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Deposit First, Arbitrate Later? Pre-Deposit as a Gateway to Arbitration



Vasanth Rajasekaran
Founder and Head



Harshvardhan Korada
Counsel

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Deposit First, Arbitrate Later? Pre-Deposit as a Gateway to Arbitration

by Vasanth Rajasekaran* and Harshvardhan Korada**

Published on September 24, 2026 - By Editor



Can an arbitration clause require the claimant-contractor to deposit a percentage of its claim before the dispute can even be heard and decided? The Supreme Court's decision in *Santosh Associate (P) Ltd. v. Haryana SIIDC Ltd.*¹ has brought that question into renewed focus and placed it on course for possible consideration by a larger Bench.

The significance of the *Santosh Associate case*² lies in a question that the two-Judge Bench of the Supreme Court considered necessary to revisit, but could not itself conclusively determine. Nearly two decades earlier, in *S.K. Jain v. State of Haryana*³, a three-Judge Bench had upheld a contractual condition requiring a contractor invoking arbitration to furnish a refundable security deposit. For claims of Rs 1 lakh and above, the deposit was fixed at 7 per cent of the amount claimed. The Supreme Court rejected the challenge to the stipulation and regarded the deposit as a legitimate “balancing factor” against frivolous and inflated claims. In the *S.K. Jain case*⁴ therefore recognised that a pre-deposit requirement, at least in the form considered there, could validly operate as a condition precedent to a contractor's invocation of arbitration.

Subsequent decisions, however, began to examine pre-deposit requirements through a different lens. *ICOMM Tele Ltd. v. Punjab State Water Supply & Sewerage Board*⁵ scrutinised the deterrent effect of pre-deposit clauses on arbitration and also questioned the nexus between an upfront deposit and the objective of curbing frivolous claims. *Lombardi Engg. Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*⁶ emphasised that party autonomy cannot sustain an arbitration clause which falls foul of fundamental rights or other constitutional requirements, while *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)*⁷ (CORE) reaffirmed the mandatory character of equal treatment under Section 18, Arbitration and Conciliation Act, 1996 (Arbitration Act). Yet none of these decisions displaced the *S.K. Jain case*⁸.

It is against this unsettled background that the *Santosh Associate case*⁹ assumes importance. Faced with a 10 per cent refundable pre-deposit imposed only upon the contractor invoking arbitration, the two-Judge Bench expressed *prima facie* agreement with the reasoning in the *ICOMM Tele case*¹⁰, but recognised that it remained bound by the three-Judge decision in the *S.K. Jain case*¹¹. The Supreme Court therefore requested the Chief Justice of India to consider whether the following

six questions warranted reference to a larger Bench:

1. Whether a stipulation requiring the contractor alone to make a pre-deposit of security/fees prior to reference of disputes to arbitration is contrary to Section 18, Arbitration Act, which mandates equal treatment of parties at all stages of arbitration?
2. Whether pre-deposit conditions in contracts containing an arbitration clause discourage alternative dispute resolution and undermine its objective of declogging the court system?
3. Whether a condition requiring pre-deposit of security/fees prior to reference to arbitration is arbitrary and violative of the right to sue, Article 14 of the Constitution, and Section 28, Contract Act, 1872?
4. Whether the requirement of pre-deposit of security/fees bears any rational relation to the object of curbing frivolous claims when, at that stage, the claims cannot yet be characterised as frivolous and such claims may in any event be addressed through costs under Section 31(8), Arbitration Act at the conclusion of the arbitration?
5. Whether a pre-deposit condition is valid where the deposit is refundable upon conclusion of the arbitration proceedings?
6. Whether the *S.K. Jain case*¹² remains a valid and binding precedent?

The dispute in *Santosh Associate*

Haryana State Industrial and Infrastructure Development Corporation Ltd. (HSIIDC) invited e-tenders in November 2016 for storm-water drainage works at Gurugram. Santosh Associate was awarded the contract in May 2017. The contract contained Clause 25-A(vii), which imposed a pre-deposit requirement where arbitration was invoked by the contractor. It stipulated that “no reference for arbitration shall be maintainable” unless the contractor furnished security to the satisfaction of the Executive Engineer in charge of the work. For claims of Rs 1 lakh and above, the security was fixed at 10 per cent of the amount claimed.

