

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

CWP-14587-2022 (O&M)

Date of decision :August 02, 2022

M/s Brij Gopal Construction Co. Pvt. Ltd.

.....Petitioner

Versus

Haryana Shehri Vikas Pradhikarn

...Respondent

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Suvir Kumar, Advocate for the petitioner.

LISA GILL, J.

Petitioner seeks quashing of order dated 15.01.2022 (Annexure P9) passed by the learned Arbitrator whereby application under Section 16 of the Arbitration and Conciliation Act, 1996 (for short – ‘Arbitration Act’) filed by the respondent has been allowed. There is a further prayer for quashing of order dated 02.04.2022 (Annexure P11) passed by the learned Additional District Judge-cum-Presiding Judge, Exclusive Commercial Court, Gurugram whereby appeal filed by the petitioner under Section 37(2) of the Arbitration Act challenging order dated 15.01.2022 has been dismissed and petitioner has been directed to deposit the amount to the extent of 7.5% of the claim amount in terms of Section 25(A)(viii) of the Contract.

Brief facts shorn of unnecessary details, as necessary for adjudication of this matter are that petitioner claims to be a Private Limited Company engaged

in the business of construction works for various government and private departments. It is stated that tenders were floated by the respondent - Haryana Shehri Vikas Pradhikarn in March, 2013 for the work as detailed therein. Bid of the petitioner, being the lowest was accepted and communicated vide letter dated 25.03.2013 with directions to start work immediately. It is pleaded that there was further enhancement in the scope of work allotted. However, dispute arose between the parties with the petitioner alleging that respondent had failed to perform contractual obligations on its part. It is stated that petitioner raised its claim before the Executive Engineer in terms of clause 25(A) of the Contract but no decision was taken by the Executive Engineer within sixty (60) days of the said notice. Consequently, petitioner invoked arbitration clause vide notice dated 29.09.2020. Thereafter, Chief Engineer appointed the learned Arbitrator to adjudicate all disputes and differences between the parties.

Statement of claim was filed by the petitioner on 30.06.2021 and application for amendment of statement of claim was allowed on 15.11.2021. Statement of defence was filed alongwith application under Section 16 of the Arbitration Act on 31.12.2021. Objection was raised by the respondent that in view of clause 25(A)(vii) of the Contract, it is incumbent upon the petitioner to first furnish the security deposit in terms thereof.

Application under Section 16 of the Arbitration Act filed by the respondent was allowed by the learned Arbitrator vide impugned order dated 15.01.2022 directing the petitioner to comply with clause 25(A)(vii) of the agreement within six weeks with a direction that the said amount be kept in fixed deposit to earn interest and the amount would remain available for refund, if any, at the time of pronouncement of Award. It is further ordered that proceedings shall remain suspended till compliance of order. Petitioner challenged this order

before the learned Additional District Judge, Gurugram by filing appeal under Section 37(2) of the Arbitration Act, which has also been dismissed vide order dated 02.04.2022. Aggrieved therefrom, present writ petition has been filed.

Learned counsel for the petitioner argues that impugned orders are liable to be set aside as judgment of the Hon'ble Supreme Court in **M/s ICOMM Tele Limited vs. Punjab State Water Supply and Sewerage Board and another, 2019 (5) RCR (Civil) 242** has not been considered in correct perspective. It is argued that clause 25 (A)(vii) which requires pre-deposit is absolutely arbitrary and is liable to be struck down. It is further submitted that Chief Engineer of the respondent had appointed the Arbitrator on notice served by the petitioner without any condition of pre-deposit, therefore, the said condition is presumed to be waived. Furthermore, while relying upon judgment of the Hon'ble Supreme Court in **M/s ICOMM Tele Limited**(supra), it is argued that clause of pre-deposit is totally arbitrary and violative of Article 14 of the Constitution of India and it cannot be used to deter a party to an agreement from invoking this alternate dispute resolution process of arbitration. Learned counsel submits that Hon'ble Supreme Court has held that such a clause of pre-deposit is contrary to the object of de-clogging the Court system and would render the arbitral process ineffective and expensive. He further relies upon judgment of the Hon'ble Supreme Court in **Mardia Chemicals Ltd. and others versus Union of India 2004 (2) RCR (Civil) 665**, to submit that offending clause should be struck down. It is, thus, prayed that this petition be allowed.

Heard learned counsel for the petitioner and have gone through the file with his able assistance.

At the outset, it would be useful to refer to Clause 25(A)(vii), which reads as under:-

“ It is also a term of this arbitration agreement that where the party invoking arbitration is the contractor, no reference for Arbitrator shall be maintainable unless the contractor, furnishes to the satisfaction of the 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 cost, if any, awarded by the Arbitrator against the claimant party and the balance remaining after such adjustment or whole sum in the absence of any such cost being awarded the whole of the sum will be refunded to him within one month from the date of the award.

AMOUNT OF CLAIMS	RATE OF SECURITY DEPOSIT
i)For claims below Rs.10,000/-	2% of amount claimed.
ii)For claims of Rs.10,000/- and Above & below Rs.1,00,000/-	5% of amount claimed.
iii)For claims of Rs.1,00,000/-	7½% of amount claimed and above.

Offending clause as involved in the case of **M/s ICOMM Tele Limited** (supra) was that of ‘deposit-at-call’ of 10%, which reads as under:-

“viii. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed 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 in 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 in proportion to the amount awarded w.r.t the amount claimed and the balance, if any, shall be forfeited and paid to the other party.”

