2026 INSC 872

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**
**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. OF 2026**
**@ SLP (C) No. 31245 of 2025**

**M/S SANTOSH ASSOCIATE PRIVATE LIMITED ….. APPELLANT**

**VERSUS**

**HARYANA STATE INDUSTRIAL AND INFRASTRUCTURE DEVELOPMENT CORPORATION LTD. .….RESPONDENT**

**J U D G M E N T**

**MANMOHAN, J.**

1. Leave granted.

2. The present Appeal has been filed challenging the judgment dated 12th September 2025 passed by the Commercial Court, Gurugram whereby the appeal filed by the Appellant under Section 37(2) of the Arbitration & Conciliation Act, 1996 (‘**the Act**’) was dismissed. The Commercial Court affirmed the order dated 1st August 2025 passed by the Sole Arbitrator, who had allowed the Respondent's application under Section 16 of the Act and dismissed the Appellant's claim in its

entirety for non-compliance with the contractual stipulation requiring a prior security deposit of ten per cent (10%) of the claim amount.

*FACTUAL BACKGROUND*

3. The Respondent invited e-tenders on 7th November 2016 for the execution of storm water drainage systems and contingent works at Sector-35, Udyog Vihar, Phase-VII, Gurugram. The Appellant participated in the bidding process and was awarded the contract on 17th May 2017 for a total consideration of Rupees Five Crore Fourteen Lakh Eleven Thousand Six Hundred and Thirty-Five Only (₹5,14,11,635/-). The contract contained an arbitration clause, Clause 25-A(vii), which mandated that a contractor, in the event of raising claims exceeding Rupees One Lakh (₹1,00,000/-), must deposit ten per cent (10%) of the claim amount as security prior to reference to arbitration. Clause 25-A(vii) is reproduced hereinbelow:

> *"It is also a term of this arbitration agreement that **where the party invoking arbitration is the contractor, no reference for arbitration shall be maintainable unless the contactor furnishes to the satisfaction of the Executive Engineer In charge of the work, a security deposit of a sum determined according to details given below and the sum so deposited shall on the termination of the arbitration proceedings, be adjusted against the cost, if any, awarded by the arbitrator against the claimant party, and the balance remaining after such adjustment in the absence of any such cost being awarded, the whole of the sum will be refunded to him within one month from the date of the Award.**"*

| *Amount of Claims* | *Rate of Security Deposit* |
|---|---|
| *i. For claims below Rs. 10,000/-* | *2% of the amount claimed* |
| *ii. For claims of Rs. 10,000/- and above but below Rs. 1,00,000/-* | *5% of the amount claimed* |
| *iii. For claims of Rs.1,00,000 and above.* | *10% of the amount claimed...."* |

(emphasis supplied)

4. During execution, the project encountered site-related challenges, resulting in a significant reduction in scope. Consequently, the contract value was revised to Rupees Two Crore Forty Lakh Ninety-Three Thousand and Fifty-Nine Only (₹2,40,93,059/-) on 19th January 2021. Upon completion of the reduced scope, disputes arose concerning final settlement of payments.

5. On 8th August 2024, the High Court of Punjab and Haryana exercising jurisdiction under Section 11(6) of the Act appointed Justice (Retd.) Surender Gupta as Sole Arbitrator. At the threshold of proceedings, the Respondent filed an application under Section 16 of the Act, contending that the reference was not maintainable owing to the Appellant's failure to furnish the mandatory ten per cent (10%) deposit for claims exceeding Rupees One Lakh Only (₹1,00,000/).

6. The Sole Arbitrator upheld the Respondent's objection and directed the Appellant to deposit ten per cent (10%) of the claim amount within fifteen (15) days. Upon refusal, the Appellant's claim was dismissed in entirety.

7. Aggrieved by the same, the Appellant filed an appeal under Section 37(2) of the Act before the Commercial Court, Gurugram. By order dated 12th September 2025, the Court dismissed the appeal, holding that the Arbitrator's view was plausible and supported by the precedent in ***S.K. Jain vs. State of Haryana*, *(2009) 4 SCC 357***.

*SUBMISSIONS ON BEHALF OF THE APPELLANT*

8. Mr. Shreeyash U. Lalit, learned counsel for the Appellant, argued that Clause 25-A(vii) is unconstitutional, being violative of Article 14 of the

Constitution of India. He submitted that the clause discriminated against contractors by requiring them alone to furnish a pre-deposit, while the State was exempt.