The deposit was not intended to be permanently retained. At the conclusion of the arbitration, it was to be adjusted against any costs awarded against the claimant. The balance, or the entire amount where no costs were awarded, was to be refunded. The clause therefore made the furnishing of security a condition precedent to the contractor obtaining a reference to arbitration, while providing for its eventual refund subject to any award of costs.

Disputes subsequently arose in relation to the settlement of payments under the contract. In August 2024, the Punjab and Haryana High Court appointed a sole arbitrator under Section 11(6), Arbitration Act. HSIIDC thereafter raised a jurisdictional objection under Section 16 on the ground that Santosh Associate had not furnished the contractual pre-deposit. The arbitrator upheld the objection and directed Santosh Associate to deposit 10 per cent of the claim amount within 15 days. When the contractor declined to do so, the arbitrator dismissed its claims in their entirety.

Santosh Associate challenged that order under Section 37(2) before the Commercial Court at Gurugram. The appeal was dismissed, the Commercial Court holding that the arbitrator’s view was plausible and supported by the decision in the *S.K. Jain case*¹³. The matter then reached the Supreme Court.

The financial consequence of the clause was central to the challenge. On a claim of approximately Rs 1.77 crores, Santosh Associate was required to furnish Rs 17.70 lakhs merely to proceed with the arbitration. By comparison, the *ad valorem* court-fee payable on a civil suit for the same amount in Haryana would have been approximately Rs 7 lakhs. The issue was whether a refundable pre-deposit of 10 per cent of the claim amount could validly operate as a condition precedent to the contractor’s access to arbitration.

From *S.K. Jain* to *CORE*: Two lines of authority

The immediate obstacle to the challenge was the *S.K. Jain case*¹⁴. The case concerned a materially similar Clause 25-A(7),

under which a contractor invoking arbitration was required to furnish security as a condition for reference. For claims of Rs 1 lakh and above, the security was fixed at 7 per cent of the amount claimed.

The three-Judge Bench upheld the stipulation. It rejected the argument that the pre-deposit requirement was inconsistent with Sections 31(8) and 38, Arbitration Act. The Supreme Court also declined to invalidate the clause on grounds of unequal bargaining power or unconscionability, treating the agreement as a commercial contract entered into with the State rather than one involving the kind of inequality that would justify interference with its terms.

The Supreme Court separately considered the argument that the deposit should be subject to an upper limit. It rejected that contention as well, reasoning that there was a rational basis for requiring greater security as the value of the claim increased. In that context, the Supreme Court described the pre-deposit requirement as a “balancing factor to prevent frivolous and inflated claims”. In any case, the security was refundable at the conclusion of the arbitration, subject to adjustment against any costs awarded against the claimant.

The reasoning in the *S.K. Jain case*¹⁵ is consistent with a broader line of authority concerning judicial interference with commercial tender contracts. In *New Bihar Biri Leaves Co. v. State of Bihar*¹⁶, the Supreme Court considered tender arrangements operating within a statutory State-monopoly regime. The purchasers had voluntarily submitted their tenders and thereafter acted upon the agreements. The Supreme Court held that the purchasers could not accept the advantageous parts of the transaction while repudiating those which had become burdensome. It nevertheless clarified that fundamental rights cannot be defeated on the ground of estoppel or waiver.

A similar approach was adopted by the Delhi High Court in *Track Innovations India (P) Ltd. v. Union of India*¹⁷. The High Court emphasised that concluded commercial contracts entered into through tender or negotiation should not ordinarily be altered merely by invoking broad notions of fairness. It distinguished such transactions between commercially capable parties from cases involving a genuine inequality of bargaining power.

Read together, these authorities support a narrower proposition. The fact that a contractual term is onerous does not, by itself, render it vulnerable to judicial interference. The validity of a pre-deposit requirement must therefore turn on considerations beyond the financial burden imposed by the clause alone.

The decision in *ICOMM Tele*

A different emphasis emerged in the *ICOMM Tele case*¹⁸. The Supreme Court distinguished the *S.K. Jain case*¹⁹ on 2 grounds. *First*, it proceeded on the basis that no challenge founded on arbitrariness under Article 14 had been advanced in the *S.K. Jain case*.²⁰ *Second*, the deposit mechanism before it was materially different.

