

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

1. CWP No.21840 of 2020 (O&M)
Date of Decision: 08.04.2022

M/s Garg and CompanyPetitioner

Versus

State of Haryana and others Respondents

AND

2. CWP No.21857 of 2020 (O&M)

M/s Garg and Company

.....Petitioner

Versus

State of Haryana and others Respondents

AND

3. CWP No.21858 of 2020 (O&M)

M/s Garg and Company

.....Petitioner

Versus

State of Haryana and others Respondents

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. Harpreet Singh Brar, Sr. Advocate
with Mr. Kanwal Goyal, Advocate and
Ms. Anshika, Advocate
for the petitioner.

Mr. Kiran Pal Singh, AAG., Haryana.

Mr. Lokesh Sinhal, Advocate
for respondents no.2 and 3.

LISA GILL, J(Oral).

This order shall dispose of CWP Nos. 21840, 21857 and 21858
of 2020, as all the writ petitions involve an identical question for
adjudication and were hence taken up for hearing together at request and

with consent of learned counsel for the parties.

The question involved in these writ petitions is as to whether Clause 33 (7) of the Agreement/s between the petitioner and respondents, requiring a pre-deposit for invoking the arbitration, is unreasonable, unconscionable and liable to be set aside.

Present petitions arise out of three different contracts/agreements executed between the petitioner and the respondents arising out of three tenders floated for;

- i. Construction of forty two (42) Type-B Group-I Flats (Stilt + Seven storied) (6 flats of seven storey in one tower) at Housing Board Colony, Jind Road at Rohtak (comprising Civil Work, Internal Public Health Work, Internal work and Elevator Services), the bid amount was Rs. 10,71,53,712/-, subject matter of CWP No. 21840 of 2020.
- ii. Construction of 64 Nos. Type-C Group-II Flats (Stilt + Eight storied) at Housing Board Colony, Jind Road at Rohtak (comprising Civil Work, internal Public Health Work, Internal Electrical work and Elevator Services), the bid amount being Rs.18,03,97,943/-, subject matter of CWP No. 21857 of 2020 and
- iii. Construction of 96 Nos. Type-C Group-VII Flats (Stilt + Eight Storied) at Housing Board Colony, Jind Road at Rohtak (comprising Civil Work, internal Public Health Work, Internal Electrical Work and Elevator Services), the bid amount being Rs.27,64,74,851/-, subject matter of CWP No. 21858 of 2020.

Petitioner being eligible applied for the same and the tender was allotted. It is stated that the respondents restricted the amount of work in all the three cases. Acceptance letter was/were issued on behalf of the Housing Board, Haryana on 30.09.2015. Agreement/s was/were entered into by the petitioner firm/s with the Executive Engineer, Housing Board, Haryana vide

agreement no.1/2016-2017 (subject matter of CWP No. 21840 of 2020) agreement no. 2/2016-2017 (subject matter of CWP No. 21857 of 2020) and agreement no.3/2016-2017 (subject matter of CWP No. 21858 of 2020), with the time limit for completion of work being 30 months commencing from 30.09.2015 and expiring on 29.03.2018. However, dispute arose between the parties. Petitioner firm/s issued notice under Clause 33 (7) of the Contract Agreement, for referring the dispute for arbitration. Clause 33 of the Agreement attached as Annexure P-7, with all the writ petitions admittedly provides for resolution of the dispute through Arbitration. Grievance of the petitioner is qua Clause 33 (7) of the Contract Agreement inasmuch as it provides for a pre-deposit in case arbitration is invoked by the contractor. Clause 33(7) of the Agreement reads as under:-

“7. 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 Executive Engineer 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, 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:

Sr. No.	Amount Claims	Rate of Security Deposit
i.	For claims below Rs.10,000/-	2% of amount claimed
ii.	For claims of Rs.10,000/- & above but below Rs.1,00,000/-	5% of amount claimed
iii.	For claims of Rs.1,00,000/- and above	7.5% of amount claimed

The stamp-fee due on the award shall be payable by the party as decided by the Arbitrator and in the event of such party's default the stamp-fee shall be recoverable from any other sum

due to such party under this or any other contract.”

Pursuant to petitioner’s notice, the Chief Administrator, Housing Board, Haryana, appointed the Arbitrator for settlement of dispute vide order dated 26.12.2019. Statement of claim was submitted by the petitioner before the Arbitrator. It is stated that the respondents however raised an objection vide communication dated 14.03.2020 and sought a direction to the petitioner to deposit the required security for adjudication of claims as per the Arbitration Clause.