9. He further submitted that the requirement of a ten per cent (10%) deposit bore no rational nexus to the objective of curbing frivolous claims, since such claims could always be addressed through costs at the conclusion of arbitration under Section 31(8) of the Act. He also pointed out that on a claim of Rupees One Crore Seventy Seven Lakhs (₹1,77,00,000/-), as in the present instance, the Appellant would have to furnish a security deposit of Rupees Seventeen Lakhs Seventy Thousand (₹17,70,000/-), whereas the *ad valorem* court fee payable in a Civil Suit in Haryana on the same amount of claim would merely amount to Rupees Seven Lakhs Sixteen Thousand Three Hundred (₹7,16,300/-).

10. He contended that reliance in the impugned order upon ***S.K. Jain*** (supra) is misconceived. In that case, this Court had rejected the plea of unequal bargaining power and unconscionability but had not examined whether the arbitration clause was violative of Article 14. According to learned counsel, the clause is manifestly one-sided, operating solely against contractors and is contrary to Section 18 of the Act which mandates equal treatment of parties at all stages of arbitral proceedings.

11. Mr. Lalit, learned counsel further relied on ***ICOMM Tele Ltd. vs. Punjab State Water Supply,(2019) 4 SCC 401***, wherein this Court struck down a similar clause as arbitrary under Article 14. The Court held that unless litigation was

shown to be frivolous, neither exemplary costs nor pre-deposit could be imposed. It also observed that pre-deposit clauses discourage arbitration and undermine its objective of declogging the court system.

12. He also cited ***Lombardi Engineering Ltd. vs. Uttarakhand Jal Vidyut Nigam Ltd., (2024) 4 SCC 341***, where a three-Judge Bench of this Court held that, *"The concept of "party autonomy" as pressed into service by the respondent cannot be stretched to an extent where it violates the fundamental rights under the Constitution. For an arbitration clause to be legally binding it has to be in consonance with the "operation of law" which includes the Grundnorm i.e. the Constitution. It is the rule of law which is supreme and forms parts of the basic structure. The argument canvassed on behalf of the respondent that the petitioner having consented to the pre-deposit clause at the time of execution of the agreement, cannot turn around and tell the Court in a Section 11(6) petition that the same is arbitrary and falling foul of Article 14 of the Constitution is without any merit"*.

13. He further relied on the Constitution Bench decision in ***Central Organisation for Railway Electrification (CORE) vs. M/s ECI-SPIC-SMO-MCML (JV), (2025) 4 SCC 641***, which affirmed ***ICOMM Tele Ltd.*** (supra) and ***Lombardi Engineering Ltd.*** (supra). According to him, the Constitution Bench reiterated that principles of non-arbitrariness apply even when government instrumentalities contract with private parties and that equal treatment of parties must be ensured at all stages of arbitration.

14. Mr. Lalit submitted that ***S.K. Jain*** (supra) did not constitute a binding precedent as it was *sub silentio* on Article 14 and Sections 18 and 38 of the Act, which issues were later considered in ***ICOMM Tele Ltd.*** (supra), ***Lombardi Engineering Ltd.*** (supra) and ***CORE*** (supra). He reiterated that this Court in ***S.K. Jain*** (supra) only considered the question of unequal bargaining power and cap on quantum payable. He explained *sub silentio* as a situation where a point of law is not perceived or addressed by the Court. In support of his submission, he relied upon the judgment of this Court in ***Municipal Corporation of Delhi vs. Gurnam Kaur, (1989) 1 SCC 101***, wherein this Court has held as under: -

> "*11. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das case [ Writ Petitions Nos. 981-82 of 1984] and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavements or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P.J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th Edn. explains the concept of sub silentio at p. 153 in these words:*
>
> > *A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.*

*12. ….Precedents sub silentio and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority.*"

*SUBMISSIONS ON BEHALF OF THE RESPONDENT*

15. Mr. Harsh Mehla, learned counsel for the Respondent, argued that ***S.K. Jain*** (supra) remains a binding precedent. He submitted that this Court had upheld the validity of pre-deposit clauses where deposits were refundable on the ground that such clauses serve the legitimate purpose of deterring frivolous disputes.

