

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP No. 17859 of 2021 (O&M)

Date of decision:- 22.11.2021

M/s Parbhat Kumar Contractor

.....Petitioner

Versus

Lala Lajpat Rai University of Veterinary and Animal Sciences, Hisar and
another

...Respondents

**CORAM: HON'BLE MR. JUSTICE RAVI SHANKER JHA, CHIEF JUSTICE
HON'BLE MR. JUSTICE ARUN PALLI,**

Present:- Mr. Arun William, Advocate, for the petitioner.

Mr. Dharmender Singh Rawat, Advocate, for the respondents.

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RAVI SHANKER JHA, CHIEF JUSTICE (oral)

This petition has been filed by the petitioner being aggrieved by the order dated 13.08.2021 (Annexure P-25) passed by the respondent-University pursuant to the order dated 19.07.2021 passed by this Court in Civil Writ Petition No. 13063 of 2021, which had been disposed of by this Court on a statement being made by learned counsel for the respondent-University that it may be granted four weeks' time to review/re-examine the matter and take a decision.

The brief facts leading to the filing of the present petition are: the petitioner was awarded a contract for construction of Vice Chancellor/Administrative Building at new campus of LUVAS, Hisar, pursuant to which an agreement was entered into between the parties on 12.11.2018. A dispute regarding payment arose between the parties, pursuant to which a notice was issued by the petitioner on 08.01.2019

(Annexure P-5). Accordingly, the dispute between the parties was referred to the Dispute Review Expert on 28.07.2020 in terms of the Conditions of Contract (Standard Bidding Document Procurement of Civil Works), Annexure P-1. The Dispute Review Expert decided the matter on 04.11.2020 in favour of the petitioner. The decision of the Dispute Review Expert not being acceptable to the respondent-university, it issued a notice to the petitioner on 28.11.2020 proposing to appoint a sole arbitrator as per clause 24.3 of the Conditions of Contract (ibid). The aforesaid proposal was opposed by the petitioners vide their objections dated 01.12.2020 (Annexure P-9) on the ground that the matter could not be decided by the sole arbitrator. The respondent-University thereafter asked the petitioner by its letter dated 31.12.2020 to propose the names of three arbitrators, out of which one could be appointed as the arbitrator of the contractor and also asked the petitioner to deposit claim fee @ 5% of the claim amount in terms of clause 25.1 of the Conditions of Contract (ibid). The petitioner refused to deposit the claim fee as he was satisfied with the order passed by the Dispute Review Expert and did not wish to raise any claim or initiate any arbitration proceedings against the same. However, the petitioner vide his letter dated 29.01.2021 proposed the names of three arbitrators in terms of clause 24.3 of the Conditions of Contract (ibid) and again raised its objection as regards the repeated demands by the respondent-university to deposit claim fee @ 5% of the claim amount for proceeding with the arbitration.

As the respondent-university persisted with its demand of deposit of 5% as fee by the petitioner for initiating arbitration proceedings, the petitioner was constrained to file a Civil Writ Petition No. 13063 of 2021, which was eventually disposed of by this Court vide order dated

19.07.2021 on the statement of the learned counsel for the respondent-university that the university would review/re-examine its order.

The respondent-University has thereafter passed the impugned order dated 13.08.2021 (Annexure P-25) again reiterating its demand to deposit claim fee @ 5% of the amount claimed by the petitioner in terms of clause 25.1 of the arbitration clause. Aggrieved with the aforesaid decision, the petitioner has filed the present petition.

Learned counsel for the petitioner submits that in terms of the Conditions of Contract (ibid), the dispute which was referred to the Dispute Review Expert was decided by order dated 04.11.2020 (Annexure P-7) in favour of the petitioner. Learned counsel for the petitioner further submits that the petitioner is satisfied with the order passed by the Dispute Review Expert and he does not want to take up any further proceedings against the same in arbitration as provided in clause 24.1(3) of the Conditions of Contract (ibid). He submits that in such circumstances, as the respondent-university itself wishes to initiate arbitration proceedings, the respondent-university should deposit the claim fee @ 5% of the claim amount and the university cannot force or require the petitioner to deposit the same in arbitration proceedings initiated by the respondent-university.

