

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Date of Reserve: 27.09.2022

Date of Decision: 14.10.2022

1. ARB No.170 of 2017 (O&M)

M/s Bharat Bhushan Gupta and Company.....Petitioner

Vs

State of Haryana and othersRespondents

2. ARB No.512 of 2021 (O&M)

M/s Lord Shiva Construction CompanyPetitioner

Vs.

**The Haryana State Co-operative Labour and Construction
Fed. Ltd. and anotherRespondents**

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. Vivek Khatri, Advocate for the petitioner(s).

Mr. Sumit Gupta, Addl. A.G., Haryana.

Mr. Harsh Aggarwal, Advocate
for respondents No.2 to 4.

Mr. Lokesh Sinhal, Advocate
for the respondents in ARB No.512 of 2021.

RAJ MOHAN SINGH, J.

[1]. Vide this common order, ARB No.170 of 2017 and ARB No.512 of 2021 are being decided.

[2]. Both the petitions have been preferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an independent Arbitrator to adjudicate the dispute between the parties arising out of the contract

agreement. Since common question of law and facts are involved, therefore, facts are being culled out from ARB No.170 of 2017.

[3]. In ARB No.170 of 2017, petitioner was allotted construction work of Model School at Village Geong (i/c Civil, P.H. & E.I works and boundary wall) in District Kaithal on 12.01.2012. The work was started by the petitioner despite various hurdles made by the respondents. The work was completed within the time framed by the respondents and the building had already been occupied by the respondents on 08.05.2014. Thereafter the petitioner made a representation to respondents No.2 and 3 for releasing the payment of the petitioner in respect of execution of work done. Respondent No.3 issued a letter to the petitioner on 09.07.2014 in respect of some deficiencies in the work which were required to be removed by the petitioner. The deficiencies pointed out by the respondents have already been removed by the petitioner and the petitioner again wrote a letter to respondent No.4 on 08.08.2014 for the release of payment.

[4]. The payment has not been released to the petitioner despite removal of defects as pointed out by the respondent to their entire satisfaction. Petitioner issued a representation dated 24.11.2014 to this effect. The respondents did not pay any heed

to the claim of the petitioner. Secondly, petitioner visited the office of respondent No.2 in respect of its cause of action. Thereafter, respondent No.2 issued a letter dated 13.08.2015 to the petitioner for submitting the bills so that the remaining payment may be released. In response to the aforesaid letter, the petitioner submitted its bills and also completed the formalities for releasing the dues. Respondents did not do the needful and that prompted the petitioner to file CWP No.585 of 2016 in view of aforesaid cause of action.

[5]. The aforesaid writ petition i.e. CWP No.582 of 2016 was disposed of by the High Court vide order dated 07.04.2017 and the petitioner was relegated to avail the remedy as per terms and conditions of the contract. Thereafter petitioner invoked the arbitration clause No.25.A.5 by sending notice of invocation to respondent No.1 on 01.05.2017.

[6]. Owing to the inaction on behalf of the respondents, the present petition has been filed by the petitioner staking tentative value of its claim to the tune of more than Rs.50 lakhs. The matter was argued by the parties on 14.09.2022 to some extent and following order was passed by this Court:-

“Though the parties are ready for appointment of Arbitrator as per para 25.A.7 of the agreement, but both the parties are at variance on the issue of deposit of refundable

security amount in terms of para 25.A.5 of the agreement.

Learned counsel for the parties intend to argue the case on merits with reference to case laws.

Adjourned to 27.09.2022.

A photocopy of this order be placed on the file of connected case.”

[7]. In order to appreciate the controversy, clause Nos.25.A.5, 25.A.6 and 25.A.7 of the contract agreement are required to be perused. The said clauses are reproduced hereasunder:-

“(25.A.5)The appointment of the arbitrator for arbitrating the disputes/differences so referred to arbitration shall be made only by the Financial Commissioner and Principal Secretary to Govt. of Haryana School Education Department after the Contractor furnishes to the satisfaction of the Executive Engineer-in-charge of the work, a security deposit of a sum determined according to details given below:-

Amount of claim	Security Deposit
Total Claim vlaue less than or equal to Rs.10,000/-	2% of the Claim Amount.
Total Claim > Rs.10,000 but less than or equal to Rs.1 lac.	5% of the Claim Amount.
Total Claim > Rs. 1 lac	10% of the Claim Amount.

