

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

Civil Writ Petition No. 28981 of 2019 (O&M)

Date of Decision: 27.03.2023

Bathinda Railway Transhipment Cooperative L&C Society Ltd. Bathinda

.....Petitioner

versus

Punjab Mandi Board and others

.....Respondents

CORAM: HON'BLE MR.JUSTICE RAVI SHANKER JHA, CHIEF JUSTICE
HON'BLE MR. JUSTICE VIKAS BAHL, JUDGE

Present : Mr. Dharminder Singh Randhawa, Advocate,
for the petitioner.

Mr. Sumit Jain, Advocate, for the respondents.

RAVI SHANKER JHA, CHIEF JUSTICE (oral)

This petition has been filed by the petitioner praying for the following relief:-

- i) *Issue a writ in the nature of certiorari or any other appropriate writ or direction to the effect that Clause 25(viii) contained in general conditions of contract of the NIT (Note Inviting Tender) (Annexure P-1) between petitioner and respondents be declared as bad in law being arbitrary, unconstitutional, unconscionable and against the principles of the public policy and consequently for the issuance of writ in the nature of certiorari for quashing order dated 28.08.2019 (Annexure P-2) whereby petitioner has been asked to deposit 10% Deposit-at-call as per Clause 25(viii) and for setting aside of order dated 13.08.2019 (Annexure P-4) vide which application filed by the petitioner for recalling/review of the order Annexure P-2 in view of the judgment of the Hon'ble Supreme Court in "M/s Icomm Tele Ltd. vs. Punjab State Water Supply and Sewerage Board and*

another” i.e. Civil Appeal No. 2713 of 2019 has also been illegally, wrongly and arbitrarily dismissed”.

2. Learned counsel for the petitioner submits that the petitioner has entered into a contract with the respondent-Punjab Mandi Board on 13.05.2015 for construction of drains in streets of villages Aliana and Sahiwala, Halqa Jalalabad, District Fazilka. As a dispute arose between the parties, the petitioner sought to invoke the arbitration clause 25 of the agreement by issuing notice dated 25.09.2017. However, the respondent-authorities did not proceed with the same in view of the fact that the petitioner had not made the necessary pre-deposit of 10% of the amount involved in the dispute. While the matter was pending, the Supreme Court has rendered a decision on 11.03.2019 in the case ***M/s Icomm Tele Ltd. vs. Punjab State Water Supply & Sewerage Board and another 2019(4) SCC 401*** and the petitioner has immediately moved an application before the Arbitrator on 29.05.2019 seeking recall of its previous order dated 28.08.2018 directing the petitioner to make necessary pre-deposit of 10% of the amount involved in the dispute. The said application was filed on the strength of the decision rendered by the Supreme Court in ***M/s Icomm Tele Ltd. (supra)*** and the said application was dismissed by the Arbitrator on 13.08.2019. The petitioner being aggrieved has filed the present petition before this Court praying not just for setting aside the order dismissing his application but also for quashing Clause 25(viii) of the contract dated 13.05.2015 containing a clause regarding pre-deposit.

3. Learned counsel for the petitioner submits that the arbitration clause before the Supreme Court in the case of ***M/s Icomm Tele Ltd. (supra)*** was identical and in such circumstances the present

petition be allowed and clause 25(viii) of the contract be declared as unconstitutional. It is further prayed that the respondent authorities especially the Arbitrator be directed to proceed further with the matter without insisting on the pre-deposit of the 10% amount involved in the dispute.

4. Learned counsel for the respondents per-contra submits that the clause for pre-deposit has been upheld by the Supreme Court by a judgment rendered by a larger Bench of the Supreme Court in ***S.K.Jain vs. State of Haryana (2009) 4 SCC 357*** wherein Supreme Court has also considered its previous decision rendered in ***Municipal Corporation, Jabalpur and others vs. M/s Rajesh Construction Co. 2007(5) SCC 344***.

5. Learned counsel for the respondents submits that apart from the above, the Supreme Court in the case ***M/s Icomm Tele Ltd. (supra)*** has considered the decision rendered in the case of ***S.K.Jain vs. State of Haryana (supra)*** but while allowing the petition has also taken into consideration the fact that the offending clause does not provide for total refund of the amount deposited by the claimant in case the arbitration is decided in his favour but requires proportional deduction and thereafter payment of the remaining amount be forfeited and paid to the other party. Learned counsel for the respondents submits that it is this part of Clause 25(viii) of the contract that has been found to be offending by the Supreme Court in ***M/s Icomm Tele Ltd. (supra)***.

6. Learned counsel for the respondents further submits that once the clause requiring pre-deposit has been affirmed and upheld by the Supreme Court in ***S.K.Jain vs. State of Haryana (supra)***, the subsequent decision of a smaller Bench of the Supreme Court rendered in

M/s Icomm Tele Ltd. (supra), cannot be read to mean that clause requiring pre-deposit is bad in toto. He submits that this is so as the clause requiring pre-deposit for invoking the arbitration clause has been specifically and clearly upheld by the Supreme Court in *S.K.Jain vs. State of Haryana (supra)*, which is of a larger Bench decision.

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

8. The clause that has been challenged by the petitioner is in the following terms:-

“25(viii) It shall be an essential term of this contract that in order to avoid frivolous claims, the party invoking arbitration shall specify the disputes based upon 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 scheduled bank in the name of the Arbitrator/Chairman of the Arbitral Tribunal, 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 with respect to the amount claimed and the balance, if any, shall be forfeited and paid to the other party”.

9. The clause that has been held to be unconstitutional by the Supreme Court, which is also clause 25(viii) of the contract entered into between the parties before the Supreme Court, was as follows:-

“25(viii) It shall be an essential term of this contract that in order to avoid frivolous claims, the party invoking arbitration shall specify the disputes based upon 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 scheduled 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 with respect to the amount claimed and the balance, if any, shall be forfeited and paid to the other party”.

10. From a perusal of the aforesaid two clauses (*supra*) i.e. one that has been assailed by the petitioner and the other that has been quashed by the Supreme Court in *juxta position* makes it absolutely clear that they are identical containing the same stipulations. The Supreme Court in the case of *M/s Icomm Tele Ltd. (supra)* after considering the validity of the said clause has held as under:-

“28. For all these reasons, we strike down clause 25(viii) of the notice inviting tender. This clause being severable from the rest of clause 25 will not affect the remaining parts of Clause 25. The judgment of the High Court is set aside and the appeal allowed.”

11. In the light of the aforesaid decision rendered by the Supreme Court in *M/s Icomm Tele Ltd. (supra)*, which has considered absolutely an identical clause contained in the agreement between the parties and after doing so has struck down the said clause, it is not for this Court i.e. the High Court to consider the contention of the respondent and take a different view as that would be not just beyond the authority of this Court but would also be an act of impropriety. This Court being bound by the decision rendered by the Supreme Court in *M/s Icomm Tele Ltd. (supra)* allowed the present petition filed by the petitioner and declares the arbitration clause 25(viii) of the tender conditions, quoted above, as

unconstitutional and passes the same orders in similar terms as were passed by the Supreme Court in paragraph-28 of the decision rendered in *M/s Icomm Tele Ltd. (supra)*.

In view of the fact that the Supreme Court has considered and decided the question relating to an identical clause, this Court is not required to and cannot go into any other issue raised by the petitioner, which is left open to be considered and decided in appropriate proceedings.

In view of the aforesaid observations, the petition stands disposed of.

(RAVI SHANKER JHA)
CHIEF JUSTICE

(VIKAS BAHL)
JUDGE

27.03.2023
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Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No