THE FOURTH SCHEDULE OF THE ARBITRATION AND CONCILIATION ACT, 1996 VIS-À-VIS PARTY AUTONOMY IN DECIDING THE ARBITRATOR'S FEE

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"*Nemo judex in causa sua*" is one of the oldest principles which means no one can be a judge in their cause. The entire Arbitration Act and Conciliation Act, 1996 ***(hereinafter "Act")*** stands on party autonomy and the same is embodied under section 2(6) of the Act wherein parties are free to authorize any person to determine their issues. The parties are even free to choose their procedure concerning the arbitration proceedings[1] as well as the procedure for appointing the arbitrators[2]. The Apex Court also held that party autonomy is the "brooding and guiding spirit" of arbitration[3] and the same was further reiterated in ***Centrotrade Minerals & Metals Inc. vs. Hindustan Copper Ltd.***[4] It is in the background of such established principle that this article aims to analyze the Fourth Schedule of the Act which relates to payment of the fees to arbitrator vis-a-vis party autonomyin deciding the Arbitrator's fees. The article further traces the law in light of statutory principles and precedents established.

THE EXORBITANT FEE CULTURE: BEFORE THE 2015 AMENDMENT

Arbitration in India can be broadly placed into two categories i.e. Institutional arbitrations and ad-hoc arbitrations. The difference between the two categories as per the relevancy of this article is that in Institutional arbitrations the parties have no say concerning the fee of the arbitrator as it is already fixed by the arbitral institution whereas in ad-hoc arbitrations since no fees are fixed by any institution, so parties are free to decide their fees. In India, the arbitrators are appointed either under sections 11(3) and 11(6) of the Act or by an agreement already executed between the parties. The arbitrators before the 2015 amendment of the Arbitration Act were charging exorbitant fees from the parties and the same was noted by the Hon'ble Supreme Court in the case of ***UOI vs. Singh Builders Syndicate***[5]**.** The problem was majorly concerning the arbitrations where the arbitrators were court-appointed. It was further observed by the Hon'ble Supreme Court in ***Sanjeev Kumar Jain vs. Raghubir Saran Charitable Trust and Ors.*** [6] *that "There is a general feeling among the consumers of*

arbitration that ad hoc arbitrations in India- either International or domestic are time-consuming and disproportionately expensive. Frequent complaints are made about two sessions in a day being treated as two hearings for charging fee."

FOURTH SCHEDULE: POST 2015 AMENDMENT

The said issue was remedied by the 2015 Amendment Act which introduced the Fourth Schedule to the Act. This Fourth schedule will act as a model rule for all the High Courts to frame their own rules for determining the fees of arbitrators. In addition, clause (14) was also added to section 11 of the Act specifying that fees to arbitrators will be paid subject to the rates specified in the Fourth Schedule. An explanation of the said clause clarified that the Fourth Schedule does not apply to International Commercial Arbitration and in arbitrations where parties have agreed for the determination of fees as per the rules of an arbitral Institution.

The 2015 amendment left a void concerning the applicability of the Fourth Schedule where the parties had already fixed the fee of the arbitrator in the agreement they signed. The single Judge in ***National Highways Authority of India vs. Gayatri Jhansi Roadways Ltd.***[7] while placing reliance on the interpretation of Section 31(8) and 31A of the Act held that party autonomy will take a back seat and that Fourth schedule will be the governing force to decide the fee of the arbitrator. The single Judge decision in **Gayatri Jhansi** did not find consonance with another Judgement of the Delhi High Court in ***Gammon Engineers and Contractors Pvt. Ltd. vs. National Highways Authority of India***[8] wherein the single Judge held that the agreement executed between the parties will prevail over the Fourth Schedule. The single Judge thus terminated the mandate of the Arbitral Tribunal under section 14 of the Act since the Arbitral Tribunal ignored the agreement executed between the parties. An appeal against both the judgments was made to the Hon'ble Supreme Court and the matter was finally settled by the Apex court in ***National Highways Authority of India Vs. Gayatri Jhansi Roadways Limited***[9] wherein Hon'ble Justice Rohinton F. Nariman upheld the observation of the single Judge in ***Gammon Engineers***. Thus, party autonomy was given primary consideration by the courts in India.

THE CONTRACTUAL RELATIONSHIP BETWEEN THE PARTIES AND THE ARBITRATOR

The contract entered between the parties forms the basis for the appointment of an arbitrator. The relationship of the parties and the arbitrator is purely contractual yet impartiality of the arbitrator is of paramount consideration. The impartiality of the arbitrator is in line with the principle of natural justice i.e. "Rule against bias". The contractual relationship between the parties and the tribunal is taken up by the Apex court in ***Voestalpine Schienen GmbH v. Delhi Metro Rail Corp. Ltd.***[10]. It was observed that "*Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. The arbitrator has an adjudicatory role to perform and, therefore, he must be independent of the parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in* ***Hashwani v. Jivraj, (2011) 1 WLR 1872*** *in the following words "…the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties by the terms of the agreement and, although the contract between the parties and arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."*