In reply thereto the petitioner firm, took a stand that in view of the judgement of the Hon’ble Supreme Court in **M/s ICOMM Tele Limited Vs. Punjab State Water Supply and Sewerage Board and another, 2019(5) R.C.R (Civil) 242**, there is no requirement for pre-deposit as claimed by the respondents.

Learned Arbitrator vide impugned order dated 09.11.2020, however directed the petitioner/s to deposit the amount in question in all the three matters in terms of Clause 33 (c) of the Contract, holding the said clause to be valid in view of the judgement of the Hon’ble Supreme Court in **S.K. Jain Vs. State of Haryana, 2009(2) R.C.R (Civil) 202**.

Aggrieved therefrom, present writ petitions have been filed.

Learned senior counsel for the petitioner vehemently argued that the contract in question is in-fact a contract of adhesion where the petitioner has no bargaining power. Clause 33 (7) of the Agreement requiring a pre-deposit, is claimed to be arbitrary and contrary to the *raison d’etre* of the Arbitration Act. It is further submitted that the Chief Administrator, Housing Board, Haryana, had proceeded to appoint the Arbitrator on petitioner’s notice under Clause 22 without any condition of a pre-deposit. Therefore, there was no question of raising such a demand

before the learned Arbitrator as such appointment amounts to a waiver of condition of pre-deposit. Mr. Brar, learned senior counsel for the petitioner further argues that the Hon'ble Supreme Court in **M/s ICOMM Tele Limited's** case (**supra**) clearly held the clause of pre-deposit to be arbitrary, violative of Article 14 of the Constitution of India and that such a clause cannot be used to deter a party to an agreement from invoking this alternative dispute resolution process or arbitration. It is vehemently argued that the Hon'ble Supreme Court has held such clause of pre-deposit to be contrary to the object of de-clogging the Court system and would render the arbitral process ineffective and expensive, especially keeping in view the fact that the amount of pre-deposit is far greater than the Court fee that may be leviable while filing a suit before the Civil Court.

Learned counsel for the petitioner further argues that it has been clearly held by the Hon'ble Supreme Court in the case of **M/s ICOMM Tele Limited's** case (**supra**) that insertion of such clauses to avoid frivolous claims being raised is not necessary as a frivolous claim can easily be dismissed with exemplary costs. It is submitted that there is thus no basis or foundation for insertion of such a clause in the agreement which in any case, cannot be binding upon the petitioner, who is not in a position to negotiate with the might of the State.

Learned counsel also relies upon decision of Kerela High Court in **Lite Bite Foods Private Limited Vs. Airports Authority of India, Calicut International Airport, Calicut Airport (P.O) Kerela, A.R No. 103 of 2019 d/o 28.10.2020**, decisions of this High Court in **M/s P&R Infraprojects Limited Vs. PSPCL and others, in CWP No. 8311 of 21019, decided on 13.12.2019, The Mayyar Adars Co-operative L/C Society Ltd. Vs. State of Haryana and others, Arbitration Case No. 297**

of 2017, decided on 15.11.2019 and CR No. 9024 of 2017 (O&M) and connected petitions, Executive Engineer, Punjab Water Supply and Sewerage Board, Division No.2, Ludhiana Vs. M/s DASM Construction Co. Pvt. Ltd., decided on 27.01.2020, to substantiate his arguments. It is thus prayed that these petitions be allowed.

Per contra, learned counsel for the respondents argues that there is no ground whatsoever for interference in the well reasoned and logical order dated 09.11.2020, Annexure P-4, passed by the learned Arbitrator. It is submitted that the present writ petitions are squarely covered by the judgement of the Hon'ble Supreme Court in **S.K Jain's case (supra)** which has been rendered by a three Judges Bench of the Hon'ble Supreme Court and has been succinctly discussed by the Hon'ble Supreme Court in **M/s ICOMM Tele Limited's case (supra)**. Clause of pre-deposit involved in S.K. Jain's case (Supra), is identical to the one in the present case. Therefore, present writ petitions, it is prayed be dismissed with costs.

I have heard learned counsel for the parties and have gone through the files with their assistance.

