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Supreme Court clarifies issues surrounding fees charged by arbitrators in *ad hoc arbitrations*

Recently, a 3-judge bench of the Hon'ble Supreme Court of India (**"Court"**), in the case ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV***[1], disposed of a batch of petitions[2] and clarified various issues surrounding the fees that can be charged by arbitrators in *ad hoc* arbitrations in India.

The Court framed and answered the following questions:

1. Whether an arbitrator/arbitral tribunal can unliterally fix or increase its fee, even when there exists an agreement between the parties on the quantum of fee payable to the arbitrator/arbitral tribunal?
2. If no agreement, as specified in point 1, exists then what practice must be followed by the arbitrator(s) to fix the fee?
3. Whether the cap of INR 30,00,000 (Indian Rupees thirty lakh) specified under the entry at Serial No. 6 (six) of the Fourth Schedule to the Arbitration & Conciliation Act, 1996 (**"Act"**) is the maximum fee payable or whether the cap is with respect to the variable component, such that the maximum fee payable would become INR 49,87,500 (Indian Rupees forty nine lakh eighty seven thousand five hundred).
4. Whether the term "sum in dispute" referred to in the Fourth Schedule of the Act refers to the cumulative sum of the claim and counter claim, or whether the fee is to be determined separately for the claim and the counter claim?

The majority judgment was delivered by Justice D.Y. Chandrachud on behalf of himself and Justice Surya Kant. Justice Sanjiv Khanna wrote a separate and dissenting opinion.

Majority opinion

Executive Summary

The majority opinion of the Court observed that:

1. Arbitrators do not have the power to unilaterally issue binding and enforceable orders determining their own fees. *[see sub-section (a) below]*
2. The Arbitral Tribunal may apportion the costs (including its fee) between the parties in accordance with Section 38 of the Act. *[see sub-section (a) below]*

[1] Arbitration Petition (Civil) No. 05 of 2022, decided on August 30, 2022.
[2] Civil Appeal No 5880 of 2022, Civil Appeal No 5879 of 2022, Miscellaneous Application Nos. 1990-1991 of 2019 in Special Leave Petition (Civil) Nos. 10021-10022 of 2017

3. The parties can approach the courts under Section 39(2), if they find the fee fixed by the arbitrator as unreasonable. *[see sub-section (a) below]*

4. Guidelines were issued for fixation of fees at the inception of arbitration to avoid unnecessary litigation. *[see sub-section (b) below]*

5. The term "sum in dispute" in the Fourth Schedule refers to sum in dispute in a claim and counter claim separately and not cumulatively. *[see sub-section (c) below]*

6. The maximum fee payable under the Fourth Schedule is INR 30,00,000 (Indian Rupees thirty lakh) per arbitrator. In case of a sole arbitrator, he/she would be entitled to a further amount of 25% over and above the payable fee. *[see sub-section (d) below]*

(a) **Observations re. Determination of arbitrators' fee**

The Court observed that a unilateral fixation of fees by the arbitrator(s) goes against the principle of party autonomy, which is central to the resolution of disputes through arbitration, especially when there is no enabling provision in the Act permitting the arbitrator(s) to do so.

The Court took note of the rules of various international arbitral institutions and organisations.[3] It observed that typically, in an arbitration conducted under the auspices of an arbitral institution, the fees payable to the arbitrator(s) is fixed by the institution itself, however, some allow the parties and the arbitrators to negotiate the fee to a certain extent, upholding the principles of party autonomy.

However, it noted that none of the international bodies (including arbitral institutions) confer an absolute or unilateral power to the arbitrator(s) to decide their own fees.

Taking note of the various legislations on arbitral procedure in other countries,[4] the Court observed that although there are jurisdictional differences, typically, the arbitrator(s) do not possess an absolute or unilateral power to determine their own fees. The parties in arbitration are involved in determining the fees of the arbitrator(s) in some form. It could be by:

(i) Determining the fees at the threshold in the arbitration agreement; or

(ii) Negotiating with the arbitrators when the dispute arises regarding the fees that are payable; or

(iii) By challenging the fees determined by the tribunal before a court.

Turning to the statutory scheme in force in India with respect to payment of fee, the court took note of various provisions in the Act itself, judicial precedents, as well as the recommendations made under the 246th Law Commission Report (**"LCI Report"**). It observed that in terms of the Court's earlier decision in *NHAI v. Gayatri Jhansi Roadways Ltd.*[5] and the cardinal principle of party autonomy, the Fourth Schedule is not mandatory, and that the parties can by agreement specify the fees payable to the arbitrator(s) or the modalities for determination of arbitrator's fees.

In cases where an arbitrator is appointed by the Court, in the absence of rules framed by the concerned High Court for determining arbitrator's fees, the Fourth Schedule would not be applicable by itself to such court-appointed arbitrators.

