

Supreme Court Refers Validity Of Pre-Deposit Conditions For Invoking Arbitration For Larger Bench Consideration

Authors: Vasanth Rajasekaran* and **Harshvardhan Korada****

Introduction

In a recent decision in ***Santosh Associate Private Limited vs. Haryana State Industrial and Infrastructure Development Corporation Ltd.*** [2026 INSC 872], the Supreme Court of India ("**Supreme Court**"), while examining a contractual stipulation requiring a contractor to furnish a security deposit before reference of disputes to arbitration, expressed serious reservations regarding onerous pre-deposit conditions that may deter access to arbitration. At the same time, the Supreme Court noted that an earlier three-Judge Bench in ***S.K. Jain vs. State of Haryana*** [(2009) 4 SCC 357] had upheld a refundable pre-deposit condition and, being a two-Judge Bench, it could not depart from the binding precedent. The Supreme Court therefore directed that the matter be placed for consideration of whether the broader questions concerning the validity of such clauses, including their compatibility with Article 14 of the Constitution of India, Section 18 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") and Section 28 of the Indian Contract Act, 1872 ("**Contract Act**"), warrant reference to a larger Bench. In this article, we briefly navigate through the facts and findings in the aforesaid decision.

Facts

The respondent, Haryana State Industrial and Infrastructure Development Corporation Ltd. ("**HSIIDC**"), invited e-tenders in November 2016 for execution of storm water drainage systems and contingent works at Udyog Vihar, Gurugram. The appellant participated in the bidding process and was awarded the contract in May 2017 for a consideration of approximately INR 5.14 crore.

The contract contained an arbitration clause which, amongst other things, stipulated that where the contractor invoked arbitration, no reference would be maintainable unless the contractor first furnished a security deposit. For claims of INR 1,00,000 and above, the stipulated security deposit was ten per cent of the amount claimed. The clause further contemplated adjustment of the deposit against costs, if any, awarded against the claimant, with the balance amount being refundable upon conclusion of the arbitral proceedings.

During execution of the works, the project encountered site-related issues, and the scope of work was substantially reduced. Consequently, in January 2021, the contract value was revised to approximately INR 2.41 crore. After completion of the reduced scope, disputes arose between the parties over the final settlement of payments.

In August 2024, the High Court of Punjab and Haryana, exercising jurisdiction under Section 11(6) of the Arbitration Act, appointed a sole arbitrator to

adjudicate the disputes. At the threshold of the arbitral proceedings, HSIIDC filed an application under Section 16 of the Arbitration Act contending that the reference was not maintainable because the appellant had failed to furnish the contractual security deposit. The objection was upheld, and the appellant was directed to deposit ten per cent of its claim amount within fifteen days. When the appellant declined to make the deposit, its claims were dismissed in their entirety.

The appellant challenged the order under Section 37(2) of the Arbitration Act before the Commercial Court, Gurugram. The Commercial Court dismissed the appeal, holding that the view taken in the arbitral proceedings was plausible and was supported by the decision of the Supreme Court in **S.K. Jain vs. State of Haryana** [(2009) 4 SCC 357]. The appellant thereafter approached the Supreme Court.

Submissions

The appellant argued that the pre-deposit stipulation was arbitrary and violative of Article 14 of the Constitution since it imposed the financial burden only upon contractors invoking arbitration, while no corresponding obligation was placed upon HSIIDC. It was further submitted that requiring ten per cent of the claim amount at the threshold had no rational nexus with the stated objective of discouraging frivolous claims, particularly when frivolous claims could be dealt with through an award of costs at the conclusion of the arbitral proceedings. In the present case, the appellant's claim of approximately INR 1.77 crore would have required a security deposit of INR 17.70 lakh, whereas the ad valorem court fee stated to be payable on a civil suit for the same amount in Haryana was approximately INR 7.16 lakh.

In support of its challenge, the appellant relied upon **ICOMM Tele Ltd. vs. Punjab State Water Supply and Sewerage Board** [(2019) 4 SCC 401], wherein the Supreme Court had invalidated a pre-deposit clause on the ground that it was arbitrary and operated as a deterrent to invocation of arbitration. Reliance was also placed upon **Lombardi Engineering Ltd. vs. Uttarakhand Jal Vidyut Nigam Ltd.** [(2024) 4 SCC 341], which held that party autonomy cannot be extended to contractual stipulations that violate fundamental rights. The appellant further relied upon the Constitution Bench decision in **Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV)** [(2025) 4 SCC 641] ("**CORE**"), particularly the principle that Section 18 of the Arbitration Act is mandatory and requires equal treatment of parties at all stages of arbitration.

