers working in various States as Arbitrators in cases relating to acquisition nor is there any intention on the part of the Ministry of NHAI to make such payments as they are expected to perform these functions as part of their normal duty in public interest which has also been made

explicitly clear to respondent No.4 by the Government of Punjab;

- (ii) A revenue officer working under the State Government does not have the power to fix his own fee. It is not entitled to any remuneration in respect of land acquisition cases involving national highways. This aspect is stated to have been made clear vide recent guidelines dated 26.7.2013 annexed to the affidavit;
- (iii)(a) The services rendered by revenue authorities by way of arbitration in the matter of land acquisition for national highways is a part of normal duties requiring no special honorarium, but should a State Government desire to reward its revenue officers assigned the work of arbitration in such matters, it is the State Government, who is the competent authority, who is free to do so, but such honorarium shall be paid from the Consolidated Fund of the State Government;
- (iii)(b) In terms of O.M. dated 2.7.1960 of the Ministry of Finance, Department of Expenditure, a Government servant appointed as Arbitrator in a dispute between a private party and a Ministry other than one he is working in, may undertake such work and receive honorarium therefor with the prior approval of the competent authority and the rates of honorarium are prescribed in the O.M. which has been revised vide O.M. No.17011/21/79-Estt.(Allowances) dated 29.9.1981 and O.M.No. 17011/8/2007-Estt.(Allowances) dated 27.10.2008. These O.Ms. are applicable to Central Civil Services Employees of the Government of India appointed as Arbitrators. As the officer who was appointed as Arbitrator being respondent No.4 is an AIS Officer working in a State, the provisions of the O.Ms. would not be applicable to him.
- (iv) The questions would not arise in view of the answers given aforesaid.

(18) The Union of India has, thus, taken a categorical stand in respect of the non-entitlement of respondent No.4. It has, however, been mentioned that NHA Circular on policy matters dated 24.12.2012 takes care of a financial provision to cope with the expenditure incurred on supporting staff and contingencies so as to ensure smooth functioning of arbitration proceedings.

(19) The aforesaid stand of all the three concerned respondent-authorities, thus, in our view, leaves no manner of doubt that they are all of the same opinion i.e. respondent No.4's appointment is as a consequence of his holding a particular post and the appointment being by designation, the work he carried on was a part of his official duties and, thus, no fee whatsoever is payable to him.

(20) Despite the aforesaid stand taken by all the departments concerned, respondent No.4 was insistent that he is entitled to retain the amount which he recovered as a fee. In fact, the Court did put to learned senior counsel for respondent No.4 whether the said respondent would have a reconsidered thought process in view of the stand taken by all the official respondents and refund the amount, but the learned senior counsel submitted that the said respondent would like to invite an order as he is of the view that he is entitled to retain the amount.

(21) We, thus, proceeded to hear learned counsel and to appreciate his submission for which we would turn to the stand taken by him in his written statement. The stand of the respondent No.4 is that he has been appointed as an Arbitrator by Government of India in exercise of powers under Section 3G(5) of the NHA Act with the concurrence of the State Government and, thus, the same is a statutory appointment and not in an *ex-officio* capacity. The proceedings of the arbitration have to be carried on as per the provisions of the Arbitration Act in view of Section 3G(6) of the NHA Act. No fee had been prescribed either by the Central Government or the State Government and, thus, in view of Section 31(8) of the Arbitration Act, respondent No.4 fixed the arbitration fee. A reference has also been made to Section 2(4) of the Arbitration Act which makes the provisions of that Act applicable to every arbitration under any enactment except Sub-section (1) of Section 40, Section 41 and Section 43 of the Arbitration Act.