The clause in the *ICOMM Tele case*²¹ required the claimant to furnish a 10 per cent “deposit-at-call” before arbitration could proceed. The amount was refundable only in proportion to the claim ultimately awarded, while the balance stood forfeited. The financial consequence of invoking arbitration therefore depended upon the eventual success of the claim.

The Supreme Court held that such a requirement could operate arbitrarily. At the stage of invocation, there was no basis to assume that the claim was frivolous, and a deposit calculated at 10 per cent of the claim could become substantial in high-value disputes. Frivolous claims could instead be addressed through an appropriate award of costs. The Supreme Court also regarded the requirement as a deterrent to arbitration and inconsistent with the policy of encouraging alternative dispute resolution. Clause 25(viii) was accordingly struck down.

***Lombardi Engg. and CORE* : Constitutional limits on party autonomy**

The three-Judge decision in the case of *Lombardi Engg. Ltd.*²² carried the analysis further. The concerned case had a 7 per cent pre-deposit requirement contained in a public contract. The Supreme Court noted that the requirement had no evident

nexus with the separate performance security already furnished by the contractor. It also observed that frivolous claims could be dealt with through an award of costs under Section 31-A, Arbitration Act.

More significantly, *Lombardi Engg. case*²³ addressed the limits of party autonomy. The three-Judge Bench held that party autonomy cannot be stretched to validate an arbitration clause which violates fundamental rights. An arbitration agreement must remain consonant with the “operation of law”, including the Constitution.

Even so, the *Lombardi Engg. case*²⁴ did not treat the *S.K. Jain case*²⁵ and the *ICOMM Tele case*²⁶ as irreconcilable.

The Constitution Bench decision in the *CORE case*²⁷ arose in a different context. It concerned the validity of an arbitral appointment mechanism rather than a pre-deposit clause. Its relevance to the present issue lies in the treatment of equality under Section 18, Arbitration Act as a mandatory and non-derogable feature of arbitral procedure.

In the *CORE case*²⁸ also reaffirmed that State instrumentalities cannot rely upon party autonomy to sustain arbitral arrangements inconsistent with principles of equality and non-arbitrariness. In that context, the Constitution Bench referred to both *ICOMM Tele case*²⁹ and *Lombardi Engg. case*³⁰. At the same time, as *Santosh Associate case*³¹ later noted, *CORE case*³² quoted *S.K. Jain case*³³ with approval. The three-Judge decision in the *S.K. Jain case*³⁴ therefore remained undisturbed.

Santosh Associate: Doubt without departure

The above-discussed jurisprudential position shaped the course ultimately adopted in the *Santosh Associate case*³⁵. The appellant sought to avoid *S.K. Jain case*³⁶ by contending that the decision was passed *sub silentio* on Article 14 and Sections 18 and 38, Arbitration Act. The two-Judge Bench was not persuaded that *S.K. Jain case*³⁷ could be displaced on that basis. It observed that it was *prima facie* difficult to accept that the Article 14 challenge had not been advanced in *S.K. Jain case*³⁸, notwithstanding the contrary premise on which *ICOMM Tele case*³⁹ had proceeded.

There was also a more fundamental constraint. A two-Judge Bench could not disregard a binding decision of a three-Judge Bench. *Lombardi Engg. case*⁴⁰ had expressly held that *S.K. Jain case*⁴¹ and *ICOMM Tele case*⁴² were not in conflict, and neither *Lombardi Engg. case*⁴³ nor *CORE case*⁴⁴ had declared *S.K. Jain case*⁴⁵ to be bad law. The Bench therefore recorded its *prima facie* agreement with the reasoning in *ICOMM Tele case*⁴⁶, while accepting that it could not itself displace *S.K. Jain case*⁴⁷.

Frivolous claims: Is pre-deposit the right remedy?

The principal justification advanced in favour of a pre-deposit requirement is deterrence. A public authority may legitimately seek to discourage inflated or frivolous claims and to secure recovery of costs from a claimant who abuses the arbitral process. The difficulty, however, lies in imposing that burden before the merits of the claim have been examined.

That concern formed an important part of the reasoning in *ICOMM Tele case*⁴⁸ and is also reflected in the questions formulated in *Santosh Associate case*⁴⁹. At the stage when arbitration is invoked, there will ordinarily be no basis to determine whether the claim is frivolous. A requirement calculated as a percentage of the claim therefore applies indiscriminately to genuine and frivolous claims alike.