The appellant also sought to distinguish **S.K. Jain vs. State of Haryana** [(2009) 4 SCC 357] on the basis that the constitutional challenge under Article 14 and the effect of Sections 18 and 38 of the Arbitration Act had not been considered in that decision. In support of the proposition that a decision is not an authority on a point that passed without consideration, reliance was placed upon **Municipal Corporation of Delhi vs. Gurnam Kaur** [(1989) 1 SCC 101].

HSIIDC, on the other hand, contended that **S.K. Jain vs. State of Haryana** [(2009) 4 SCC 357] continued to be binding. According to HSIIDC, the clause

under consideration was materially different from the clause invalidated in **ICOMM Tele Ltd. vs. Punjab State Water Supply and Sewerage Board** [(2019) 4 SCC 401], since the latter contemplated forfeiture of a portion of the deposit, whereas the present clause contemplated a refundable security deposit subject only to adjustment against costs. HSIIDC further relied on **Lombardi Engineering Ltd. vs. Uttarakhand Jal Vidyut Nigam Ltd.** [(2024) 4 SCC 341] to submit that the Supreme Court had itself recognised that the clauses considered in **S.K. Jain** and **ICOMM Tele** stood on materially different footings.

Findings

(i) Existing Legal Position On Pre-Deposit Conditions

The Supreme Court first examined the line of precedent governing pre-deposit conditions in arbitration clauses. In **S.K. Jain vs. State of Haryana** [(2009) 4 SCC 357], a three-Judge Bench had rejected the challenge based on unequal bargaining power and unconscionability to a clause requiring the contractor to make a pre-deposit before reference to arbitration. The Court in **S.K. Jain** had regarded the deposit requirement as a balancing mechanism to prevent frivolous and inflated claims, and had held that the requirement was reasonable and bore a nexus with the object sought to be achieved.

The Supreme Court then considered **ICOMM Tele Ltd. vs. Punjab State Water Supply and Sewerage Board** [(2019) 4 SCC 401], where a two-Judge Bench had taken a different approach to a materially different clause. **ICOMM Tele** observed that requiring a pre-deposit before reference to arbitration discourages alternative dispute resolution and runs contrary to the objective of reducing recourse to courts. The clause in that case also provided for refund of the deposit only in proportion to the amount ultimately awarded, with the balance being forfeited. In that context, the pre-deposit requirement was held to be arbitrary and lacking a direct nexus with the objective of curbing frivolous claims.

Thereafter, in **Lombardi Engineering Ltd. vs. Uttarakhand Jal Vidyut Nigam Ltd.** [(2024) 4 SCC 341], a three-Judge Bench reiterated that party autonomy cannot be stretched to validate contractual terms which infringe fundamental rights and observed that frivolous claims can be addressed by imposition of costs. Significantly, however, Lombardi Engineering expressly held that there was no conflict between **S.K. Jain** and **ICOMM Tele** because the clauses considered in the two cases were materially distinct.

The Supreme Court also considered **Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV)** [(2025) 4 SCC 641], wherein the Constitution Bench held that Section 18 of the Arbitration Act is mandatory and non-derogable, and applies at all stages of arbitral proceedings. CORE also discussed the reasoning in **S.K. Jain**, **ICOMM Tele** and Lombardi Engineering while examining the principle of equal treatment in arbitration.

Against this background, the Supreme Court observed that judicial discipline did not permit a two-Judge Bench to override the principle laid down by a

three-Judge Bench in **S.K. Jain**. It also noted that **Lombardi Engineering**, itself a three-Judge Bench decision, had expressly held that there was no conflict between **S.K. Jain** and **ICOMM Tele**, and neither **Lombardi Engineering** nor **CORE** had declared **S.K. Jain** to be no longer good law. The Supreme Court therefore held that it could not treat **S.K. Jain** as having been rendered sub silentio or as having ceased to be binding, even though it recorded its prima facie agreement with the reasoning adopted in **ICOMM Tele** on the deterrent effect of pre-deposit requirements.

