

2023:PHHC:110630

**In the High Court for the States of Punjab and Haryana
At Chandigarh**

CR-4875-2023 (O&M)
Date of Decision:-24.8.2023

M/s Enviro Infra Engineers Private Limited

..... Petitioner

Versus

Haryana Shahari Vikas Pradhikaran Division (HSVP), Sonipat

..... Respondents

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Ms. Isha Goyal, Advocate for the petitioner.

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GURVINDER SINGH GILL, J. (Oral)

1. The petitioner assails order dated 7.8.2023 (Annexure P-7) vide which an application submitted by the respondent directing the claimant/petitioner to make a pre-deposit to the extent of 7.5% of the contract amount, has been accepted.
2. Learned counsel for the petitioner submits that the impugned order is against the spirit of judgment rendered by Hon'ble the Supreme Court in M/s ICOMM Tele Limited Versus Punjab State Water Supply and Sewerage Board and another, 2019(4) SCC 401, wherein such like condition of pre-deposit has been held to be contrary to the spirit of arbitration. In the aforesaid case, the Hon'ble Apex Court struck down the clause of pre-deposit and the said clause 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-atcall” 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.”

(emphasis supplied)

3. This Court has considered the aforesaid submissions.

4. Before proceeding further, it is apposite to refer to the arbitration clause pertaining to pre-deposit i.e. Clause 25-A(7), which 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 arbitration shall be maintainable unless the contractor, furnishes to the full 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 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.**

Amount of Claims	Rate of security deposited
I. For claims below Rs. 10,000	2% of amount claimed
II. For claims of Rs. 10,000 & above	5% of amount claimed & below Rs.1,00,000
III. For claims of Rs. 1,00, 000 and	7.5% of amount claimed above

The stamp fee due on the award shall be payable by the party as desired 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.”

5. A perusal of the aforesaid clause would indicate that while the claimant is required to make a pre-deposit, but it has been clearly stipulated that the same would either stand adjusted or shall be refunded upon final adjudication. There is no such condition as regards forfeiture of such pre-deposit.

6. A matter, similar to the present case, came up before a co-ordinate Bench i.e. ARB. No. 170 of 2017, M/s Bharat Bhushan Gupta and Co. vs. State of Haryana(decided on 14.10.2022) wherein, the petitioner in order to challenge condition of pre-deposit raised a similar contention based on ICOMM's case

(supra). The relevant paragraph wherein said contention is noticed is reproduced herein-under:

“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 declogging 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:- ”

7. The co-ordinate Bench, in *Bharat Bhushan's case* (supra), however, rejected the aforesaid contention while highlighting the distinct position in ICOMM's case. The discussion made therein is as under:

“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 & 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. xxx xxx xxx

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.”
8. This Court in Bharat Bhushan’s case (supra), while distinguishing the factual position inasmuch as there was no condition of forfeiture of pre-deposit in Bharat Bhushan’s case, as was there in ICOMM’s case(supra) held that the pre-deposit cannot be said to be deterrent since as per pre-deposit clause therein, the was not liable to be forfeited and there was specific condition of refund. The observations of other co-ordinate Benches to the effect that ICOMM Tele Ltd.'s case (supra) has not overruled or diluted the ratio of **S.K. Jain's** case (supra) but is a decision based on different facts, have been reiterated. .
9. Even in the present case, the pre-deposit clause does not provide for such harsh measures such as forfeiture and rather there is a clear stipulation that the amount shall either be adjusted or refunded. Under these circumstances, the condition of pre-deposit can not be said to be arbitrary or harsh in any manner. This Court does not find any infirmity in the impugned order and the same is hereby upheld. The petition is found to be sans merit and the same is hereby dismissed.

24.8.2023

pankaj

(**Gurvinder Singh Gill**)
Judge

Whether speaking /reasoned

Yes / No

Whether Reportable

Yes / No