(25.A.6) This Security shall on the termination of the

arbitration proceedings be adjusted against the cost if any, awarded by the arbitrator against the claimant party and the balance remaining after such adjustment in the absence of any such cost being awarded the whole of the sum of will be refunded to him within one month from the date of the award.

(25.A.7) Only graduate civil engineers shall be eligible for appointment as arbitrator.”

[8]. In the present cases, the issue is in respect of deposit of refundable security amount in terms of clause 25.A.5 of the contract agreement.

[9]. Learned counsel for the petitioner(s) by referring to the **M/s ICOMM Tele Ltd. vs. Punjab State Water Supply & Sewerage Board and Anr., 2019(5) R.C.R. (Civil) 242** submitted that condition of deposit of 10% of the amount claimed as deposit-at-call has been declared to be an act of deterring a party to an arbitration from invoking alternative dispute resolution process and this condition would discourage the arbitration which would be contrary to the object of de-clogging the court system and would also render the arbitration proceedings ineffective and expensive. In the aforesaid case, the Hon'ble Apex Court has struck down the clause of notice inviting tender and the said clause which was held to be

ineffective and was severed from rest of the clauses. Para 23 of the said judgment reads as under:-

“23. The important principle established by this case is that unless it is first found that the litigation that has been embarked upon is frivolous, exemplary costs or punitive damages do not follow. Clearly, therefore, a “deposit-at-call” of 10% of the amount claimed, which can amount to large sums of money, is obviously without any direct nexus to the filing of frivolous claims, as it applies to all claims (frivolous or otherwise) made at the very threshold. A 10% deposit has to be made before any determination that a claim made by the party invoking arbitration is frivolous. This is also one important aspect of the matter to be kept in mind in deciding that such a clause would be arbitrary in the sense of being something which would be unfair and unjust and which no reasonable man would agree to. Indeed, a claim may be dismissed but need not be frivolous, as is obvious from the fact that where three arbitrators are appointed, there have been known to be majority and minority awards, making it clear that there may be two possible or even plausible views which would indicate that the claim is dismissed or allowed on merits and not because it is frivolous. Further, even where a claim is found to be justified and correct, the amount that is deposited need not be refunded to the successful claimant. Take for example a claim based on a termination of a contract being illegal and consequent damages thereto. If the claim succeeds and the termination is set aside as being illegal and a damages claim of one crore is finally granted by the learned arbitrator at only ten lakhs, only one tenth of the deposit made will be liable to be returned to the successful party. The party who has lost in the arbitration

proceedings will be entitled to forfeit nine tenths of the deposit made despite the fact that the aforesaid party has an award against it. This would render the entire clause wholly arbitrary, being not only excessive or disproportionate but leading to the wholly unjust result of a party who has lost an arbitration being entitled to forfeit such part of the deposit as falls proportionately short of the amount awarded as compared to what is claimed.”

[10]. Learned counsel for the petitioner further submitted that in view of **M/s ICOMM Tele Ltd.'s** case (supra), there is no requirement of pre-deposit as claimed by the respondents. Terms of the contract agreement provide for deposit of 10% of the claimed amount in case the total claim exceeds an amount of Rs.1 lakh. Perusal of clause 25.A.6 would show that the security amount on the termination of the arbitration proceedings shall be adjusted against the cost, if any, awarded by the Arbitrator against the claimant and the balance remaining after such adjustment in the absence of any such cost being awarded the whole of the sum will be refunded to the claimant within one month from the date of award.