Learned counsel for the petitioner has also assailed the constitutional validity of clause 25.1 requiring pre-deposit by relying upon a decision of the Supreme Court in ***Icomm Tele Ltd. vs. Punjab State Water Supply and Sewerage Board and another 2019(4) SCC 401.***

Per-contra, learned counsel for the respondent-university submits that clause 25.1 of the Conditions of Contract (ibid) is explicit, clear and leave no room for any kind of doubt or misinterpretation. He submits that clause 25.1 clearly requires the claimant to deposit with the employer

the fee @ 5% of claim amount. He submits that the authorities have re-examined the matter and have even filed an affidavit sworn by Dr. Trilok Nanda, Director, Students Welfare-cum-Estate Officer, Lala Lajpat Rai University of Veterinary & Animal Sciences, Hisar, reiterating its stand that in terms of clause 25.1, the claimant is obliged to deposit 5% of the claim amount as fee. The respondent-university has submitted in its affidavit that the words claimant and employer have a different and distinct connotation and have to be strictly understood in terms of the conditions of the contract. It is submitted that in view of clause 25.1 of the Conditions of Contract, petitioner is the claimant and the respondent university is the employer and therefore, when clause 25.1 of the Conditions of Contract (ibid) clearly required the claimant to deposit 5% of the claim amount as fee to invoke the arbitration, then irrespective of the fact whether the arbitration is invoked by the university or the claimant, he is required to make the necessary deposit and no fault can be found with the decision of the respondent-university. It is urged that the petition being meritless deserves to be dismissed.

Learned counsel for the respondent-university has distinguished the decision of the Supreme Court laid down in *Icomm Tele Ltd. case* (supra) on the ground that the clause under interpretation by the Supreme Court in the said decision was totally different and is not *parimateria* with clause 25.1 contained in the Conditions of Contract (ibid). It is asserted that in *Icomm Tele Ltd. (supra)*, the condition for invoking arbitration was pre-deposit of 10% of the claim amount with further stipulation that the amount in question would be refunded to the claimant in 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. It is submitted that there is no forfeiture clause contained in the Conditions of Contract as is evident from the perusal

of clause 25.1 and therefore, the contention of learned counsel for the petitioner in respect of the decision of the Supreme Court cited (supra) is meritless.

We have heard learned counsel for both the parties at length.

In context of the issues raised before this Court, it would be appropriate to consider clauses 24 and 25 of the Conditions of Contract which is part of the Standard Bidding Document Procurement of Civil Works (Annexure P-1), which are in the following terms:-

“24. Dispute Redressal System

24.1 If the contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall refer to the Dispute Review Expert as mentioned in the contract data within 14 days of the notice of the Engineer’s decision.

Procedure for Disputes

- 1. The Dispute Review Expert shall give a decision in writing within 28 days of receipt of a notification of a dispute.***
- 2. The Dispute Review Expert shall be paid at the rate specified in the Arbitration and Conciliation Act, 1996, as amended to date and the cost shall be divided equally between the Employer and the Contractor, Whatever the decision is reached by the Dispute Review Expert, Either party may give notice to the other to refer a decision of the Dispute Review Expert written decision. If neither party refer the dispute to Arbitration within the next 28 days, the Dispute Review Expert decision will be final and binding.***
- 3. The arbitration shall be conducted in accordance with the arbitration procedure as given below:-***

a. In case of dispute or difference arising between the Employer and a domestic contractor relating to any matter arising

out of or connected with the agreement, such disputes or differences shall be settled in accordance with the Arbitration and Conciliation Act, 1996 as amended to date. The parties shall make efforts to agree on a sole arbitrator and only if such an attempt does not succeed, the Arbitral Tribunal consisting of 03 Arbitrators, one each to be appointed by the employer and the Contractor (The employer will choose contractor arbitrator out of three names given to the employer) and the third Arbitrator to be chosen by the two arbitrators so appointed by the parties to act as Presiding Arbitrator shall be considered. In case of the failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the University. All the three arbitrators will be regular degree holders in Civil Engineering having sufficient building knowledge.

- b. Arbitration proceeding shall be held in Hisar (India) and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.*
- c. The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as per Arbitration and Conciliation Act, 1996 as amended to date.*
- d. Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the owner shall not be*

withheld, unless they are the subject matter of the arbitration proceedings.

25. Arbitration

25.1 As per provisions of the clause 24 of the Dispute Redressal System, the claimant shall deposit with the employer a claim fee @ 5% of claim amount or as prescribed in tender document while going for arbitration. On termination of the arbitration proceedings, this fee shall be adjusted against the cost, if any, awarded by the arbitrator (or arbitral tribunal) against the claimant party and the balance remaining after such adjustment, and in the absence of such cost being awarded, the whole of the sum will be refunded within one month of the date of the award. No interest will be given on deposit.”

From a perusal of the said clauses, it is evident that the Dispute Review Expert has to give his decision within 28 days of the receipt of a notification of the dispute which has been done in the present case and is not disputed. It is not in dispute either that the Dispute Review Expert has given the award in favour of the petitioner-claimant on 04.11.2020 vide Annexure P-7.