On behalf of the respondents, it was submitted that the arbitral tribunal's power to fix costs under Section 31(8) read with 31A of the Act entails the power to fix arbitrators' fees, which are also a component of the costs in terms of the Explanation to Section 31A of the Act. The Court observed that the functional role of costs and fees is different. While 'fees' represent the payment of remuneration to the arbitrators, 'costs' refer to all

[3] United National Commission on International Trade, Permanent Court of Arbitration, London Court of International Arbitration, International Centre for Dispute Resolution, International Chamber of Commerce, Singapore International Arbitration Centre, Hong Kong International Arbitration Centre, International Centre for Settlement of Investment Disputes.
[4] England, Italy, Sweden, Germany, Japan, Singapore, and United States.
[5] (2020) 17 SCC 626

the expenses incurred in relation to arbitration that are to be allocated between the parties upon the assessment of certain parameters by the arbitral tribunal or the court.

Dealing with the Respondent's submissions with respect to Section 38 of the Act, the Court observed that the purpose of demanding a deposit is to simply secure the future expenses or the "costs" relating to the arbitration, including arbitrator's fees. The arbitrator(s) may resign or cease their work until such payment is made. This principle cannot be extended to establish that the arbitrator(s) have a unilateral power to fix their own fees while demanding a deposit.

The arbitral tribunal while deciding the allocation of costs under Sections 31(8) read with 31A or advance of costs under Section 38 cannot issue any binding or enforceable orders regarding their own remuneration. This would violate the principle of party autonomy and the doctrine of prohibition of *in rem suam* decisions, which postulates that the arbitrators cannot be the judge of their own claim against parties regarding their remuneration. The tribunal may apportion costs between the parties and can also demand deposits and supplementary deposits since these advances on costs are merely provisional in nature.

(b) **Directives governing fees of arbitrators in ad hoc arbitrations**

The Court proposed that preliminary hearings should be used to determine and agree on the fee to be paid by the parties. It observed that the preliminary/case management hearings should also be conducted when the fees are specified in the arbitration agreement since there might be a need for revision of fee if the arbitration agreement is several years old, making the fee prescribed in the agreement unrealistic due to the passage of time.

In the preliminary hearings, if all the parties and the arbitral tribunal agree to a revised fee, then that fee would be payable to the arbitrator(s). However, if any of the parties raise an objection to the fee being demanded by the arbitrator(s) and no consensus can be arrived at between such a party and the tribunal or a member of the tribunal, then the tribunal or the member of the tribunal should decline the assignment. Since the relationship between the parties and arbitrator(s) is contractual in nature, specifically with respect to the payment of remuneration, there must be a consensus on the fees to be paid.

For arbitration proceedings expected to continue for a longer time than usually taken, the parties and the arbitrator(s), during the preliminary hearings, should clearly stipulate that after a certain number of sittings, the fee would stand revised at a specified rate. The specific details with regards to the same must be clearly discussed and determined during the preliminary hearings. There is no unilateral power reserved to the arbitrator(s) to revise the fees on their own terms if they believe that an additional number of sittings would be required to settle the dispute.

Failing an agreement as mentioned above, the arbitrator(s) who decline to accept the fee suggested by the parties (or any of them) would be at liberty to decline the appointment.

When one or both parties, or the parties and the arbitral tribunal are unable to reach a consensus, it would be open to the arbitral tribunal to charge the fee as stipulated in the Fourth Schedule. When an arbitral tribunal fixes the fee in terms of the Fourth Schedule, the parties should not be permitted to object to the fee so fixed.

The Court noted that these directions are to effectuate the object and purpose behind enacting the model fee schedule, even though there may be a situation where some litigants would object to even a just and fair arbitration fee.

(c) **Observations re. "Sum in Dispute"**

The Court took note of the statutory framework of the Act and the Code of Civil Procedure, 1908, related academic discourse, and judicial pronouncements and observed that the adjudication of claims and counter claims are independent and distinct proceedings. It applied these observations to interpret the term "sum in dispute" appearing in the Fourth Schedule of the Act.

The Court stated that from Section 31(8), Section 31A, and Section 38(1) of the Act, it is clear that: (i) separate deposits are to be made for a claim and counter claim in an arbitration proceeding; and (ii) these deposits are in relation to the costs of arbitration, which includes the fee of the arbitrators. Therefore, the determination of the fee under the Fourth Schedule should also be calculated separately for a claim and counter claim and the term "sum in dispute" would refer to independent claim amounts for the claim and counter claim.

The Court observed that if this interpretation is not adopted, it would have the following consequences in terms of procedural fairness:

(i) First, under the proviso to Section 38(1), the arbitral tribunal can direct separate deposits for a claim and counter claim. Hence, if the arbitrators were to charge a common fee for both the claim and counter claim, they would have to then equitably divide that fee while calculating individual deposits for the purposes of the proviso to Section 38(1).

