# Arbitrator's Fee: Supreme Court Settles the Law


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The Supreme Court of India in the matter of ***Oil & Natural Gas Corporation Ltd. vs. Afcons Gunanusa JV - 2022 SCC OnLine SC 1122*** had resolved various issues circling around the Arbitrators' fee. The Court while dealing with the question of Arbitrator's fee framed the following issues, which are discussed separately in this article:

(I) Whether the arbitrator(s) are entitled to unilaterally determine their own fees?
(II) Whether the term "*sum in dispute*" in the Fourth Schedule to the Arbitration Act, means the cumulative total of the amounts of the claim and counter-claim?
(III) Whether the ceiling of ₹30,00,000 in the entry at Serial No. 6 of the Fourth Schedule of the Arbitration Act is applicable only to the variable amount of the fee or the entire fee amount? and
(IV) Whether the ceiling of ₹30,00,000 applies as a cumulative fee payable to the arbitral tribunal or it represents the fee payable to each arbitrator?

**ISSUE NO. 1:**

**1.1 Whether the Arbitral Tribunal Can Unilaterally determine their own fees**

The first question that the Court proceeded to decide was whether an arbitral tribunal has the necessary powers to decide its own fee unilaterally or can it be fixed by the parties to the arbitration agreement. The Court while acknowledging the fact that the above issue has not been exhaustively addressed in India, took into consideration the various rules framed by various institutions across the globe such as United Nations Commission on International Trade, Permanent Court of Arbitration, London Court of International Arbitration, International Chamber of Commerce to name a few and further analysed the statutory scheme enacted in India for payment of fees to arbitrators. The Court also discussed the principle of party autonomy, which is one of the inherent ingredients of arbitrations, besides discussing the provisions contained in the Fourth Schedule of the Arbitration and Conciliation Act ("the Act"), and observed the following:

a. The Court while reaffirming the importance of party autonomy reiterated its decision passed in the

judgment of **NHAI** v. **Gayatri Jhansi Roadways Ltd.**[1], and observed that the Fourth Schedule provided under the Act was not mandatory and it was open to the parties to enter into an agreement and specify the fees payable to the arbitrator(s) or the modalities for determination of arbitrators' fees. The Court also observed that since most of the high courts in India have not framed rules for fixing arbitrators' fees, therefore, this cannot be said that Fourth Schedule is by default applicable to all such matters where the arbitrators were appointed by the High Court.

b. The Court while discussing the provisions of Section 11(3A) and Section 11(14) of the Act, further observed that unilateral fixation of fees by an arbitrator goes against the principle of party autonomy which is central to the resolution of disputes through arbitration. Thus, it was concluded that since there is no enabling provision under the Act empowering the arbitrator(s) to unilaterally issue a binding or enforceable order regarding their fees, therefore, they cannot fix their fee unilaterally *dehors* the agreement between the parties.

After concluding the above, the Court proceeded to examine the issue and interpretation of the two very important expressions used in the Act, i.e., "Costs" and "Fees".

### 1.2 Interpretation Of The Terms "Costs" And "Fees"

a. The Court while dealing with these terms observed that the term "costs" and "fees" are two different paradigms. While fees represent the payment of remuneration to the arbitrators for their time and efforts required for adjudication of any matter, costs refer to all the reasonable 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. It is relevant to mention here that the costs also include the fees paid to the arbitrator, as mentioned under Section 38 of the Act.

b. The Court further analysed in detail all the provisions of the Act relating to costs and fees including Sections 31(8), 31A, 38 and 39 and concluded that the meaning and scope of abovementioned two terms are very distinct and an arbitral tribunal while deciding the amount of costs under Section 31(8) read with Section 31A of the Act or advance of costs as mentioned in Section 38, cannot pass any binding or enforceable orders regarding their own remuneration.
In other words, an arbitral tribunal while deciding the issue of payment of costs by a party to another party, is not entitled to pass any binding orders with respect to its fees. The Court was of the view that this would violate the principle of party autonomy and the doctrine of prohibition of in *rem suam decisions*, which provides that an arbitrator cannot be the judge of his own claim (fees/ remuneration) against the parties.

c. However, the Court further held that the above principles do not restrict the arbitral tribunal from deciding the amount of costs which may become payable by one party to another party (including the arbitrator(s) remuneration), since this is merely a reimbursement of the expenses that the successful party has incurred in participating in the arbitral proceedings.

