



Supreme Court strikes down an arbitration clause mandating pre-deposit of 10% of the amount claimed as a pre-requisite for invocation of arbitration for being arbitrary and violative of Article 14 of the Constitution¹

Brief Facts

In 2008, the Punjab State Water Supply & Sewerage Board, Bhatinda (Respondent No. 1) issued a notice inviting tender for extension and augmentation of water supply, sewerage scheme, pumping station and sewerage treatment plan for various towns on a turnkey basis. The tender was awarded to M/s ICOMM Tele Ltd. (Appellant), pursuant to which a formal contract was executed between the Appellant and Respondent No. 2. Notice inviting tender formed a part of the formal contract and contained an arbitration clause *i.e.*, Clause 25(viii) which *inter alia* provided that 10% of the amount claimed would be deposited by the party invoking arbitration as a pre-requisite for invocation of such arbitration. The Clause further provided that in the event of an award in favour of the claimant, the deposit would be refunded to the claimant in proportion to the amount awarded and the balance, if any, would be forfeited and paid to the other party.

The Appellant addressed letters to Respondent No. 2 with regard to the appointment of an arbitrator for resolution of certain disputes and further, sought waiver of the 10% pre-deposit. Having received no response, the Appellant filed a Writ Petition before the High Court of Punjab and Haryana *inter alia*

challenging the validity of the pre-deposit part of the arbitration clause. The High Court dismissed the Writ Petition, holding that the aforesaid tender condition was not arbitrary or unreasonable in any way.

Aggrieved by the aforesaid dismissal of the Writ Petition, the Appellant filed the present Special Leave Petition.

Issue

Whether the arbitration clause mandating a 10% pre-deposit of the amount claimed prior to the invocation of arbitration can be said to be arbitrary or discriminatory and therefore, in violation of Article 14 of the Constitution of India?

Judgment

The Supreme Court held that Clause 25(viii) cannot be said to be discriminatory, as it would apply to both parties equally. However, while holding 'arbitrariness' as a separate and distinct facet of Article 14, the Court went on to examine the 'arbitrariness' of Clause 25(viii) and whether it would violate Article 14. While acknowledging that the 10% pre-deposit was incorporated in the contract to avoid frivolous claims, the Court reiterated the well settled position that a frivolous claim can always be dismissed with exemplary costs. In the present case, the Court further

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held that a “*deposit-at-call*” of 10% of the amount claimed was without any direct nexus to the filing of frivolous claims, as the Clause would apply to all claims whether frivolous or otherwise.

Therefore, a 10% deposit made *before* any determination with regard to the validity or *bona fides* of a claim is arbitrary. Additionally, should a claim succeed but the amount awarded be lesser than the amount claimed, the losing party shall be entitled to forfeit the balance despite an unfavourable award. The Court held that this would render the entire clause wholly arbitrary, not only being excessive or disproportionate but also leading to the wholly unjust result of an losing party being entitled to forfeit such part of the deposit as falls proportionately short of the amount awarded as compared to what is claimed.

The Court went on to hold that the pre-requisite of such a deposit would render the arbitral process otiose. The Court observed that the primary objective of arbitration is to ultimately dispose of disputes in an expeditious and efficacious manner. Deterring frivolous claims through a “*deposit at-call*” would only deter the invocation of arbitration

itself, the same being in direct contrast to the objective of this method of alternate dispute resolution *i.e.*, de-clogging the court system. Accordingly, the Court struck down Clause 25(viii) as being arbitrary.

Analysis

By way of the present judgment, the Supreme Court has essentially held that any bar or deterrent to the invocation of arbitration, irrespective of parity in its application to both/all parties to a commercial contract, is arbitrary in nature and violative of Article 14 of the Constitution. Furthermore, the Court has reinforced the distinction between discrimination and arbitrariness, holding the latter to be a distinct and separate facet of Article 14 of the Constitution.

The Supreme Court has rightly held that invoking the principle of imposition of exemplary costs remains available in cases where claims are found to be frivolous. However, a pre-deposit of 10% of the claim amount and subsequent forfeiture of a part of the pre-deposit, would run contrary to the primary object of arbitration, which is to achieve the final disposal of disputes in a speedy, effective, inexpensive and expeditious manner.

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1 Authored by Smarika Singh, Partner, Shreya Sircar, Principal Associate and Sneha Poddar, Associate; M/s ICOMM Tele Ltd. v. Punjab State Water Supply & Sewerage Board & Anr., Civil Appeal No. 2713 of 2019, Supreme Court, 2019 SCC OnLine SC 361, judgment dated 11 March 2019.

Quorum: R.F. Nariman and Vineet Saran, JJ.

PRACTICE AREA EXPERTS

Pallavi Shroff

Managing Partner and
National Practice Head Dispute Resolution
+91 98100 99911
E: pallavi.shroff@AMSShardul.com

Siddhartha Datta

Partner
+91 90070 68488
E: siddhartha.datta@AMSShardul.com

Binsy Susan

Partner
+91 96500 80397
E: binsy.susan@AMSShardul.com

Tejas Karia

Partner and Head, Arbitration Practice sub-group
+91 98107 98570
E: tejas.karia@AMSShardul.com

Ila Kapoor

Partner
+91 98717 92737
E: ila.kapoor@AMSShardul.com

Aashish Gupta

Partner
+91 98189 19857
E: aashish.gupta@AMSShardul.com

Anirudh Das

Partner
+91 98100 98329
E: anirudh.das@AMSShardul.com

Rishab Gupta

Partner
+91 98217 80313
E: rishab.gupta@AMSShardul.com

Smarika Singh

Partner
+91 97170 98075
E: smarika.singh@AMSShardul.com

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