(22) Rule 13 of the Conduct Rules is stated to be referring to obtaining of sanction of Government by members of service in case the person deals with any work as prescribed under Sub-rules (1), (2) and (3) of Rule 13 and in that case while accepting fee, permission of the Government has to be obtained under Rule 13(4) of the said rules. Since respondent No.4 claims not to be working as an Arbitrator in an *ex-officio* capacity, the rule is stated not to be applicable. It is claimed to be a specific appointment each time when notification is issued and not by virtue of his office. An *ex-officio* appointment is stated to be an appointment by virtue of the office, in view of the observations of the Hon'ble Supreme Court in ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and others(1)***. Respondent No.4 claims that he had been repeatedly representing the State Government regarding deposition of one-third of arbitration fee with the Government Treasury, as envisaged under Supplementary Rules of FR, through various communications and claims to have informed the State Government in one form or the other about fixation and charging of arbitration fee. In this behalf, reference has been made to an internal communication of Chief General Manager, NHAI dated 14.7.2009 to the effect that arbitration fee will have to be paid as per the provisions of the Arbitration Act unless exemption is granted by the Government. The State Government is stated to have in fact advised the NHAI vide letter dated 6.7.2010 for depositing arbitration fee and this matter was taken up with the Chief Secretary, Punjab by NHAI in terms of their letter dated 21.6.2011. Despite this, NHAI was reluctant to deposit the fee. The said respondent claims that he had spent time on Saturdays and gazetted holidays for purposes of arbitration work and in Jalandhar Division he spent over 3 years and 11 months. In the process of various communications, respondent No.4 claims to have come across Annexure P-2 which is the Office Memorandum (O.M.) dated 27.10.2008 and, thus, addressed a letter dated 3.9.2012 to the Government to allow the answering respondent to charge the arbitration fee according to the circular with the offer to deposit in the Government Treasury the excess amount wherever it had been charged. However, the interpretation being put forth on that O.M. is that when the reference is made to charging of a maximum fee of ₹ 10,000/- per case, the amount

(1) (2002) 5 SCC 111

is stated to be co-relatable to the particular claim of an individual party i.e. “per case” and observed to be a reference to ‘not per Arbitrator’ but an ‘individual dispute pending’. This fee is stated to be paid to Arbitrators by the Department of Railways and private parties. Certain communications received from Dedicated Freight Corridor Corporation of India have also been referred to in this behalf.

(23) An application for intervention filed by the intervener has also enclosed this O.M. dated 27.10.2008 and it is stated in the application that the reference to “case” is not to an arbitration case but an officer per year. For DOPT, each officer is a file & a case and his total fee/honorarium in a year is a case and the possible misinterpretation is stated to have been clarified as per the earliest O.M. dated 2.7.1960 annexed as Annexure I/6. The Memorandum reads as under:-

“Honorarium to Government Servant appointed as arbitrator.—

No uniform practice is being followed by various Ministries/ Departments of the Government of India with regard to the grant of honorarium/fees to a Government servant appointed to act as arbitrator in disputes between the Government of India and private parties or between private parties. In order to ensure uniformity in this respect, it has been decided, in consultation with Ministry of Law, as follows:-

- (i) When a Government servant is appointed to act as an arbitrator in a dispute between the Ministry/Department of Government of India in which he is working and a private party, he should not be granted any honorarium.*
- (ii) If, however, he is appointed as an arbitrator in a dispute between a private party and Ministry/Department other than the one in which he is working, he may undertake such work and receive honorarium therefor on the following conditions:-*
 - (a) Before undertaking the work, the officer shall, as required under FR 46(b), obtain the prior approval of the competent authority, who shall decide whether, consistently with his official*

duties, he may be allowed to undertake the work and receive honorarium for it.

- (b) *The honorarium may be paid to him at the rate of ₹500 per day or ₹250 per half-day subject to a maximum of ₹10,000 per case. For this purpose, a day means more than two hours' continuous work on any day and half-day means work for two hours or less. He shall record a certificate in writing indicating whether he has done a day's work or a half-day's on a particular day.*
- (iii) *In either of the above two cases, when any costs on account of arbitration are awarded against a private party, the entire amount, on recovery by the Ministry/ Department concerned, shall be credited to Government and shall not be paid to the arbitrator.*
- (iv) *A Government servant may, with the prior permission of the competent authority as required under FR46(a) accept the appointment as an arbitrator in a dispute between private parties. At the time of giving such permission, the competent authority shall decide whether, consistently with his official duties, he may undertake the arbitration work and also whether he may accept any fee for it from the parties to the dispute. This fee shall be subject to the provisions of SR 12."*

The relevant extracts of the Office Memorandums Annexure I/8 dated 31.3.1994/20.1.1997 and Annexure I/9 dated 17.7.1998, respectively, are quoted hereunder:

"2. Instances have come to the notice of this Department where payment of honorarium exceeding ₹ 5000/- has been made during a year on the plea that the limit of ₹5000/- is applicable to each item of work separately. It is clarified that the total amount of honorarium payable to a Govt. Servant during a financial year is limited to ₹ 5000/- under the powers delegated to the Ministries/Departments/C & A G of India and to ₹2500/- under the powers of Heads of Deptts. These limits

cannot be exceeded in any case by treating different items of work or same item of work performed at different times of the year as separate for the purpose of calculating the entitlement of honorarium.”

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“It is also clarified that the amount of ₹5000/- ₹2500/- payable ‘in each case’ by the Ministries/Departments under the powers delegated to them vide this Department’s O.M. No.17011/9/85-Estt (AL) dated 23.12.85, refers to the total amount of honorarium, whether recurring or non-recurring, that may be paid to an individual in a financial year.”

