
ARBITRATORS CAN DETERMINE THEIR FEES DESPITE AGREEMENT BETWEEN PARTIES

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The globally recognized foundation of arbitration is “**party autonomy**” because parties come forward to waive off their rights to approach the national courts. Party autonomy is not a simple decorative phrase; it is almost absolute in nature. The concept of party autonomy empowers parties with the right to decide the number of arbitrators, qualifications of Arbitrators, language of arbitration, supervising courts, procedure of arbitration etc., The procedure of Arbitration includes appointment of arbitrators, removal of arbitrators, hearing procedure, witness examination procedure, Fees of the Arbitrators etc., Hence parties have every right to decide every aspect of the arbitration procedure. This is the main reason why the appeal against an arbitral award is very restricted and limited.

The above said autonomy of the parties are exercised by the parties while deciding the provisions of the arbitration agreement between them. The parties have every right to alter, amend and modify the arbitration clause later, even during the arbitration. It is important to note that all the Arbitral Institutions of the World including SIAC, ICC, LCIA, AAA, ICA etc., are the creature of party autonomy. When Parties choose an Arbitral institution to administer their arbitral institution, the rules of the said Arbitral Institution takes over the procedure of the Arbitration. The Arbitrators must strictly follow the Rules of the Arbitral Institution which include not only the procedure to conduct the arbitration but also the fees. Hence alteration to the concept of party autonomy shall have a very negative impact in the purpose of Arbitration itself.

Facts of the case: In a recent case between **National High Ways Authority of India(NHAI) and Gayatri Jhansi Road Ways Limited (2017) SCC Online Del 10285**, the Delhi High Court has dealt with a circular of NHAI which specify the fees of the Arbitrators, which was also agreed by the parties by way of a supplementary agreement. Hence there was an agreement between the parties towards the fees which can be paid to the arbitrators. Ignoring the said agreement between the parties, arbitral tribunal fixed a different fee schedule, which was challenged by NHAI.

Finding of the Court: Delhi High Court has given a judgment holding that the parties cannot decide the fees of the Arbitrator and only the arbitrators have the absolute power to determine the fee structure, due to the amended Section 31(8) of the Arbitration and Conciliation Act,1996. Section 31(8) of the un-amended version and the amended version of the 1996 Act are as follows:

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Old Section 31(8)

“Unless otherwise agreed by the parties,

- (a) The Arbitral Tribunal shall specify –
 - (i) The Party entitled to Costs
 - (ii) The Party who shall pay Costs
 - (iii) The amount of Costs or method of determining the amount
 - (iv) the manner in which costs shall be paid

New Section 31(8):

“The Costs of an Arbitration shall be fixed by the arbitral Tribunal in accordance with Section.31A.”

In addition to holding that the order passed by the Arbitral tribunal is not an appealable order and further held that since the legislature has chosen to remove the words “Unless otherwise agreed by the Parties” in the amended version of the Section 31(8), the intent of the legislature is to give an absolute power to the Arbitral Tribunal.

Conclusion: It is unfortunate that the parties also failed to place before the court, the different contexts of 31(8) in the old and new Act and the large-scale implications that arise out of the curtailing of party autonomy in Arbitrations. It was also ignored that determination of any thing comes only when there is no common decision between the parties, for that there is no need for a statutory provision. A Judge or an arbitrator cannot decide anything against the joint view of the parties to the dispute. If the said view of the High Court becomes the law of the land none of the Arbitral Institutions will have power to fix the fees and whole purpose of institutional Arbitration will be defeated.