[1] 2017 SCC OnLine Del 10285

d. The Court also observed that the arbitral tribunal can also demand deposits and supplementary deposits since these advances on costs are merely provisional in nature. If while fixing costs or deposits, the arbitral tribunal makes any finding relating to arbitrators' fees (in the absence of an agreement), they cannot enforce it. The aggrieved party in such case can approach the court to review the fees demanded by the arbitrators.

e. It was finally held that the arbitral tribunal in terms of Section 39(1), can only exercise a lien over the arbitral award if any payment remains outstanding. A party can approach the court to review the fees demanded by the arbitrators under Section 39(2) if it believes that the fees are unreasonable.

**1.3 <u>Directives Governing Fees of Arbitrators In Ad Hoc Arbitrations</u>**

The Court while exercising its powers under Article 142 of the Constitution of India, framed certain guidelines in relation to fees payable to arbitrators in ad hoc arbitrations in India, which are discussed in brief here:

a. Upon the constitution of the arbitral tribunal, the parties and the arbitral tribunal shall hold preliminary hearings with a maximum cap of four hearings to finalise the terms of reference and the arbitral tribunal must set out the components of its fees in the terms of reference which would serve as *a tripartite agreement* between the parties and the arbitral tribunal.

b. In cases where an arbitrator is appointed by the parties in the manner set out in the arbitration agreement, the fees payable to the arbitrator would be as per the arbitration agreement. However, in case the arbitrator finds the fee stipulated in the arbitration agreement as unacceptable, he must indicate his proposed fee with clarity in the preliminary hearings itself. In the preliminary hearings, if all the parties and the arbitrator jointly agree to a revised fee, then that fee would be payable to the arbitrator. However, in case of any disagreement, the arbitrator or in case where more than one arbitrator is there, one of the members of the tribunal may decline the assignment.

c. Once the terms of reference have been finalised and issued, it would not be open for the arbitral tribunal to vary either the fee fixed or the heads under which the fee may be charged.

d. The parties and the arbitral tribunal may mention in the Terms of Reference that the fees fixed therein may be revised upon completion of a specific number of sittings and the quantum of such revision should also be mentioned clearly. The parties and the arbitral tribunal may also hold a meeting on reaching such specific number of hearings and decide the additional number of sittings required and such number should then be incorporated in the Terms of Reference as an additional term.

e. Where the arbitrator is appointed by the Court, then the order should clearly specify the fee, that such arbitrator would be entitled to charge. However, where the Court leaves the determination of fee to the arbitral tribunal in its appointment order, the arbitral

tribunal and the parties should agree upon the terms of reference as specified in para a mentioned above.

f. The Court also clarified that there can be no unilateral deviation from the terms of reference being a tripartite agreement and any modification or amendment can be accrued out only with the consent of the parties.

g. The Court also directed all the High Courts to frame the rules governing the arbitrators' fee for the purpose of Section 11(14) of the Act.

h. A direction was also passed to the Union of India to revise the fee structure mentioned in the Fourth Schedule periodically, at least once in three years.

i. The Court further observed that in a case where there is no fee structure agreed between the parties in the arbitration agreement, and the parties as well as the arbitrator failed to reach any consensus, the arbitrator can fix his fee as per the Fourth Schedule, which is the model fee schedule and can be treated as binding on all. It was further observed that the fee mentioned in the Fourth Schedule is the default fee and can be changed only with mutual consensus and not otherwise.

**ISSUE NO. 2**

**Whether the term "*sum in dispute*" in the Fourth Schedule to the Arbitration Act, means the cumulative total of the amounts of the claim and counter-claim**

While dealing with this issue, the Court first acknowledged the fact that the terms claim and counter-claim have not been defined anywhere under the Act. Thereafter, the Court analysed various provisions of the Act, where references to claim and counter claim are appearing, such as Section 2(7), Section 28(1), Section 2(9), Section 23(2-A), Section 25 and Section 38. In addition to these provisions, the Court also referred to Order 8 Rule 6 of the Code of Civil Procedure, 1908 and also to the 246th Report of the Law Commission of India and concluded that the object of taking up a counter claim is not because the counter-claim arises due to the claim, but in order to prevent multiplicity of proceedings. The Court further observed the following:

a. The Arbitration Act treats claims and counter-claims at par and same procedure and timelines have to be followed for both of it;

b. The Arbitration Act allows the arbitral tribunal to fix deposit of separate costs for claims and counter-claims, considering the same to be distinct proceedings for the following reasons:

