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SUPREME COURT: FEE SCHEDULE OF ARBITRATORS FIXED BY PARTIES OVERRIDES THE FOURTH SCHEDULE OF THE ARBITRATION ACT

23 July 2019

Introduction

The division bench of the Supreme Court of India (Supreme Court) comprising of Hon'ble Mr Justice R F Nariman and Hon'ble Mr Justice Surya Kant, in its judgment dated 10 July 2019 in *Gammon Engineers and Contractors Pvt Ltd v National Highways Authority of India*, has *inter alia* held that if the parties to an arbitration have agreed to a fee schedule of arbitrators, then the arbitrators will be entitled to charge their fees in accordance with this agreed schedule and not in accordance with the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015.

Background

Section 31(8) of the Arbitration and Conciliation Act, 1996 (Arbitration Act) provided that '*unless otherwise agreed by the parties*', the costs of an arbitration, which included *inter alia* the party entitled to costs and the fees and expenses of arbitrators, shall be fixed by the arbitral tribunal.

Section 31(8) was amended by the 2015 amendment to state that costs of an arbitration shall be fixed by the arbitral tribunal in accordance with Section 31A, which was inserted in the Arbitration Act *vide* the 2015 amendment. As per Section 31A, the arbitral tribunal has the discretion to determine costs of an arbitration, which includes *inter alia* costs payable by one party to another as well as the fees and expenses of arbitrators. However, *vide* the 2015 amendment, the expression "*unless otherwise agreed by the parties*" in Section 31(8) of the Arbitration Act was omitted.

The Delhi High Court, in its earlier judgment dated 11 September 2017 in *National Highway Authority of India v Gayatri Jhansi Roadways Limited* (Gayatri Jhansi decision), interpreted the omission of the expression "*unless otherwise agreed by the parties*" in Section 31A of the Arbitration Act to mean that the arbitrators' fees would have to be fixed in accordance with the Fourth Schedule of the amended Arbitration Act, notwithstanding an agreement between the parties fixing the fee schedule of the arbitrators. In other words, it was interpreted that an arbitral tribunal was competent to fix its fees regardless of an agreement between the parties.

Facts of the Present Case

In the present case, the parties entered into a contract containing an arbitration clause. This contract contained a clause wherein the arbitral fees and other expenses were agreed upon by the parties. When the matter came up before the appointed arbitral tribunal, it was directed that in view of Section 31(A) of the amended Arbitration Act and in view of the Gayatri Jhansi decision, the arbitral tribunal was competent to fix the fees as per the provisions of the Fourth Schedule of amended Arbitration Act, regardless of the agreement of the parties. This was challenged by one of the parties by an application under Section 14 of the amended Arbitration Act before the Delhi High Court.

In its decision in the aforesaid application, the Delhi High Court disagreed with the earlier view taken in the Gayatri Jhansi decision. The Delhi High Court held that the Fourth Schedule of the Arbitration Act was not mandatory and the arbitral tribunal ought to follow the terms laid down as to the arbitrators' fees in the agreement between the parties. It was observed that "costs" under Section 31(8) read with Section 31(A) of the amended Arbitration Act are costs which are awarded by the arbitral tribunal as part of its award in favour of one party against the other. As such, the rationale behind deletion of the words "*unless otherwise agreed by the parties*" was to ensure that parties, by an agreement, cannot contract out of payment of "costs" and disable the arbitral tribunal to award "costs" of arbitration in favour of the successful party. Accordingly, it was held that the Gayatri Jhansi decision is *per incuriam* and the application under Section 14 was allowed. This decision of the Delhi High Court came up for challenge before the Supreme Court in the present case.

Ruling of Supreme Court

The Supreme Court, in the present decision, agreed with the aforesaid decision of the Delhi High Court insofar as it held that if parties to an arbitration have agreed to a schedule for arbitrators' fee, arbitrators are required to charge their fees in accordance with the said schedule and not in accordance with the Fourth Schedule to the amended Arbitration Act.

The Supreme Court also held that the interpretation of the Delhi High Court in the present case regarding change in the language of Section 31(8) read with Section 31A was correct in law. That is to say, Section 31(8) read with Section 31A governs "costs" of an arbitration in general, and not the arbitrators' fees. However, it was held that the Delhi High Court in the present case erred insofar as it terminated the mandate of the arbitrators by allowing the application under Section 14, as the arbitrators had merely followed the law as was laid down in the Gayatri Jhansi decision. The Delhi High Court decision was accordingly set aside.

In view of the aforesaid reasons, the Supreme Court held that the declaration of law in Gayatri Jhansi decision is not a correct interpretation of the law and the Gayatri Jhansi decision was also accordingly set aside.

Comments

By way of the present ruling, the Supreme Court has clarified and set a precedent that arbitrators' fees would be strictly governed by the agreement between parties in this regard. While this decision gives credence to party-autonomy and as such may be hailed as a pro-arbitration stand, it does not specify any limits or provide any other directions for parties to bear in mind while fixing the fee schedule. As such, it remains to be seen whether this wide discretion given to parties is misused to the disadvantage of arbitrators. Further, in a situation where the fixed fee is not agreeable to arbitrators as a result of which the mandate is rejected by the arbitrators, the entire proceedings

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are likely to get delayed thereby rendering the expeditious nature of arbitration proceedings moot.

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