The factual aspect of the contracts being executed between the parties and a dispute arising therefrom between the parties is a matter of record. It is further not in dispute that the petitioner invoked the arbitration clause and sought resolution of the dispute by resorting to the process of arbitration. Arbitrator was appointed vide order dated 26.12.2019 in all the three matters by the Chief Administrator, Housing Board Haryana. Clause 33(7) of the Agreement, which has been reproduced in the foregoing paras, especially provides that where the party invoking arbitration is the contractor, no reference for Arbitrator shall be maintainable unless the contractor furnishes a security deposit of a sum determined as per the table

given therein. A specific percentage based on the claim amount is provided in Clause 33 (c). It is further provided that the sum so deposited on termination of Arbitration proceedings shall 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 shall be refunded to the contractor within one month from the date of the Award.

It is to be noticed at this stage that the offending clause which was being dealt with by the Hon'ble Supreme Court in **M/s ICOMM Tele Limited's case (supra)** i.e., Clause 25(iii) therein, 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.”

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	@% 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 Corpn. (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 Corpn. (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. Relevant part of the said judgement in this respect is reproduced 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.”

It is in the said factual matrix that the observations regarding

the clause of pre-deposit discouraging arbitration was made and the said clause was struck down while distinguishing the earlier judgement passed by the Hon'ble Supreme Court in **S.K.Jain's case (supra)**.

Learned counsel for the petitioner is unable to deny that Clause 33(7) of the Agreement in the present writ petitions is identical to Clause 25 (7) of the Agreement, which was under consideration in **S.K. Jain's case (supra)**. Though learned senior counsel for the petitioner/s was at pains to submit that the ratio of **M/s ICOMM Tele Limited's case (supra)** suggests that any kind of pre-deposit has to be set aside as it necessarily leads to deterring a party to an arbitration from invoking this alternate dispute resolution system and in-fact renders the entire arbitral process ineffective, however, keeping in view the specific discussion by the Hon'ble Supreme Court in its decision in **M/s ICOMM Tele Limited's case (supra)** of **S.K. Jain's case (supra)**, I do not find any merit in the argument raised by learned counsel for the petitioner. The same is accordingly rejected as it is clear that this Court is bound by the judgement of the Hon'ble Supreme Court in **S.K.Jain's case (supra)**, which has not been overruled till date.

It is relevant to note at this stage that a Coordinate Bench has upheld a similar pre-deposit clause in the decision dated 03.11.2020 passed in **ARB no. 127 of 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)**.

Argument raised by learned counsel for the petitioner/s that once the Arbitrator was appointed by the Chief Administrator himself without the pre-deposit being made, there is no question of insistence upon the same, is an argument which is devoid of any merit, hence rejected. This is so for the reason that it is clearly mentioned in impugned order dated

09.11.2020 itself that Chief Administrator Housing Board Haryana, while appointing the Arbitrator directed the Arbitrator to ensure compliance of the Arbitration Agreement including the clause regarding the security deposit in respect of the claims (counter claims). Therefore, appointment of the Arbitrator cannot be in any manner be construed to be a waiver of the clause requiring pre-deposit by the petitioner.

In all fairness, learned counsel for the petitioner also raised the argument that the petitioner was placed in an unequal bargaining power at the time of execution of the agreement in question as he had no option, but to sign on the dotted line, therefore, for this reason, Clause 33(7) of the Agreement, should not be applicable. It is relevant to note that the Hon'ble Supreme Court in **S.K. Jain's case (supra)**, in this regard has observed as under:-

“6. It is to be noted that the plea relating to unequal bargaining power was made with great emphasis based on certain observations made by this Court in Central Inland Water Transport Corporation Ltd. and Anr. v. Brojo Nath Ganguly and Anr. (1986 (3) SCC 156). The said decision does not in any way assist the appellant, because at para 89 it has been clearly stated that the concept of unequal bargaining power has no application in case of commercial contracts.”

Reference was also made to by the Hon'ble Supreme Court to its earlier decision in **Assistant Excise Commissioner and others Vs. Issac Peter and others, 1994(4) SCC 104.**

No other argument has been raised.

Keeping in view the facts and circumstances of the case as discussed in the foregoing paras, I do not find any illegality, irregularity or perversity in the impugned order dated 09.11.2020, Annexure P-4, passed by the learned Arbitrator.

Writ petitions are accordingly dismissed with no order as to cost.

08.04.2022

s.khan

[LISA GILL]

Judge

Whether speaking/reasoned

:

Yes/No.

Whether reportable

:

Yes/No.