(24) Thus, it was submitted by the respondents No.1 and 2 that the escape route sought to be adopted by respondent No.4 of charging ₹ 10,000/- “per case” would not be permissible.

(25) Learned senior counsel for respondent No.4 also sought to distinguish a fee from an honorarium by referring to Swami’s Fundamental Rules where fee and honorarium have been described as under:-

“(6-A) Fee means a recurring or non-recurring payment to a Government servant from a source other than the Consolidated Fund of India, or the Consolidated Fund of a State or the Consolidated Fund of a Union Territory whether made directly to the Government servant or indirectly through the intermediary of Government, but does not include-

- (a) unearned income such as income from property, dividends, and interests on securities; and*
- (b) income from literary, cultural, artistic, scientific or technological efforts and income from participation in sports activities as amateur.”*

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(9) Honorarium means a recurring or non-recurring payment granted to a Government servant from the consolidated Fund of India or the Consolidated Fund of a State or the Consolidated

Fund of a Union Territory as remuneration for special work of an occasional or intermittent character.”

(25) In the aforesaid context, as per Audit Instructions, FR-46 reads as under:-

“F.R. 46 (a) Fees.—Subject to any rule made under Rule 46- A and Rule 47, a Government servant may be permitted, if this can be done without detriment to his official duties and responsibilities, to perform a specified service or series of services for a private person or body or for a public body including a body administering a local fund and to receive a remuneration therefor, if the service be material, a non-recurring or recurring fee.

NOTE.—This clause does not apply to the acceptance of fees by medical officers in civil employ, for professional attendance which is regulated by the orders of the President.

(b) Honoraria.—The Central Government may grant or permit a Government servant to receive an honorarium as remuneration for work performed which is occasional or intermittent in character and either so laborious or of such special merit as to justify a special reward. Except when special reasons which should be recorded in writing, exist for a departure from this provision, sanction to the grant of acceptance of an honorarium should not be given unless the work has been undertaken with the prior consent of the Central Government and its amount has been settled in advance.

(c) Fees and Honoraria.—In the case of both fees and honoraria, the sanctioning authority shall record in writing that due regard has been paid to the general principle enunciated in Fundamental Rule 11 and shall record also the reasons which in his opinion justify the grant of the extra remuneration.”

A reading of the aforesaid FR shows that the Government servant “may be permitted” to perform a specified service or series of service for a public body against non-recurring or recurring fee.

(26) A reference was also made to FR-48, which reads as under:-

“F.R.48. Any Government servant is eligible to receive and, except as otherwise provided by a general or special order of the President, to retain without special permission—

- (a) the premium awarded for any essay or plan in public competitions;*
- (b) any reward offered for the arrest of a criminal, or for information or special service in connection with the administration of justice;*
- (c) any reward in accordance with the provisions of any Act or Regulation or rules framed thereunder;*
- (d) any reward sanctioned for services in connection with the administration of the customs and excise laws; and*
- (e) any fees payable to a Government servant for duties which he is required to perform in his official capacity under any special or local law or by order of Government.”*

It is in the aforesaid context that the learned senior counsel for respondent No.4 contended that even without any special permission, a Government servant is entitled to retain any fee payable for duties which he is required to perform in his official capacity under any special or local law or by order of Government.

(27) In the aforesaid context, reference was also made to the Punjab Civil Service Rules, Part-I which is stated to be on a pari materia basis as under:

“[Old 5.63] 1.5.49. Any Government employee is eligible to receive and except as otherwise provided by a general or special order of the competent authority, to retain without special permission.

- (a) the premium awarded for any essay or plan in public competitions;*
- (b) any reward offered for the arrest of a criminal, or for information or special service in connection with the administration of justice;*

- (c) *any reward payable in accordance with Regulation or rules framed thereunder;*
- (d) *any reward sanctioned for services in connection with the administration of the customs and excise laws; and*
- (e) *any fees payable to a Government employee for duties which he is required to perform in his official capacity under any special or local law or by order of Government.”*

Thus, his submission is that respondent No.4 need not get permission and can still retain the fee.

(28) On having given our deep thought to the controversy in question we are unequivocally of the view that respondent No.4 is not entitled to retain and claim any amount whatsoever in view of the stand of both respondents No.1 and 2.