16. He contended that arbitration clauses in ***S.K. Jain*** (supra), ***ICOMM Tele Ltd.*** (supra) and ***Lombardi Engineering Ltd.*** (supra) were materially different. The learned counsel for the Respondent drew attention of this Court towards a comparison table of the aforementioned precedents:

| **Citation** | **S.K. Jain vs. State of Haryana (2009) 4 SCC 357** | **ICOMM Tele Ltd. vs. Punjab Board (2019) 4 SCC 401** | **Lombardi Engineering vs. UJVNL (2024) 4 SCC 341** |
|---|---|---|---|
| Bench Strength | 3 Judge Bench | 2 Judge Bench | 3 Judge Bench |
| Clause in dispute | "*25-A. (7) It is also a term of this contract agreement that where the party invoking arbitration is the contractor, no reference for arbitration shall be maintainable unless the contractor furnishes to the satisfaction of the Executive Engineer in* | "*viii. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a* | *(a) All questions and disputes relating to the meaning of the specification design, drawing and instructions herein and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of or relating* |

| | | | |
|---|---|---|---|
| | *charge of the work, a security deposit of a sum determined according to details given below and the sum so deposited shall, on the termination of the arbitration proceedings be adjusted against the costs, if any, awarded by the arbitrator against the claimant party and the balance remaining after such adjustment in the absence of any such costs being awarded, the whole of the sum will be refunded to him within one month from the date of the award – ...*" | *"deposit-at-call" for ten per cent of the amount claimed, on a schedule 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 reference to the amount claimed and the balance, if any, shall be fortified and paid to the other party".* | *to the contract, designs, drawings, specification, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof, shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings. However, the party initiating the arbitration claim shall have to deposit 7% of the arbitration claim in the shape of fixed deposit receipt as security deposit.*<br>*(b) On submission of claims the arbitrator shall be appointed as per the following procedure:*<br>*(I) For claim amount up to Rs 10.00 crore, the case shall be referred to sole arbitrator to be appointed by the Principal Secretary/Secretary (Irrigation), GoU...."* |

17. Relying on the aforesaid arbitration clauses, he submitted that in ***ICOMM Tele Ltd.*** (supra), the clause was struck down because it provided for forfeiture of deposits even when the claimant succeeded in the arbitration proceedings. In contrast, the present clause, akin to that in ***S.K. Jain*** (supra) merely required a refundable security deposit, without punitive forfeiture.

18. He further argued that ***Lombardi Engineering Ltd.*** (supra) reaffirmed that only clauses foreclosing access to arbitration or mandating partial forfeiture irrespective of outcome would offend Article 14 of the Constitution. Refundable deposit clauses, such as the one in the present case remain valid as they are designed to discourage unmeritorious claims without being punitive.

19. Accordingly, he submitted that ***S.K. Jain*** (supra) continues to govern refundable deposit clauses and the Arbitrator and Commercial Court rightly applied it in dismissing the Appellant's claim.

## *REASONING*

20. Having heard learned counsel for the parties, this Court considers it appropriate, at the outset, to recapitulate the ratio decidendi of ***S.K. Jain*** (supra), ***ICOMM Tele Ltd.*** (supra), ***Lombardi Engineering Ltd.*** (supra) and ***CORE*** (supra).

21. In ***S.K. Jain*** (supra), a three Judge Bench of this Court rejected the plea of unequal bargaining power of the parties and unconscionability of the arbitration clause to the extent it required the contractor alone to make a pre-deposit of seven per cent (7%) of the amount claimed prior to reference of disputes to arbitration.

The three Judge Bench of this Court also held that there is logic in the arbitration clause to the extent it prescribes higher amount of security deposit/fees commensurate with the magnitude of the claim. The Court in ***S.K. Jain*** (supra) held that such a pre-deposit condition in the arbitration clause '*…is the balancing factor to prevent frivolous and inflated claims*'. Accordingly, it held the pre-deposit condition to be non-arbitrary, reasonable and having nexus with the object sought to be achieved. Consequently, we are of the view that it is prima facie difficult for a combination of two Judges to hold that the argument qua Article 14 was not advanced in the ***S.K. Jain*** (supra) case.

22. In ***ICOMM Tele Ltd.*** (supra), however, a two Judge Bench of this Court held that any requirement with regard to pre-deposit prior to reference of matter to arbitration would discourage alternative dispute resolution and would be contrary to the objective of declogging the court system. It also held that in ***S.K. Jain*** (supra) case, no plea had been advanced that the pre-deposit condition in the arbitration clause was violative of Article 14 of the Constitution on the ground of arbitrariness. Accordingly, it held that as the arbitration clause in the said case provided for refund in proportion to the amount awarded against the amount claimed, the pre-deposit condition was arbitrary and materially different from the arbitration clause in ***S.K. Jain*** (supra) case. The Court, additionally held that a stipulation mandating a pre-deposit of ten per cent (10%) of the claim amount, prior to any determination of frivolousness, lacked a direct nexus with the object of curbing frivolous claims and was therefore arbitrary.

