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Is Arbitration Process Cost Effective

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Arbitration hasn't proven to be as cost-effective as it had promised to be once upon a time. Exorbitant amounts were asked by the arbitrators as their fees which made this mechanism of dispute settlement essentially unreachable to the general public and certain types of cases.

The first mention of this issue emerged in Union of India v Singh Builders Syndicate[1] in 2009. The judgment mentioned that when arbitrators are appointed by the court without mentioning their fee, it has the power to put either one or both parties at a disadvantage. Both parties might not be on an equal footing with respect to the funds at their disposal which would give rise to issues in following the

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[1] *Union of India v Singh Builders Syndicate* 4 SCC 523 (2009).

arbitration mechanism to settle disputes as some may feel the cost aspect might make the process unfavourable for them.

The 246th Law Commission Report published in August 2014 recommended developing a model to fix and cap the maximum amount of fee an arbitrator can charge. The Law commission researches and reviews laws in the country and makes suggestions to the Parliament in the form of publishing reports. It aims to ensure the laws are responsive to the reasonable demands of the times. Thus, we can say that the cost aspect of arbitration is a subject that even the Government is aware of for almost a decade.

Keeping this issue in mind, the Arbitration and Conciliation Act was amended in 2015. It introduced the 4th Schedule to prevent arbitrators from charging an exorbitant fee. It fixed the fees for arbitrators depending upon the amount in dispute. The maximum they could charge was Rs. 30,00,000, that too when the amount in dispute exceeded Rs. 20 Crore. Further, in the case of Delhi State Industrial Infrastructure Development vs Bawana Infra Development Private Ltd[2]. in the Delhi High Court, the court held that arbitrators

[2] *Delhi State Industrial Infrastructure Development Corporation Ltd vs Bawana Infra Development Private Ltd* 4 Arb LR 168 (2018).

cannot ask for a separate fee in case of a counterclaim being made in the case which meant that the arbitrator's fee will be fixed at the sum of dispute only. This amendment and judgment came in with a lot of potential to solve the issue at hand but unfortunately, it didn't.

The Supreme Court in the case of National Highway Authority of India vs Gammon Engineers and Contractors Private Limited[3] held that the fourth schedule is not mandatory to adhere to fix the fee. This essentially made the schedule a suggestion and took away its power of enforcement. Further, it passed multiple judgments such as NTPC Limited v. Afcons RN Shetty & Co Private Limited[4] and Rail Vikas Nigam v. Simplex Infrastructure Limited [5] where it held the exact opposite of the Delhi State Industrial Infrastructure Development case and held the fees for the sum in dispute and counterclaim has to be charged separately. Due to this, the maximum limit for the arbitrator's fee could go above Rs. 30 Lakh and again, taking this mechanism far from the grasp of the general public.

[3] *National Highway Authority of India vs Gammon Engineers and Contractors Private Ltd* SCC OnLine Del 10183 (2018).
[4] *NTPC Limited v. Afcons RN Shetty & Co Private Limited* SCC OnLine 5588 (2021).
[5] *Rail Vikas Nigam vs Simplex Infrastructure Ltd* SCC OnLine SC 2307 (2019).

Another aspect of this act was making its practical usage hard. It was Sections 31-8 and 31A. These sections gave the arbitration tribunals the power to decide on the fees of the process unilaterally. The parties did not have much say regarding this. This fee fixation might end up putting one of the parties at a disadvantage from the beginning and sometimes they might be too embarrassed to even bring this issue up. The tribunal and arbitrators had started taking advantage of this and began charging high fees and sometimes they charged fees even on an hourly basis. Along with all this, it did not give the parties adequate power nor much scope to bargain.

However, again a ray of hope has shined which may lead to tackling the cost aspect of arbitration. Recently in the case of ONGC VS Afcons Gunanusa JV[6] at the Supreme Court, the learned judge held that the fees which are to be borne, cannot be imposed by the tribunals on the parties without their consent. This essentially aims to give bargaining power to the parties in determining the fee along with a guarantee that tribunals cannot make them incur high costs when they choose arbitration as a settlement mechanism without

[6] *Oil and Natural Gas Corporation Ltd v Afcons Gunanusa JV* SCC OnLine SC 590 (2022).

consent. With this judgement, the court re-emphasised autonomy as a fundamental principle of arbitration as is already elucidated in the Act and chief rulings of the Supreme Court. To ensure a smooth road with no hiccups in this field, the judgement also provided guidelines to be implemented in different circumstances by parties and the arbitrational tribunal to set the arbitral fee.

Legally, when a conflict between parties takes place, it should ideally be left to the parties which way of recourse they want to take to settle the dispute. This right comes with an extension about how much money and time they are willing to spend in the process. This landmark judgment helps realize this aspect which can prove beneficial against the cost issue arbitration comes with. This gives parties a say in the fees and also room for negotiation. It can also help bring fairness to the process as it can help bring both parties at equal footing and the process will have less chance of being dominated by the side with deeper pockets

Similar to lawyers, the fee of arbitrators also depends on the skills and experience of the arbitrator. The more skilled they are, the higher fee they would charge. In normal circumstances, people will prefer to choose more skilled and experienced personnel to settle their

disputes but they will always keep in mind the costs. For instance, if we go to buy a car with a budget for a small car, we will try to buy the car best in that particular category and not look for SUVs as they will be above the budget. Thus, sometimes it may lead to conflicts in choosing an arbitrator among the parties as they get bargaining power. A party with more funds would try to bring in a more costly arbitrator while the party with lesser funds would try to bring in an arbitrator with less experience. This could essentially lead to a delay in the dispute resolution process which might require some additional clauses to be added in the future to safeguard and keep this mechanism effective as it promises.

Arbitration as a process comes with some shortcomings such as it cannot be used to settle all types of disputes. It will only work in civil and financial disputes. It follows a 'take it or leave it' policy so sometimes the decisions or the arbitral awards may be too harsh for a particular party. Section 35 of the Arbitration and conciliation Act makes the awards binding on both parties which comes as a risk when opting for arbitration. Unlike litigation, arbitral awards cannot be appealed against at a higher body as no such system of safeguard exists in this process. At recent Supreme Court judgment, Oriental

Insurance co Ltd. Vs Narbheram Power and steel Private Ltd.[7], the court held that a party can unilaterally refuse to enforce an award to categorize it as a 'dispute'. So, the parties again end up at square one where there is no sort of progress made in the process which questions the effectiveness of the mechanism. There is a lack of and use of precedents in this process which also makes coming to a result more difficult. Finally, cooperation among parties plays a big role in the process. If the parties aren't amiable enough, the dispute may drag on for a very long time making the process costlier as well as time-consuming.

The Arbitration process is a new pathway to justice. It has worked up to an extent where it has helped settle disputes in a short period of time. However, it has a long way and a long evolution to go as there are various shortcomings in the process. The recent judgment looks to rectify the cost issue of the process which can essentially make the mechanism approachable for a bigger section of the public, which may lead to a decrease in the filing of cases in the court in the near future.

[7]*Oriental Insurance Company Limited vs Narbheram Power and Steel Private Limited* SCC OnLine SC 479 (2018).