

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Sr. No. 114

CWP-8311-2019

Date of decision : 13.12.2019

M/s P&R Infraprojects Ltd.

..... Petitioner

VERSUS

PSPCL and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr.P.S.Rana, Advocate and
 Mr.G.S.Rana, Advocate, for the petitioner.

Mr.Pulkit Jain, Advocate, for
Mr.Sahil Sharma, Advocate, for the respondents

DEEPAK SIBAL, J. (ORAL)

The construction of balance work comprising of Part of Head & Tail Race Channel, Power House Building, Trash Rack, Intake, Draft Tube, Intake & Draft Tube Gates & all Allied protection work of Mukerian Hydel Project State-II was allotted to the petitioner by the respondents-Punjab State Power Corporation Limited (for short, the Corporation). In this regard on 06.01.2011 the parties entered into an agreement which contained clause 3.23 as per which disputes between them were to be settled through arbitration.

During the course of discharging the above allotted work disputes arose between the parties. The petitioner, after invoking the aforesaid arbitration clause, wrote to the Corporation seeking appointment of an Arbitrator. The Corporation did not respond. The petitioner then filed a petition before this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, the Act) seeking appointment of an Arbitrator. Through order dated 15.12.2017 this Court appointed Mr. Justice Anil R Dave, a former Judge of the Supreme Court of India as the sole Arbitrator.

The petitioner filed its claims before the Arbitrator to which the Corporation filed their counter. Thereafter an application was filed by the petitioner

seeking exemption from the payment of 10% of the claim which was required to be

furnished as per clause 3.23(viii) of the aforesaid agreement between the parties. The Corporation opposed the petitioner's prayer on the ground that the requirement to make the deposit, as per aforesaid clause of the agreement, had been agreed to between the parties and that the same was a deterrent against filing of frivolous claims. Through order dated 01.12.2018 the Arbitrator rejected the petitioner's request and accordingly directed the petitioner to deposit 10% of the amount claimed by it. Such order of the Arbitrator, alongwith clause 3.23(viii) of the agreement dated 06.01.2011, is challenged by the petitioner through the present petition on the ground of arbitrariness.

Learned counsel for the parties have been heard.

Clauses 3.23(viii) and 3.23(xv) of the agreement between the parties, which are relevant, read as under: -

“3.23(viii). It shall be an essential term of this contract that in order to avoid frivolous claims, the party invoking arbitration shall specify the disputes based on facts and calculations stating the amount under each claim and shall furnish a “deposit at call” for ten percent of the amount claimed on a Schedule Bank in the name of the Arbitrator.(by his official designation) who shall keep the amount as deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him proportion to the amount awarded with respect to the amount claimed and the balance, if any shall be forfeited and paid to the other party.”

“3.23(xv) No question relating to this contract shall be brought before any Civil court without first invoking the and completing the arbitration proceedings, if the issue is covered by the scope of arbitration under this contract. The pendency of arbitration proceedings shall not disentitle the Engineer-in-charge to terminate the contract and to make alternate arrangements for completion of work.”

As per clause 3.23(viii) a party seeking resolution of a dispute through arbitration is required to specify the dispute based on facts and calculations; state the amount claimed by it and to deposit 10% of the claimed amount in a scheduled bank in the name of the Arbitrator who is to keep the said amount in a deposit till the announcement of the Award. In case the Award is in favour of the claimant the deposit is to be refunded to claimant and if not, the same is to be forfeited and paid to the other party. Such deposit is to be made to avoid frivolous claims at the behest of the party invoking the arbitration clause.

As per clause 3.23(xv) the Civil Court is sought to be kept away to decide the disputes between the parties arising out of the agreement between them and which are covered under the arbitration clause.

A challenge to an identically worded clause 3.23(viii), as above, came up before the Supreme Court in *M/s Icomm Tele Ltd. Vs Punjab State Water Supply & Sewerage Board & Anr. (2019) 4 SCC 401* on the ground that such condition was arbitrary and thus violative of Article 14 of the Constitution. The Supreme Court, after considering the relevant clauses of the agreement before it, which, as stated earlier, were identical to the above extracted clauses in the agreement in the present case, struck down the clause which required the deposit of 10% of the claimed amount by a party invoking the arbitration clause by holding the same to be arbitrary and thus violative of Article 14 of the Constitution. The Supreme Court held as under: -

“7. Having heard learned counsel for both parties, it will be seen that the 10% “deposit-at-call” before a party can successfully invoke the arbitration clause is on the basis that this is in order to avoid frivolous claims. Clause 25(xv) is also material and is set out hereinbelow:

“xv. No question relating to this contract shall be brought before any civil court without first invoking and completing the arbitration proceedings, if the issue is covered by the scope of arbitration under this contract. The pending arbitration proceedings shall not disentitle the Engineer-in-charge to terminate the contract and to make alternate arrangements for completion of the works.”

8. From this clause, it also becomes clear that arbitration is considered to be an alternative dispute resolution process and entry to the civil court is sought to be taken away if the disputes between the parties are covered by the arbitration clause.

9 to 26 xxx xxx xxx

27. Deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10% would discourage arbitration, contrary to the object of de-clogging the Court system, and would render the arbitral process ineffective and expensive.

28. For all these reasons, we strike down clause 25(viii) of the notice inviting tender. This clause being severable from the rest of clause 25 will not affect the remaining parts of clause 25. The judgment of the High Court is set aside and the appeal allowed.”

(emphasis supplied)

Learned counsel for the respondents-Corporation does not dispute that the facts before the Supreme Court in *M/s Icomm Tele Ltd.'s* case (supra) were

identical to the facts of the case in hand.

In view of the above, clause 3.23(viii) of the agreement between the parties dated 06.01.2011 is struck down and since this clause is severable from the rest of clause 3.23 it will not affect the remaining parts of clause 3.23. Resultantly, the petitioner's claim shall be adjudicated upon by the Arbitrator without insistence on the deposit of 10% of the claimed amount.

The petition is allowed in the above terms.

13.12.2019
shamsher

[DEEPAK SIBAL]
JUDGE

Whether speaking/reasoned	:	Yes / No
Whether reportable	:	Yes / No