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CALCULATION OF FEES OF ARBITRATOR IN ABSENCE OF A MONETARY CLAIM

- 1 The Arbitration and Conciliation Act, 1996 (the Act) provides for determination of the arbitral tribunal's fee as remuneration for adjudication of disputes between the parties.
- 2 The Act, under section 11(14) provides for fixation of the fees of the arbitral tribunal after taking into consideration rates specified in the Fourth Schedule
- 3 The Fourth Schedule of the Act lists down the fee structure for arbitrators in accordance with the corresponding sum in dispute.
- 4 The explanation to section 11(14) clarifies that such fee structure shall not be applicable to international commercial arbitration and to arbitrations governed by arbitral institution.
- 5 J. Banumathi in *Duro Felguera, S.A. vs. Gangavaram Port Ltd. (2017) 9 SCC 729* observed that this sub-section [11(14)] was inserted to ensure a reasonable fee structure.
- 6 The dispute between the parties is referred to arbitration on the basis of the arbitration clause/agreement which determines the mode of appointment of the arbitrator; place of arbitration; rules that shall govern the arbitration; etc.
- 7 Most often, the procedure for determination of the arbitrator's fees is not expressly mentioned in the agreement.
- 8 The rules of arbitration in general parlance provide for determination of the arbitrator's fee in proportion to the amount of claims and counter-claims.
- 9 There may be situations where the party to the dispute is unable to quantify the claim or the relief sought for is in the nature of specific performance making it difficult to present the claim in monetary form. In such situation, what needs to be figured out is on what basis will the arbitrators' fee be calculated.
- 10 In *Shushila Kumari vs. Bhayana Builders (2019 SCC OnLine Del 7243)*, the court dealt in detail with the question of quantification of the claim in order to determine the fees of the arbitrator.
- 11 This case involved an arbitration which was governed by the Delhi International Arbitration Centre (DIAC), being an arbitration institution.
- 12 The DIAC (Fee) Rules, 2018 provides for reference to be made to the Co-ordinator in cases where the amount of the claim is not quantified by the claimants.
- 13 The parties were therefore directed to appear before the Co-ordinator, yet no conclusion to such effect could be reached, i.e., the claim could not be quantified.
The arbitrator terminated the arbitration proceeding on the ground that the claimant failed to quantify the claim due to which the arbitrator's fees could not be determined.
- 14 The Court recorded and considered the fact that the claimant was at no point shying away from paying the arbitrators' fees and had in fact made an advance payment against such particular on the direction of DIAC. However, according to the arbitrator such amount of fee was not appropriate.
- 15 Further, the claimant had also mentioned before the Co-ordinator that they seek to move to court in order to have the arbitrators' fee determined through ad hoc means.
- 16 Thus, understanding that the claimant had genuine reasons for failing to quantify its claim, the Court set aside the order of the arbitrator terminating the arbitration proceedings and appointed a substitute arbitrator for resolution of disputes between the parties.
- 17 With regards to cost of the arbitration, the Court directed the Coordinator of DIAC to determine the value of the claim even when it is not quantified by the petitioner/claimant, in terms of the DIAC Rules since the arbitration is governed by DIAC.
- 18 This decision may be of substantial importance in understanding the law relating to determination of the fees of the arbitral tribunal in the absence of a monetary claim, in different circumstances.
- 19 In *Union of India vs. Singh Builders Syndicate (2009) 4 SCC 523*, the Supreme Court held that exorbitantly high fee charged by the arbitrator puts a blockage on the road of India trying to become a pro-arbitration hub and breaks the flow of growth of arbitration in the country.



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- 20 Recently in *National Highways Authority of India vs. Gayatri Jhansi Roadways Limited with Gammon Engineers and Contractors vs. National Highways Authority of India 2019 SCC OnLine SC 906*, the Supreme Court discussed the issue of arbitral tribunal's fees and held:
- a The amendment of 2019 in the Act through section 31(8) and 31A does not preclude the parties from deciding on the fee structure of the tribunal mutually.
 - b Even if such agreed amount does not conform with the amounts laid down in the fourth schedule of the Act, it shall not render the clause void.
 - c The fee structure included in the contract shall be read as part of the terms of the contract and would govern the arbitration fees. Such clause shall be binding upon the arbitrators.
 - d While reaching to this decision, the Supreme Court upheld the Delhi High Courts' judgment in Gammon India and set aside the Gayatri Jhansi judgment.
- 21 However, the law as to the determination of fees of the arbitral tribunal when the same has not been pre-decided and the claim is non-monetary is not very clear. The subject must be regulated to clarify the law on the same as well to ensure that the fee demanded by arbitrators is rational, transparent and non-arbitrary.
- 22 In international arbitration, the proceedings are governed by the terms of the agreement, law of the land or by the Rules framed by the Institution if the arbitration is governed by such Institution. For instance, Appendix III of the 2021 Arbitration Rules, International Chamber of Commerce, provides that in cases where the amount in dispute is not quantified or stated, the provisional advance shall be fixed by the Secretary General and the final amount for arbitrators' fee shall be fixed by the Court.
- 23 The decisions of the Court as discussed above may be interpreted to lead to the following conclusions as to the current position of the law relating to determination of arbitrators' fee when the same is not quantified:
- a In cases where the fee structure is pre-determined by the parties in the agreement governing the arbitration, the same shall be valid and binding. The decision in Gammon India and Gayatri Jhansi may be acceded to in order to give the right to parties to mutually decide on the fees of the arbitrator.
 - b In cases of ad-hoc arbitration, when the value of the claim cannot be quantified, the Court may be approached for deciding the fees of the arbitrator.
 - c In reaching to such decision the court may either rely on the terms of the contract between the parties or on the rules framed by the High Court in this regard as empowered under section 11(14) of the Act, taking into consideration the rates specified in the Fourth Schedule.
 - d Section 31A states that "the Court or arbitral tribunal" is empowered to take decisions in relation to determination of costs. Costs, within the meaning of this section shall include fees and expenses of the arbitrators.
 - e In cases of institutional arbitration, the parties shall be bound by the rules laid down at such arbitral institution and the provisions relied upon by them or accepted in general practise, in calculating the arbitrators' fees or value of the claim when it is non-monetary in nature.
 - f Therefore, in arbitration governed by institutional arbitration, the claim has to be quantified on the rules of the institution and the fee to be decided on the basis of such quantification. The discretion of the Court shall be limited for such purposes.
 - g When the claim is non-monetary in nature, the relief sought for has to be quantified in terms of the facts of the dispute and the fees of the arbitrator shall depend upon such amount.