



ARBITRATION AND CONCILIATION

Supreme Court Clarifies The Law On Payment Of Fees To Arbitrators

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The Hon'ble Supreme Court (the SC) in *Oil and Natural Gas Corporation Ltd. vs. Afcons Gunanusa JV*^[1] settled law on applicability of the Fourth Schedule ("the Schedule") of the Arbitration and Conciliation Act, 1996 ("the Act") and in view of the same, imposed a ceiling of Rs. 30,00,000 payable to each arbitrator. Furthermore, the SC discussed and reiterated the significance of party autonomy which is the one of the fundamental principles of the arbitration jurisprudence.

Facts of the case

Oil and Natural Gas Corporation Limited (ONGC/ Petitioner) entered into a lumpsum turnkey contract with Afcons Gunanusa JV (hereinafter referred as the Respondent) in the year 2009. The said contract was entered into for construction of ICP-R Platform that was completed in December 2012. Due to occurrence of [several disputes](#) between the Petitioner and the Respondent, in the year 2015, Respondent invoked arbitration in accordance to the terms of the said contract. The said contract also explicitly provided for the arbitrators' fees to the tune of ₹ 10,00,000 in case if the claim amounts to or exceeds ₹ 10,00,00,000.

In 2018, by way of a procedural order, considering *inter alia* complexity of the issues involved and high value of claims, the arbitral tribunal revised the fee payable to each arbitrator to the tune of ₹ 1, 50,000 for each sitting confined to 3 hours. At the outset, in view the Schedule to the Act, the arbitration tribunal sought a revision in agreed fees payable to each arbitrator. The Respondent was agreeable to aforesaid fees. However, the Petitioner objected to the reading fees charged by the arbitral tribunal on the ground that the Schedule to the Act did not envisage the same. Petitioner aggrieved with the said procedural order, approached the Hon'ble High Court of Bombay.

The said Hon'ble High Court rejected the application of the Petitioner and directed it to approach the SC as the matter relates to international commercial arbitration. Subsequently in compliance of the order of the Hon'ble High Court of Bombay, this arbitration petition was filed.

Contentions

The counsel for the Petitioner relying extensively on judgment given by the SC in *NHAI vs. Gayatri Jhansi Roadways Ltd.* ^[2] and the Schedule to the Act *inter alia* mainly contended that the arbitrators fee fixed by the parties in the agreement shall be binding. In case if they do not agree to the stipulated fees, they may exercise their liberty to refuse a particular arbitration assignment. Further, the counsel also submitted that in absence of the agreement between the parties, the arbitrator shall not be allowed to unilaterally decide on the aspect of their fees.

The counsel for the Respondent while heavily relying upon S. 31 and 38 and securing the right of remuneration of the arbitrators contended that if the agreement does not stipulate the arbitrators fees, the arbitrators shall have the mandate to decide upon the same. Furthermore, it was contended that the issue of fixation of fee is dealt with as a part of "costs" under the relevant clauses of the said aforesaid section 31(8) read with Section 31A.

Observations of the SC

The Hon'ble SC held that the arbitrators cannot unilaterally decide their fees and any order passed by the arbitral tribunal to this effect shall not be binding on the parties. The Hon'ble SC further held that the parties shall at the outset, decide upon the arbitrators' fees as that would be instrumental in avoiding unnecessary litigation like that of the present petition. Considering the aforesaid, certain guidelines governing fees of arbitrators were also issued by the SC.

The SC also clarified that the ceiling amount of ₹30,00,000 in the Schedule is applicable to the sum of the base amount which is ₹ 19,87,500/- excluding the variable amount.

It was further held and clarified that the ceiling amount of ₹ 30,00,000 is applicable to only individual arbitrator and not arbitral tribunal as whole.

^[1] Arbitration Petition (Civil) No. 5 of 2022