23. In ***Lombardi Engineering Ltd.*** (supra), a three Judge Bench held that party autonomy cannot extend to contractual terms that infringe fundamental rights and that frivolous claims can be addressed through costs. However, in the said judgment, it was held that there is no conflict between ***S.K. Jain*** (supra) and ***ICOMM Tele Ltd.*** (supra) as the relevant arbitration clauses in both the cases were materially distinct and stood on different footing.

24. The Constitution Bench of this Court in ***CORE*** (supra) held that Section 18 of the Act is mandatory and a non-derogable provision which applies to all stages of the arbitral proceedings including the process of appointment of Arbitrator. Moreover, though the Constitution Bench quoted with approval the judgment in ***S.K. Jain*** (supra), it summarised the judgments in ***ICOMM Tele Ltd.*** (supra) and ***Lombardi Engineering Ltd.*** (supra) as under:-

> *"148. .....To determine the validity of the clause from the viewpoint of arbitrariness, this Court held that a contractual clause would be arbitrary "which would be unfair and unjust and which no reasonable man would agree to". This Court termed the pre-deposit clause to be violative of Article 14 for being excessive and disproportionate. Importantly, the Court held that the pre-deposit requirement was contrary to the object of arbitration because it served as a deterrent for a party to invoke arbitration. The pre-deposit clause was termed arbitrary for defeating the purpose of arbitration.*
>
> *149. In Lombardi, a decision of a three-Judge Bench of this Court.....this Court observed that party autonomy "cannot be stretched to an extent where it violates the fundamental rights under the Constitution". It was concluded that the pre-deposit clause violated Article 14 of the Constitution."*

25. This Court, mindful of the bounds of judicial discipline and the enduring authority of precedents, is constrained to observe that ***ICOMM Tele Ltd.*** (supra), being a decision of a two Judge Bench, could not override the principle of law enunciated by the three Judge Bench in ***S.K. Jain*** (supra), even though this Court

is *prima facie* in agreement with the reasoning advanced in ***ICOMM Tele Ltd.*** (supra).

26. Subsequently, a three Judge Bench of this Court in ***Lombardi Engineering Ltd.*** (supra) expressly held in paragraph 61 that there is no conflict between ***S.K. Jain*** (supra) and ***ICOMM Tele Ltd.*** (supra). Consequently, it is difficult for this two Judge Bench combination to hold that ***S.K. Jain*** (supra) judgment is *sub silientio* or no longer good law. It bears reiteration that neither ***Lombardi Engineering Ltd.*** (supra) nor the Constitution Bench in ***CORE*** (supra) has held that ***S.K. Jain*** (supra) is not good law.

27. Moreover, an argument not considered in the earlier judgments is that the right to sue inheres in every individual, save where expressly barred by statute. It is settled law that a litigant may, at his own peril, institute a suit of his choice. In ***Smt. Ganga Bai vs. Vijay Kumar and Ors., (1974) 2 SCC 393***, this Court held that it is no defence to contend, howsoever frivolous the claim may appear, that the law confers no such right. Unlike an appeal, the maintainability of a suit requires no statutory sanction. It suffices that no enactment prohibits it.

28. Further, Section 28 of the Indian Contract Act, 1872 declares void any agreement that absolutely restrains a party from enforcing contractual rights '*by the usual proceedings in ordinary tribunals*'. The sole statutory exception is the reference of disputes to arbitration (first under the Arbitration Act, 1940, and now under the Arbitration and Conciliation Act, 1996). Arbitration, under the framework of our Contract law, remains an exception to litigation in courts, not

its substitute or alternative! As the late learned Mr. Fali S. Nariman, Senior Advocate, aptly observed in his foreword to *Mediation Practice and Law: The Path to Successful Dispute Resolution* by Mr. Sriram Panchu, alternate dispute resolution is not yet ingrained in the Indian legal psyche, having historically been viewed with scepticism under Anglo-Saxon jurisprudence which abhorred resolution of disputes outside His Majesty's Courts. This historical legacy explains the cautious judicial approach towards ADR in India. The relevant passage from the foreword is reproduced hereinbelow:-