(ii) Second, the second proviso to Section 38(2) provides that if the deposit is not made by both the parties, the arbitral tribunal can dismiss the claim and/or counter claim, as the case may be. If the claim was to be dismissed in such a manner, it would lead to an absurd situation where the arbitrators' fee would have to be revised in the middle of the arbitration proceedings solely on the basis of the amount of the counter claim.

(iii) Third, under Section 23(2-A), the only requirement of a counter claim is that it should arise out of the same arbitration agreement as the claim. However, the cause of action of a counter claim may be entirely different from the claim and possibly far more complex, for which the arbitrators must be compensated separately.

(d) **Observations re. Fee Ceiling in the Fourth Schedule**

The Court noted the difference in the English and Hindi texts of the Act and the Fourth Schedule. It was alleged on behalf of the Petitioners that the presence and placement of a comma in the Hindi translation meant that the ceiling of INR 30,00,000 (Indian Rupees thirty lakh) would be applicable to the entire clause, making it the maximum fee payable irrespective of the increase in the claim amount beyond INR 20,00,00,000 (Indian Rupees twenty crore).

The Court observed that as per Article 348(1)(b)(i) of the Constitution of India, which applies to the present case as well for the purpose of interpreting the Act and the Fourth Schedule, the English language text would be considered as the authoritative text. However, it noted that an exception to the rule of literal interpretation would be made when the text goes manifestly against the legislative intent behind the enactment.

It observed that the model fee under the Fourth Schedule was incorporated in the Act after the same was recommended by the Law Commission in the LCI Report, to put an end to the practice of arbitrators charging exorbitant fees. It was also noted that since the model fee schedule proposed by the LCI Report was based on the one used by the Delhi International Arbitration Centre (**"DIAC"**), which does have a comma, the ceiling of INR 30,00,000 (Indian Rupees thirty lakh) should be construed to be the maximum fee payable. It observed that if the ceiling was applied only to the variable component, the maximum fee payable would become INR 49,87,500 (Indian Rupees forty nine lakh eighty seven thousand five hundred), which would not be in keeping with the legislative intent.

With regards to the submission that the ceiling fixed by the Court would apply to the entire tribunal, such that it gets divided between the arbitrators equally, the Court rejected the same. It observed that the fee provided in the Fourth Schedule is for each individual arbitrator, regardless of whether they are a member of a multi-member tribunal or a sole arbitrator.

Dissenting Judgment

Justice Sanjeev Khanna (**"J. Khanna"**) authored a dissenting judgment in the matter, disagreeing with Justice Chandrachud and Justice Surya Kant on certain issues, while agreeing with them on all other remaining aspects.

Regarding the determination of arbitrators' fee, J. Khanna observed that in the absence of an agreement between the parties or a court order fixing the fee, an arbitral tribunal can fix a reasonable fee. Such reasonable fee can be challenged by either party before the concerned court under Section 39(3) of the Act during the pendency of the arbitration.

He observed that what is 'fair' and 'reasonable' would depend on facts of the dispute and on what the national systems prescribe including judicial assessment of the appropriate amount. Various factors to be regarded would be – (a) complexity of the dispute; (b) difficulty or novelty of the questions involved; (c) the skill, specialised knowledge, and responsibility of the arbitral tribunal; (d) number and importance of documents to be studied; (e) value of the property involved or the amount or the sum in issue; (f) importance of the dispute to the parties; and (g) Fourth Schedule of the 1996 Act.

It was clarified that the fee structure fixed in the Fourth Schedule or by the high courts under Section 11(14) should be considered as 'fair and reasonable'.

Regarding the issue of interpretation of the Fourth Schedule of the Act, J. Khanna observed that the expression 'sum in dispute' in the Fourth Schedule does not refer to a claim or counter claim but rather total amount of the subject matter before the arbitral tribunal. The reasoning being that counter claim and set off raised before a tribunal fall within the scope of the arbitration agreement. The Act does not contemplate separate jurisdictions for arbitral tribunal on the basis of number or nature of claims. The contradictory argument advanced on the basis of Section 38(1) was negated on the ground that Fourth Schedule deals with quantum of fee whereas Section 38 does not prescribe any such quantum.

JSA Comment

The issue of arbitrator's fee and in specific, unilateral fixation, has long been in discussion. There have been multiple views and discourses around it. The expression of dissent over the final adjudication on this issue highlights the same. Nevertheless, the issue is no more *res integra* and will help consolidate the practice of arbitration in India.

The judgment brings forth the importance of the arbitrators and their demeanour as a central stakeholder in arbitration. Yet, the issue does not get resolved by finality of legal proposition on their fee. An arbitrator's efficiency and pro-active role remains *sine qua non* for making arbitration an orderly and attractive method of dispute resolution.

Lastly, reliance on Article 142 of the Constitution of India to appoint new arbitrators has its own dimensions and the suitability of the same may require a re-look when the appropriate time comes.

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This Prism has been prepared by:

Ananya Kumar
Partner

Divyam Agarwal
Partner

Kartikey Gupta
Associate

Pranav Tanwar
Associate

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