

**ICOMM TELE LTD. V. PUNJAB STATE WATER SUPPLY AND SEWERAGE BOARD AND ANR., 2019 4 SCC 401**

Supreme Court of India; 2-judge bench, **R. F. Nariman** and Vineet Saran, JJ; decided on 11 March 2019

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Article 14 of the Constitution and arbitration clauses

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The arbitration clause provided that to avoid frivolous claims, the party invoking arbitration shall furnish a "deposit-at-call" for ten percent of the amount claimed. Further, the deposit was to be refunded in proportion to the amount awarded with reference to the amount claimed, and the balance, if any, shall be forfeited.

Icomm challenged this clause. The challenge failed in the High Court and reached the Supreme Court.

Icomm argued: -

- (i) The arbitration clause was a contract of adhesion, and since there is unfair bargaining strength between the parties, it ought to be struck down following *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly*, (1986) 3 SCC 156.
- (ii) A 10 percent deposit would amount to a clog on entering the arbitral process. Claims may ultimately be found to be untenable but need not be frivolous. Heavy costs can compensate frivolous claims.
- (iii) Further, the refund mechanism was arbitrary and high-handed.

The Supreme Court struck down the clause as violative of Article 14 of the Constitution of India: -

- (i) Firstly, it said the terms of tender are not open to judicial scrutiny, as they are in the realm of contract unless they are arbitrary, discriminatory, or actuated by malice. [citing to *Directorate of Education v. Educomp Datamatics Ltd.*, (2004) 4 SCC 19; *Global Energy Ltd. v. Adani Exports Ltd.*, (2005) 4 SCC 435].
- (ii) Secondly, it rejected the argument regarding the contract of adhesion holding that it does not apply where both parties are businessmen, and the contract is a commercial transaction and [following paragraph 89 of *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*, (1986) 3 SCC 156, which is otherwise an authority on contract of adhesion].

- (iii) Thirdly, it distinguished the decision in *S.K. Jain v. State of Haryana*, (2009) 4 SCC 357 where an arbitration clause requiring security deposit for invoking arbitration was upheld holding that the concept of unequal bargaining power has no application in the case of commercial contracts. The court said the plea that the arbitration clause was violative of Article 14 Constitution of India was not at issue. It also found the clause, in this case, is "materially different."
- (iv) Fourthly, then the court referred to *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*, (2004) 3 SCC 553 for the proposition that even within the contractual sphere, the requirement of Article 14 to act fairly, justly and reasonably by persons who are "State" authorities or instrumentalities continues. Thus, said the court, it needs to be examined "whether the aforesaid Clause 25(viii) can be said to be arbitrary or discriminatory and violative of Article 14 of the Constitution of India".
- (v) Fifthly, in that examination, the court: -
- a. Rejected the argument that the clause was "discriminatory" ("the aforesaid clause cannot be said to be discriminatory in that it applies equally to both parties").
  - b. Cited to *A.L. Kalra v. Project & Equipment Corpn. of India Ltd.*, (1984) 3 SCC 316 where the court had rejected the proposition that arbitrariness is only a facet of discrimination and discussed the concept of equality.<sup>5</sup>
  - c. Discussed the stated rationale of the "deposit-at-call" clause, that is, to avoid frivolous claims and noted, "it is well settled that a frivolous claim can be dismissed with exemplary costs" [relying on *Dnyandeo Sabaji Naik v. Pradnya Prakash Khadekar*, (2017) 5 SCC 496].
  - d. Cited *General Motors (India) (P) Ltd. v. Ashok Ramnik Lal Tolat*, (2015) 1 SCC 429 noting that "punitive damages follow when a court is approached with frivolous litigation." The court also noted an "important principle established by [General Motors] is that unless it is

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<sup>5</sup> 3-judge bench, D.A. Desai, O. Chinnappa Reddy and A. Varadarajan, JJ.

first found that the litigation that has been embarked upon is frivolous, exemplary costs or punitive damages do not follow."

- e. Held that, therefore a "deposit-at-call" of 10 percent of the amount claimed, 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. It said 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 it need not be frivolous.
- f. Noted that 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 (examining the clause). 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.
- g. Also noted that arbitration is an important alternative dispute resolution process which is to be encouraged because of the high pendency of cases in courts and the cost of litigation. Any requirement as to deposit would certainly amount to a clog on this process.
- h. Observed it is easy to visualize that often a deposit of 10 percent of a huge claim would be even greater than court fees that may be charged for filing a suit in a civil court [citing to *State of J&K v. Dev Dutt Pandit*, (1999) 7 SCC 339].
- i. Primary object of arbitration is to reach a final disposal of disputes in a speedy, effective, inexpensive and expeditious manner [citing to *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228, and *Union of India v. Varinder Construction Ltd.*, (2018) 7 SCC 794].

Deterring a party to arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10 percent would discourage arbitration, contrary to the object of de-clogging the court system, and would render the arbitral process ineffective and expensive.