[11]. Per contra, learned counsel for the respondents by relying upon **S.K. Jain vs. State of Haryana, 2009(2) R.C.R. (Civil) 202; CWP No.21840 of 2020** titled '**M/s Garg and Company vs. State of Haryana and others**' decided on 08.04.2022 and **ARB No.127 of 2019** titled **M/s The Assan Co-**

op L&C Society, Bahadurgarh, District Jhajjar vs. Haryana

Vidyut Prasaran Nigam Ltd. (HVPNL) decided on 03.11.2021

submitted that the ratio(s) of M/s ICOMM Tele Ltd. and S.K. Jain's cases (supra) are to be harmoniously construed as the ratio of S.K. Jain's case has not been disturbed by the Hon'ble Apex Court.

[12]. By referring to the M/s ICOMM Tele Ltd.'s case (supra), learned counsel for the respondents further submitted that the issue is squarely covered by the ratio of S.K. Jain's case (supra) which has been discussed by the Hon'ble Apex Court in M/s ICOMM Tele Ltd.'s case (supra) as well. Para 12 of the judgment reads as under:-

“12. In S.K. Jain v. State of Haryana, (2009) 4 SCC 357, this Court dealt with an arbitration clause in an agreement which read as follows:-

“11. Sub-clause (7) of Clause 25-A of the agreement reads as follows:

“25-A.(7) It is also a term of this contract agreement that where the party invoking arbitration is the contractor, no reference for arbitration shall be maintainable unless the contractor furnishes to the satisfaction of the Executive Engineer in charge of the work, a security deposit of a sum determined according to details given below and the sum so deposited

shall, on the termination of the arbitration proceedings be adjusted against the costs, if any, awarded by the arbitrator against the claimant party and the balance remaining after such adjustment in the absence of any such costs being awarded, the whole of the sum will be refunded to him within one month from the date of the award:-

Amount of claim	Rate of security deposit
1. For claims below Rs.10,000	@% of amount claimed
2. For claims of Rs.10,000/- and above and below Rs.1,00,000/- and	5% of amount claimed
3. For claims of Rs.1,00,000 and above	7% of amount claimed

[13]. The plea as raised by learned counsel for the petitioner has already been answered by the Hon'ble Apex Court in **M/s ICOMM Tele Ltd.**'s case (supra) while discussing the ratio of **S.K. Jain's** case (supra).

[14]. In view of aforesaid discussion a distinction has to be made in respect of the type of pre-deposit clause. In the present case perusal of clause 25.A would show that the same relates to the refund and not of forfeiture whereas in **M/s ICOMM Tele Ltd.**'s case (supra), the Hon'ble Apex Court made the reference to the clause of pre-deposit discouraging arbitration and the said clause was struck down while distinguishing the earlier judgment passed in **S.K. Jain's** case (supra).

[15]. There is no denial that the clauses in the present contract agreement are identical to the clause 25 of the contract agreement which was under consideration in **S.K. Jain's** case (supra). The Co-ordinate Benches of this Court in '**M/s Garg and Company vs. State of Haryana and others**' and **M/s The Assan Co-op L&C Society, Bahadurgarh, District Jhajjar's** cases (supra) have already appreciated the similar pre-deposit clause and made a clear departure from the ratio of **M/s ICOMM Tele Ltd.**'s case (supra) in view of ratio of **S.K. Jain's** case (supra) which has not been overruled or diluted by the Hon'ble Apex Court till date, rather the same was followed in **M/s ICOMM Tele Ltd.**'s case (supra). The Co-ordinate Benches have upheld a similar pre-deposit clause in the aforesaid decided cases thereby making distinction between the judgments in **M/s ICOMM Tele Ltd.** and **S.K. Jain's** cases (supra).

[16]. During course of arguments at one point of time, learned counsel for the petitioner(s) was offered option to deposit 10% of the amount claimed in order to avail the benefit of arbitration clause. Even after obtaining instructions, learned counsel for the petitioner(s) submitted that petitioner is not interested in depositing the amount towards pre-deposit.

[17]. For the detailed reasons recorded by the Co-ordinate

Benches in 'M/s Garg and Company vs. State of Haryana and others' and M/s The Assan Co-op L&C Society, Bahadurgarh, District Jhajjar's cases (supra), I find no reasons to differ in the present cases. Both the petitions are found to be bereft of merit and the same are accordingly dismissed.

14th October, 2022

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Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No