A similar controversy was sought to be raised in CWP-21840-2020 and other connected writ petitions, which have been dismissed on 08.04.2022. Question raised for adjudication in the said writ petitions was also whether the clause in question requiring a pre-deposit for invocation of Arbitration is unreasonable, unconscionable and liable to set aside. Clause in question in the abovesaid writ petitions was identical as clause 25(A)(vii) involved in the instant writ petition. Reliance had been placed on **M/s ICOMM Tele Limited** (supra) as is the case in the present writ petition. However, while dealing with the contentions as raised and dismissing the said writ petitions, judgment of the Three Judge Bench of the Hon'ble Supreme Court in **S.K. Jain v. State of Haryana, (2009) 4 SCC 357** was duly considered. It was also noticed that Hon'ble Supreme Court itself in the case of **M/s ICOMM Tele Limited** (supra) referred to the case of **S.K. Jain** (supra) and infact upheld the clause regarding pre-deposit in **S.K. Jain's** case (supra).

It is observed in order dated 08.04.2022 in CWP-21840-2020 as under:-

“ Admittedly, in the said case, the requirement was of ‘deposit – at-call’ of 10% of the amount claimed. Moreover, it was provided that in the event of an award in favour of the claimant, the deposit would be refunded to him in proportion to the amount awarded with respect to the amount claimed and the balance, if any, would be forfeited and paid to the other party. There was admittedly no provision of any refund or adjustment of the amount. The Hon'ble Supreme Court in **M/s ICOMM Tele Limited's** case(supra) has dealt with and discussed its earlier judgment in **S.K Jain's** case(supra) and observed 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	2% 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. In upholding such a clause, this Court referred to the judgment in Central Inland Water Transport Corporation (supra) and distinguished this judgment, stating that the concept of unequal bargaining power has no application in the case of commercial contracts. It then went on to hold:-

“14. It has been submitted by learned counsel for the appellant that there should be a cap in the quantum payable in terms of sub-clause (7) of Clause 25-A. This plea is clearly without substance. It is to be noted that it is structured on the basis of the quantum involved. Higher the claim, the higher is the amount of fee chargeable. There is a logic in it. It is the balancing factor to prevent frivolous and inflated claims. If the appellants' plea is accepted that there should be a cap in the figure, a claimant who is making higher claim stands

on a better pedestal than one who makes a claim of a lesser amount.”

14. It will be noticed that in this judgment there was no plea that the aforesaid condition contained in an arbitration clause was violative of Article 14 of the Constitution of India as such clause is arbitrary. The only pleas taken were that the ratio of Central Inland Water Transport Corporation (supra) would apply and that there should be a cap in the quantum payable by way of security deposit, both of which pleas were turned down by this court. Also, the security deposit made would, on the termination of the arbitration proceedings, first be adjusted against costs if any awarded by the arbitrator against the claimant party, and the balance remaining after such adjustment then be refunded to the party making the deposit. This clause is materially different from clause 25(viii), which, as we have seen, makes it clear that in all cases the deposit is to be 10% of the amount claimed and that refund can only be in proportion to the amount awarded with respect to the amount claimed, the balance being forfeited and paid to the other party, even though that other party may have lost the case. This being so, this judgment is wholly distinguishable and does not apply at all to the facts of the present case.”

All the questions and grounds sought to be raised by learned counsel for the petitioner are succinctly answered by the Hon’ble Supreme Court in **M/s ICOMM Tele Limited’s case** (supra) itself while discussing **S.K. Jain’s case** (supra). It is obvious that a clear cut distinction has been made in respect to the type of pre-deposit clause. Discussion of the judgement of S.K. Jain’s case (supra) makes it crystal clear that such like clauses, which provide for adjustment and refund to the party making the deposit after the passing of the award are materially different from the clause which was under challenge in **M/s ICOMM Tele Limited’s case** (supra). In

case of **M/s ICOMM Tele Limited's** case (Supra), the objectionable clause 25 (viii) was struck down finding the same to be arbitrary.”

Thus, the question sought to be raised has been clearly answered against the petitioner. Learned counsel for the petitioner is unable to point out any distinguishing feature in the present writ petition which calls for interference. Insofar as the argument raised on behalf of the petitioner that once Chief Engineer has appointed Arbitrator on demand raised by the petitioner without any condition of pre-deposit, thus, the same amounts to waiver of said condition, is of no avail to the petitioner, for the reason that it is specifically observed by the learned Arbitrator in order dated 15.01.2022 that appointing authority did not waive the condition of pre-deposit but rather asked the Arbitrator to decide the disputes as per clause 25 and 25 (A) of the Contract instead of passing any other order after taking note of the claimant's plea that it was not liable to deposit 7½% of the claimed amount. Though copy of the order passed by the Chief Engineer appointing Arbitrator has not been placed on record, there is no denial of this observation made by the learned Arbitrator in order dated 15.01.2022. It has been rightly held that appointment of Arbitrator in this manner cannot be construed as waiver of condition of pre-deposit.

Similar view in regard to such a pre-deposit clause has also been taken by a Co-ordinate Bench in decision dated 03.11.2020 passed in **ARB-127-2019** and in **CWP No. 13539 of 2021, titled as M/s The Assan Co-op L&C Society, Bahadurgarh, District Jhajjar Vs. Haryana Vidyut Prasaran Nigam Limited (HVPNL)**. Thus, in view of judgment of the Hon'ble Supreme Court in **S.K. Jain vs. State of Haryana, 2009(2) RCR (Civil) 202** as discussed in **M/s ICOMM Tele Limited(supra)**, order dated 15.01.2022 (Annexure P9) and dated 02.04.2022 (Annexure P11) have been correctly passed. This Court is clearly

bound by the judgment of the Hon’ble Supreme in the case of **S.K. Jain** (supra) which has admittedly not been over ruled till date.

No other argument has been addressed.

Writ petition is, accordingly, dismissed with no order as costs.

August 02, 2022
rts

(LISA GILL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No