   (i) The adjudication on the claim is independent of the proceeding for deciding the counter-claim;
   (ii) Different issues may arise before the tribunal while adjudicating on the claim and counter-claim;
   (iii) the evidence led in support of the claim may not involve the same material which would be relied upon to decide the counter-claim; and
   (iv) the decision on the claim does not necessarily conclude the adjudication of the counter-claim;

c. The Act considers claims and counter-claims to be independent proceedings since the counter claim is not dependent upon adjudication of claim and rather the Act protects the right of any Respondent to raise a counter claim, provided the same is arising out of the arbitration agreement. It was further observed that in case of failure of the parties to pay the deposit for either the claim or the counter claim, proceedings can be terminated in respect of either the claim or the counter claim, depending upon which party has committed the default.

d. It was further observed that though, a counter-claim may arise from similar facts as that of the claim, however, the same is not a set off and is not in the nature of a defence to the claim;

e. A counter-claim will survive for independent adjudication even if the claim is dismissed or withdrawn.

With the aforesaid observations, the Court finally concluded that in so far as institutional arbitrations are concerned, parties shall be bound by the respective rules of the institutions and the arbitrator's fee shall also be payable as per the rules applicable therein. However, in case of an ad hoc arbitration, where Fourth Schedule is applicable, arbitrator's fee should be calculated separately for a claim and separately for a counter-claim and not on the cumulative value of the two. Even the ceiling appearing in the Fourth schedule shall be applicable separately for both.

**Issue No. 3**

**Whether the ceiling of ₹30,00,000 in the entry at Serial No. 6 of the Fourth Schedule of the Arbitration Act is applicable only to the variable amount of the fee or the entire fee amount**

This issue revolves around the interpretation of the sixth entry in the Fourth Schedule, and the controversy before the Court involved the following two possible interpretations:

a. First, the ceiling is for the sum of the base amount and the variable amount. If this interpretation were to be accepted, the highest possible fee would be ₹ 30,00,000; or
b. Second, the ceiling is for the variable amount only. If this interpretation were to be accepted, the highest possible fee would be ₹49,87,500

In dealing with this issue, the Court analysed the 246th Law Commission Report and observed that Fourth schedule was provided in the Act as a means to control the rising fee of arbitrators and thus, the Court held that ceiling of ₹30,00,000 in entry at Serial No. 6 of the Fourth Schedule applies to the sum of base amount and the variable amount, and not just the variable amount. Therefore, the maximum fee payable to the arbitrator shall be ₹ 30,00,000.

**Issue No. 4:**

**Whether the ceiling of ₹30,00,000 applies as a cumulative fee payable to the arbitral tribunal or it represents the fee payable to each arbitrator**

This was the final issue placed before the Court so as to determine whether the ceiling of ₹ 30,00,000 as provided at serial no. 6 of fourth schedule would be applicable to the cumulative fee paid to the entire arbitral tribunal, or would the said amount be paid to each arbitrator separately.

The Court rejected the argument that the ceiling of ₹30,00,000/- is applicable to the cumulative fee paid to the entire arbitral tribunal and held that the fee provided in Fourth Schedule is for each individual arbitrator, regardless of whether they are a member of a multi-member tribunal or a sole arbitrator.

The Court also clarified that a sole arbitrator would be paid 25% over and above the ceiling amount in accordance with the note to the fourth schedule.

**Conclusion**

This judgment settled many important and crucial questions revolving around the arbitrators' fee and has provided very clear insight on various provisions of the Arbitration & Conciliation Act, 1996 in this respect. The guidelines provided under the judgment shall protect the parties from being forced to accept unilateral and arbitrary fee, if any fixed by the arbitrators and at the same time has granted liberty to an arbitrator to accept or reject any unreasonable or unconscionable fee, which is not commensurate with the efforts required to be made by him while deciding disputes between the parties. This judgment has further paved the way in bringing more clarity and transparency with respect to law governing the arbitrations in India.