(ii) Pre-Deposit Conditions And The Right To Sue

The Supreme Court thereafter considered an additional dimension which, in its view, had not been addressed in the earlier decisions. Referring to **Smt. Ganga Bai vs. Vijay Kumar** [(1974) 2 SCC 393], it noted the settled principle that the right to institute a suit inheres in a person unless expressly barred by statute. The Supreme Court also referred to Section 28 of the Contract Act, which renders void agreements that absolutely restrain a party from enforcing contractual rights through ordinary legal proceedings, subject to the statutory exception permitting reference of disputes to arbitration.

In this context, the Supreme Court expressed the view that an arbitration clause cannot impose a pre-deposit requirement so onerous that the right to pursue a claim becomes illusory or nugatory at the very threshold. According to the Supreme Court, requiring a substantial percentage of the claim amount as a condition precedent to arbitration may suppress claims, deter recourse to alternative dispute resolution and thereby defeat the very purpose that arbitration is intended to serve.

(iii) Reference To A Larger Bench

Since the Supreme Court was sitting as a two-Judge Bench and entertained doubts regarding the continuing validity of the principle in **S.K. Jain**, it considered a reference to a larger Bench necessary. In doing so, the Supreme Court referred to **Aligarh Muslim University vs. Naresh Agarwal** [(2025) 6 SCC 1] and **Central Board of Dawoodi Bohra Community vs. State of Maharashtra** [(2005) 2 SCC 673], which reiterate that a Bench of lesser strength cannot disagree with a decision rendered by a larger Bench and must, where appropriate, seek consideration by a Bench of greater strength.

Accordingly, the Supreme Court requested that the matter be considered for reference to a larger Bench on, amongst others, the following questions:

- (i) Whether requiring the contractor alone to furnish a pre-deposit of security or fees before reference to arbitration is contrary to Section 18 of the Arbitration Act, which mandates equal treatment of parties at all stages of arbitration;
- (ii) Whether pre-deposit conditions discourage alternative dispute resolution and undermine its objective of reducing recourse to the court system;

- (iii) Whether a condition requiring pre-deposit of security or fees before reference to arbitration is arbitrary and violative of the right to sue, Article 14 of the Constitution and Section 28 of the Contract Act;
- (iv) Whether a pre-deposit requirement bears any rational relation to the object of curbing frivolous claims when frivolousness cannot be determined at the stage of invocation and such claims may instead be addressed through costs under Section 31(8) of the Arbitration Act;
- (v) Whether a pre-deposit condition remains valid where the amount deposited is refundable upon conclusion of the arbitral proceedings; and
- (vi) Whether ***S.K. Jain vs. State of Haryana*** [(2009) 4 SCC 357] continues to be a valid and binding precedent.

Conclusion

The decision assumes significance for arbitration clauses, particularly in public works and infrastructure contracts, which condition access to arbitration upon furnishing a substantial security deposit. The Supreme Court has brought into focus the tension between such contractual conditions, on the one hand, and equal treatment of parties, access to adjudicatory remedies and the policy of facilitating alternative dispute resolution, on the other.

At the same time, it is important that the decision is not read as striking down the pre-deposit clause in the present contract or as overruling ***S.K. Jain***. Bound by the discipline of precedent, the two-Judge Bench has instead directed that the matter be placed for consideration of a reference to a larger Bench. As matters presently stand, ***S.K. Jain*** continues to remain a binding precedent.

Should the matter be placed before a larger Bench, its eventual determination is likely to have a significant bearing on the drafting and enforceability of arbitration clauses containing pre-deposit requirements. In particular, the Court would have an opportunity to clarify whether a refundable deposit can nevertheless become impermissible by reason of its quantum, its unilateral application to one contracting party, or its effect of creating a practical barrier to invocation of arbitration.

* **Vasanth Rajasekaran** is the Head and Founder of Trinity Chambers, Delhi.

** **Harshvardhan Korada** is a Counsel at Trinity Chambers, Delhi.

Contact

For any query, help or assistance, please reach out at info@trinitychambers.in or visit us at www.trinitychambers.in.

Authors



Vasanth Rajasekaran
Founder & Head
vasanth@trinitychambers.in



Harshvardhan Korada
Counsel
harshvardhan@trinitychambers.in