Clause 24.1(2) further stipulates and provides that either of the party, if aggrieved by the decision of the Dispute Review Expert, may give notice to the other party to refer a decision of the Dispute Review Expert to an Arbitrator within 28 days of the decision of the Dispute Review Expert, failing which the decision of the Dispute Review Expert will be final and binding. Clause 24.1(3) delineates the arbitration proceedings to be taken up and provides that it shall be settled in accordance with the Arbitration and Conciliation Act, 1996 as amended from time to time.

Clause 25.1, which is already reproduced hereinabove, requires that the arbitration would be conducted in terms of clause 24 of the Dispute Redressal System. It further requires that “*the claimant shall deposit with the employer a claim fee @ 5% of claim amount or as prescribed in tender document while going for arbitration*” and that on termination of the arbitration proceedings, this fee shall be adjusted against the cost, if any, awarded by the arbitrator (or arbitral tribunal) against the claimant party and the balance remaining after such adjustment and in the absence of such cost being awarded, the whole of the sum will be refunded within one month of the date of the award without interest to the claimant.

From a perusal of the language of Clause 25.1 with which we are concerned in the present petition, it is crystal clear that “*the claimant shall deposit with the employer a claim fee @ 5% of claim amount or as prescribed in tender document while going for arbitration*”. Evidently, clause 25.1 comes into operation only when the claimant invokes or intends to initiate arbitration proceedings and not when the employer does so. This is further evident from giving meaningful affect and interpretation to the words “*claimant shall deposit*” and “*while going for arbitration*” used in clause 25.1. In the absence of any ambiguity in the language of clause 25.1, it cannot be interpreted to mean that the claimant is required to deposit the claim fee @ 5% with the employer even in a case where the “*employer*” is “*going for arbitration*” proceedings as it does not apply to a case where the employer initiates arbitration proceedings. Clause 25.1 (supra) does not provide nor can it be interpreted to provide any duty or requirement on the part of the claimant to deposit 5% of the claim amount as fee in a case where the arbitration proceedings are initiated/invoked by the university, which in its wisdom is “*going for arbitration*” or to a case where the claimant is not

“going for arbitration” as in the present case as he is satisfied with the order passed by the Dispute Review Expert.

We are of the considered opinion that a conjoint reading of clauses 24 and 25 of the Conditions of Contract makes it manifestly clear that while, both the employer/university and the claimant/contractor, can initiate arbitration proceedings if they are aggrieved by the decision of the Dispute Review Expert, however, the condition of deposit contained in clause 25.1 applies to only those arbitration proceedings initiated by the claimant/contractor.

In view of the aforesaid interpretation of the clauses made by this Court, the stand taken by the respondent-university in the present petition cannot be accepted as it is apparently misconceived and has no support either from clauses 24 and 25 of the Conditions of Contract notified alongwith the Standard Bidding Document Procurement of Civil Works or interpretation thereof. Thus, in view of the above and the facts of the present case, we are not required to go into the question of or consider the validity of clause 25.1 in view of the decision of the Supreme Court in *M/s Icomm Tele Ltd.* (supra), as this Court has held that the petitioner is not required to make any deposit as it is not invoking the arbitration proceedings.

It is pertinent to note that in view of the stand of the respondent-university as well as the decision of the Supreme Court in *M/s Icomm Tele Ltd.* (supra), the stipulation regarding pre-deposit of certain percentage of the claim amount is mandated only with the purpose and object of preventing the contractors/claimants from raising frivolous claims in arbitration proceedings only for the purpose of delaying recovery of the amount that is due to be recovered from them. This Court’s interpretation of clause 25.1 restricting its applicability to only those cases where the

claimant is invoking the arbitration proceeding is not in conflict with the said object and purpose.

In the facts and circumstances of the present case, we are of the considered opinion that clause 25.1 requiring pre-deposit of claim fee @ 5% with the employer would apply to those arbitration proceedings that are invoked by the claimant (contractor) who is aggrieved by the decision of the Dispute Review Expert. In other words, this requirement cannot be imposed upon the claimant/contractor by the respondent-university in a case like the present one where the university/employer itself is aggrieved by the order of the Dispute Review Expert and invokes arbitration proceedings.

In view of the aforesaid finding recorded by this Court, the impugned order dated 13.08.2021 passed by the respondent-university is accordingly quashed. The petition filed by the petitioner is allowed.

(RAVI SHANKER JHA)
CHIEF JUSTICE

(ARUN PALLI)
JUDGE

22.11.2021
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Whetherspeaking/reasoned	Yes/No
Whetherreportable	Yes/No