The Arbitration Act already provides a mechanism for addressing abusive claims through costs. Sections 31(8) and 31-A empower the Arbitral Tribunal to award costs having regard to the outcome of the proceedings, the conduct of the parties and other relevant circumstances. This permits the financial consequences of abuse to follow an assessment of the claim rather than precede it.

In *Airports Authority of India v. Hotel Leelaventure Ltd.*⁵⁰, the Delhi High Court, drawing upon Supreme Court authority, emphasised the role of realistic and, where justified, exemplary costs in controlling false or frivolous litigation.

A costs order responds to abuse once there is material from which such abuse can be identified. An *ad valorem* pre-deposit, by contrast, burdens every claimant before that assessment can take place.

This does not necessarily render every pre-deposit requirement invalid. It does, however, require a justification for imposing an upfront financial condition in addition to the statutory costs regime, and for fixing that condition at a level proportionate to the objective sought to be achieved.

Questions requiring authoritative resolution

1. *Equal treatment and the contractual gateway*

The first issue is the unilateral character of the burden. Clause 25-A(vii) applies when the contractor invokes arbitration, not when the State does so. Section 18 speaks in mandatory terms of equal treatment and a full opportunity to present one's case. The unresolved question is whether Section 18 reaches still further back to a financial condition precedent to invocation or reference, before the appointment process itself begins.

2. *Refundability is relevant, but is it decisive?*

The contrast between *S.K. Jain case*⁵¹ and *ICOMM Tele case*⁵² has often been explained through refundability. That distinction matters: forfeiture can turn security into an adverse financial consequence linked to the extent of the claimant's success. Yet a refundable deposit can still impose a serious liquidity burden at the precise moment a party seeks adjudication. Any authoritative reconsideration must therefore address whether refundability is sufficient, or merely one factor alongside the percentage demanded, the value of the claim, the availability of a cap, and the practical ability of the claimant to access arbitration.

3. *Commercial autonomy and Article 14*

A categorical rule against onerous dispute resolution clauses especially in matters involving tender conditions or an employer and vendor relationship, would sit uneasily with the *New Bihar Biri Leaves case*⁵³ and the commercial reasoning applied in the case of *Track Innovations*⁵⁴. Equally, the State does not shed Article 14 merely because it contracts rather than legislates. *Shrilekha Vidyarthi v. State of U.P.*⁵⁵ remains an important reminder that arbitrariness can be scrutinised in the contractual field.

4. *The rational nexus with frivolous claims*

The relationship between the stated objective and the form of the pre-deposit also requires closer scrutiny. Not all security requirements operate in the same way. A fixed or modest amount calibrated to likely costs is materially different from an uncapped deposit calculated as a percentage of the entire claim. A reciprocal requirement imposed on both parties also stands on a different footing from one that burdens only the contractor invoking arbitration.

The legitimacy of the objective is not seriously in doubt. Discouraging frivolous or inflated claims is a permissible aim. The real enquiry is whether the particular pre-deposit bears a rational connection to that aim and is proportionate in its operation, without creating a barrier capable of deterring genuine claims.

Conclusion

Pre-deposit clauses bring into focus the limits of party autonomy in arbitration. Commercial parties should ordinarily be held to the bargains they have entered into, including terms contained in tender documents and negotiated contracts. A condition governing access to the agreed adjudicatory mechanism, however, is not the same as an ordinary allocation of price, risk or performance. Where such a condition operates only against one party or imposes a substantial financial barrier to invocation, questions of equality, access and proportionality necessarily arise.

The questions identified in the case of *Santosh Associate*⁵⁶ therefore call for a rule capable of distinguishing between

materially different forms of pre-deposit. A refundable deposit is not the same as a forfeitable one. A fixed or modest security stands on a different footing from an uncapped percentage of the claim. A reciprocal requirement also differs from one imposed only upon the claimant-contractor.

A categorical rule either validating or invalidating all such clauses would be too broad. The better enquiry is whether the condition serves a legitimate objective, bears a rational connection to that objective, and is proportionate in its operation while preserving meaningful access to arbitration.

For the present, the *S.K. Jain case*⁵⁷ remains the binding three-Judge authority. The *Santosh Associate case*⁵⁸ does not invalidate pre-deposit clauses.

***Founder and Head, Trinity Chambers, Delhi.**

****Counsel, Trinity Chambers, Delhi.**

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