> "*……the truth is that ADR (Alternate Dispute Resolution) is not yet ingrained in the Indian psyche. It is a new graft, like a new heart or a new kidney: and as with the human body, the 'body-commercial' looks for an opening to reject it. The reason is historical. Traditionally, it was the judges of the Kings' Courts in England who were the embodiment of the law: as one commentator in the nineteenth century had said, 'the Common Law is wrapped up in the collective breasts of His Majesty's Judges': to which one of the judges responded (somewhat pompously), 'and a very happy residence too'! During two centuries of British rule, we in India were sustained on the milk of Anglo-Saxon jurisprudence–and Anglo-Saxon jurisprudence simply abhorred resolution of disputes outside His Majesty's Courts! What England abhorred, we in British India were taught to abjure. Ever since the Contract Act was introduced in India's legal system more than 100 years ago, alternate dispute resolution was outlawed: resolution of disputes by arbitration being simply tolerated!....*"

29. This Court is of the considered view that an arbitration clause cannot impose pre-deposit conditions so onerous as to render the right to sue, at the very threshold, illusory or nugatory. A stipulation mandating the deposit of a substantial percentage of the claim amount, as a precondition to invoking arbitration would inevitably suppress claims, deter recourse to alternative dispute resolution, and thereby defeat its very object.

*ORDER OF REFERENCE*

30. Keeping in view the aforesaid judgments and this Court (sitting in a combination of two Judges) having doubts about the legality and validity of a three Judge Bench judgment in ***S.K. Jain*** (supra) as a binding precedent, is of the opinion that the matter calls for reference to a larger Bench.

31. In ***Aligarh Muslim University vs. Naresh Agarwal & Ors., (2025) 6 SCC 1***, a seven Judge Bench of this Court reiterated the legal precepts which apply to orders of reference and reiterated the position of law as expounded in ***Central Board of Dawoodi Bohra Community & Anr. vs. State of Maharashtra & Anr., (2005) 2 SCC 673*** as under:-

> *"40.1. Decisions of this Court rendered by a Bench of larger strength are binding on Benches of a less or equal strength;*
>
> *40.2. If a Bench of lower strength is doubtful about the correctness of a judgment delivered by a Bench of larger strength, it cannot disagree or dissent from the view taken by the larger Bench. In case of doubt, it can invite the attention of the Chief Justice of India to its opinion and request the Chief Justice to list the matter before a Bench, the strength of which is greater than that which delivered the judgment which has been doubted;*
>
> *40.3. The correctness of the view taken by any Bench can only be doubted by a Bench of equal strength. The matter will then be placed for hearing before a Bench of greater strength;*
>
> *40.4. There are two exceptions to the rules discussed above:*
> *(i) The discretion of the Chief Justice is not bound by the rules. As the master of the roster, the Chief Justice may list any case before any Bench of any strength;*
>
> *(ii) Despite the rules discussed above, if a particular case has come up for hearing before a Bench of larger strength and that Bench is of the opinion that the judgment of the Bench of lower strength requires reconsideration or correction, or is otherwise doubtful of its correctness, it may dispense with the need for a reference in the terms described above or an order of the Chief Justice and hear the matter for reasons given by it."*

32. Consequently, this Court requests the Hon'ble Chief Justice of India to consider the desirability as to whether the issues formulated hereunder, or such other issues as may be deemed relevant, do warrant a reference to a larger Bench:-

**A.** 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 of the Act which mandates equal treatment of parties at all stages of arbitration?

**B.** Whether pre-deposit conditions in contracts having Arbitration clause discourages Alternative Dispute Resolution and undermine its objective of declogging the court system?

**C.** Whether a condition of pre-deposit of security/fees prior to reference to Arbitration is arbitrary and violative of the right to sue as well as Article 14 of the Constitution and Section 28 of the Indian Contract Act, 1872?

**D.** Whether requirement of pre-deposit of security/fees has any rational relation to the object of curbing frivolous claims as at that stage it cannot be said that the claims are frivolous and moreover such frivolous claims may adequately be addressed under Section 31(8) of the Act through imposition of costs at the conclusion of the arbitration proceedings?

**E.** Whether a pre-deposit condition is valid in an arbitration case where said deposit is refundable upon the conclusion of arbitration proceedings?

**F.** Whether ***S.K. Jain*** (Supra) is a valid and binding precedent?

33. Registry is directed to place the present Civil Appeal before the Hon'ble Chief Justice of India for appropriate directions.

**…………………….J.**
**[MANOJ MISRA]**

**…………………J.**
**[MANMOHAN]**

**New Delhi;**
**August 17, 2026**