(29) Respondent No.4 is a member of the AIS and is governed by the rules arising from course of this employment. It is not his whim and fancy to generate income from other sources in the course of this employment, if the same is not permitted by the Central Government or the State Government depending on where he is posted. The respondent No.4 was posted at the relevant time with the State of Punjab. It is interesting to note that apart from respondent No.4, no one else has claimed any fee whatsoever for performing the duties of an Arbitrator in pursuance to the appointment under Section 3G(5) of the NHA Act. It has been a unique endeavour of respondent No.4 to aggrandize and enrich himself by this method. The sad part is that even when both the State authorities have made their stand clear, the said respondent refused to follow rules unbending. Possibly, the amount being huge appears to have caused the said respondent to take an obdurate stand in this behalf!

(30) If there was any difference of views or confusion it stood resolved by the various communications issued by the State Government and the Union of India. The stand of the Union of India as taken in its affidavit has been set out by us in detail and there is no point in repeating the same again. Suffice to say, when the categorical stand is against retaining any amount and to prevent such eventualities from arising in future, necessary circulars have now been issued, *inter alia*, in the form

of guidelines relating to appointment of Arbitrators under the NHA Act vide letter dated 26.7.2013.

(31) We fail to appreciate as to how respondent No.4 can go outside the rigours of sub-rule (4) of Rule 13 of the Conduct Rules which requires prior sanction of the Government. It is not as if any permission has been obtained by respondent No.4, but, on the other hand, the permission has been specifically declined. Respondent No.4 cannot hide himself behind the plea of performing a statutory function under the NHA Act read with the Arbitration Act.

(32) We are unable to accept the plea of learned senior counsel for respondent No.4 that appointment of respondent No.4 was not by designation merely because a notification was issued every time. The notifications did not mention the name of any officer including of respondent No.4. It only referred to the post held by him. It is, thus, clearly a case of an appointment of Arbitrator by designation and the person so appointed has to perform the task as part of his overall duties. In the teeth of the Rule 13(4) of the Conduct Rules, the respondent No.4 cannot be permitted to fall back on the effort to carve out a distinction between fee and honorarium and then try to plead that a separate fee is chargeable because there is a provision under Section 31(8) of the Arbitration Act. No doubt, the mode and manner of providing for costs of arbitration including fee of the Arbitrator has been provided in the said Section, but that is for a normal situation where some fee has to be fixed and not where a person like respondent No.4 is performing his duties of an Arbitrator in the capacity of an Officer to whom the work has been assigned as part of his duties.

(33) As far as the alternative escape route endeavoured by respondent No.4 of seeking a fee of ₹ 10,000/- “per case”, the same also stands explained by the O.Ms. issued in this behalf and quoted aforesaid which make it clear that reference is to the total payment in a span of a year.

(34) The Union of India has made it clear that if the State of Punjab, where respondent No.4 is deployed at present, seeks to give some payment, it is free to do so out of the Consolidated Funds’ amount for the State. But that is not so. The State does not want to make any payment to respondent No.4 and has been quite categorical in its

communication to respondent No.4 in this behalf, more specifically the communication dated 11.10.2012. Respondent No.4 must abide by the same.

(35) We are, thus, of the view that respondent No.4 is duty bound to adhere to the advice/directions contained in the letter of the Department of Personnel of the Government of Punjab dated 11.10.2012 which have been quoted aforesaid, requiring respondent No.4 to deposit the complete amount of arbitration fee charged along with interest earned/received from the bank on this amount in the arbitration account and the Government be informed accordingly. The refund of the amount deposited as income tax on the amount charged as arbitration fee should be claimed forthwith and as soon as the refund is received the same should also be deposited in the arbitration account. The details as required in the remaining paragraph of the said letter should also be provided and all the needful be done by respondent No.4 within a period of one month from today.

(36) We, however, simultaneously consider it appropriate to issue a direction that since the private landowners have paid the share of the fee of the NHAI to get their awards released, wherever such fee has been paid, the same along with the share of fee of the private landowners be refunded in toto along with proportionate interest as may be remitted by respondent No.4. The private landowners, thus, should not be deprived of this benefit as a large amount of arbitration fee has to be really recovered and, therefore, it is the bounden duty of the State Government to ensure the remittance back of this amount to the individual landowners of whatever fee they may have paid for arbitration along with proportionate interest as may have been recovered and deposited by respondent No.4. This exercise be completed by the State within a period of one month from the deposit of the amount by respondent No.4.

(37) We, thus, allow the writ petition in the aforesaid terms.

(38) We also consider it appropriate to impose costs on respondent No.4 for his conduct and unnecessary wastage of judicial time on account of his obdurate stand, quantified at ₹ 20,000/-, to be deposited with the Mediation Centre of the High Court.

P.S. Bajwa