The parties and the Arbitral Tribunal are in a tripartite agreement and if there is no consensus between the parties and the Arbitral Tribunal, inter-alia concerning the fee of the Arbitral Tribunal then there is no other option but to end the mandate of the said Arbitral Tribunal. Here also the preference will be given to the party autonomy as in the ad-hoc arbitrations fees are only decided between the parties as well as the Arbitral tribunal based on negotiations. Generally, in ad-hoc arbitrations, the fees of the Tribunal are decided by the agreement executed between the parties. The problem arises when in the contract executed between the parties there are no provisions as to the fee of the Arbitrator and so the question arises as to how the fees will be decided in such cases. Considering the established foreign laws, there are certain foreign jurisdictions wherein the tribunal can decide the fee subject to the review of the courts whereas there are other foreign Jurisdictions that still give preference to party autonomy. In India, the primacy is given to the wish of the parties, and the same is reiterated by the Apex Court in the case of **Gayatri Jhansi Roadways.**

POWERS OF THE ARBITRAL TRIBUNAL CONCERNING THE UNPAID FEES

Section 39 of the Arbitration Act answers the above question wherein power is given to the Arbitral Tribunal to exercise a lien on the arbitral award for any unpaid costs of the Arbitrations. The parties are free to approach the court by depositing the cost in case the Tribunal refuses to deliver the award and the court may order the tribunal to deliver the

award subject to the payment of the cost by the parties[11]. The lien can only be exercised if the fee of the tribunal is not paid by the parties. The Act does not obligate/bind the parties to pay the cost to the tribunal wherein the cost was demanded by the Tribunal in the form of any remuneration.

The fees of the tribunal must be decided in the preliminary hearing and so to make the situation more conducivethe Hon'ble Supreme Court framed certain guidelines concerning the ad-hoc arbitrations in ***Oil and Natural Gas Corporation Ltd. V. Afcons Gunanusa Jv***[12].

The fee of the tribunal shall be fixed in the preliminary hearings with a maximum cap of four hearings. The agreement executed between the parties concerning the fee of the Arbitrator needs to be taken into consideration and if the Tribunal does not agree with the said fee then the Tribunal must put forth the fee structure which suits them in the preliminary hearing. In such cases, the parties are free to choose the proposal put forth by the tribunal and if the parties or one of the parties cannot arrive at any consensus then the Arbitral tribunal should decline the assignment. Once the fee of the tribunal is decided then the tribunal cannot vary the fee. In the preliminary hearing, the parties and the tribunal must decide concerning the revision of the fee after a specific number of hearings. In court court-appointed arbitrator the order of the court should expressly stipulate the fee that the tribunal would be entitled to charge. Lastly, all High Courts were directed to frame the rules governing arbitration fees.

The Hon'ble Supreme Court in ***Afcons***took away the power of the Arbitrator Tribunal to unilaterally decide their fee by issuing binding orders. The Court upheld the principle of Party autonomy in deciding the fee of the tribunal. The court further clarified that the Arbitrator while exercising their discretion to apportion the costs in terms of Section 31(8) and Section 31 of the Act cannot make any finding concerning their fee. If there is an outstanding payment then the tribunal can exercise their right of lien over the delivery of the Arbitral award under Section 39(1) of the Act. In case, the parties feel that the fee demanded by the Arbitrator is unreasonable then the parties be at liberty to approach the court to review the fee of the Arbitrator. Further, the ceiling as provided in the fourth schedule in entry at Serial No. 6 is Rs. 30,00,000/- (Rupees Thirty Lakh only) applies to the sum of the base amount of Rs. 19,87,500/- and the variable amount over and above it. The said ceiling applies

to each arbitrator and not to the Arbitral Tribunal in its entirety. In Arbitration having sole Arbitrator will be paid 25% over and above the amount as mentioned in the Fourth schedule.

CONCLUSION

The judgment of the Hon'ble Supreme Court set the law into motion concerning the fee of the arbitrator in ad-hoc arbitrations. The guidelines issued by the court to some extent end the tussle between the parties and the tribunal in reaching out to a consensus concerning the fee of the tribunal and thereby save valuable time for the arbitration. The judgment makes things more transparent and brings more clarity vis-à-vis the fee of the tribunal. Despite the same, it can be seen that there are several instances where the fee of the arbitrator is still an issue and sometimes amidst the Arbitration the Arbitrator unilaterally decides to enhance the fee. In such cases, the parties having no other option approach the court to end the mandate of the Arbitration Tribunal. This kind of exercise nullifies the entire idea of Arbitration as the newly constituted arbitrators will take their own time to conclude the proceedings.

It is also seen that there is still a lacuna left concerning the fee of the Arbitrator when the Arbitrator is court-appointed. Though, the Hon'ble Supreme Court in **Afcons**tried to cure the situation by stating that the parties as well as the tribunal are free to decide the fee in the preliminary hearing some more clarification in the same is required. Let no Arbitration suffer because of the fee of the Arbitrator.

REFERENCES

[1] The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s.19(2).

[2] The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s.11(2).

[3] *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, (2016) 4 SCC 126.*

[4] (2017) 2 SCC 228.

[5] (2009) 4 SCC 523.

[6] (2012) 1 SCC 455.

[7] 2017 SCC OnLine Del 10285

[8] 2018 SCC OnLine Del 10183

[9] (2020) 17 SCC 626

[10] (2017) 4 SCC 665.

[11] The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s.39(2).

[12] 2022 SCC OnLine SC 1122.