

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Reserved on: 19.12.2019

Pronounced on: 17.02.2020

+ O.M.P.(I) (COMM.) 523/2017, I.As. 11128/2018, 4259/2019,
5185/2019, 7203/2019

POWER MECH PROJECTS LTD.

..... Petitioner

Through Mr. Arvind K. Nigam,
Sr. Advocate with Mr. Dharmesh
Misra, Adv.

Versus

SEPCO ELECTRIC POWER

CONSTRUCTION CORPORATION

..... Respondent

Through Mr. Sandeep Sethi, Sr. Advocate
with Mr. Ranjit Prakash, Mr.
Kamal Nijhawan, Mr. Gaurav
Lavania and Ms. Mahima Sareen,
Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. OMP (COMM) 432/2017 has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging the arbitral award dated 17.10.2017, by SEPCO Electric Power Construction Corporation, hereinafter referred to as the petitioner.
2. Subsequent to the filing of the petition, Power Mech Projects Ltd., (hereinafter referred to as the respondent), on 11.12.2017 filed the

present petition under Section 9(ii)(b) of the Act being O.M.P. (I) (COMM) 523/2017 seeking to secure the entire amount awarded to it under the Award. On 14.12.2017, the Court issued notice in this petition and directed the petitioner to file an affidavit detailing its assets (moveable/immovable), bank accounts and the amounts lying in the banks within the Territory of India.

3. On 02.01.2018, the petitioner filed the affidavit giving the details of its assets. On 10.05.2018 the respondent herein filed an application being IA No. 6704/2018 praying that M/s. Talwandi Sabo Power Limited (hereinafter referred to as 'TSPL'), be directed not to release any payment to the petitioner being a sum of Rs. 142,41,14,499/- along with 12% interest or in the alternative petitioner be directed to deposit the said amount before this Court.

4. Vide order dated 15.05.2018, the application was disposed of with no orders on the application and the present petition under Section 9 of the Act was directed to be listed alongwith O.M.P (COMM) 432/2017. Both the petitions were taken up together on 19.12.2019. Order was reserved in the present petition while O.M.P(COMM) 432/2017 was directed to be listed on 23.03.2020, as the order in that petition was dependent on the outcome of the present petition.

5. On 24.07.2018, Court directed the petitioner to disclose the exact particulars and location of the assets mentioned in para-4 of its affidavit dated 02.01.2018. The petitioner was also directed that 10% of the amount available in the bank account referred to in para-5 of the same affidavit, as on 24.07.2018, shall be deposited with the Registry of this

Court. Any further deposits in the said accounts to the extent of 10% were also to be deposited, every 15 days.

6. In terms of the said order, petitioner filed a supplementary affidavit regarding the location of the assets. On 20.08.2018, the respondent filed an application being IA No. 11128/2018 praying for a direction to the petitioner to deposit the entire awarded amount of Rs. 142,41,14,499/- along with interest @ 12% per annum from the date of the Award till realization before this Court. However, the petitioner deposited only a sum of Rs. 163,68,589/- with the Registry on 01.09.2018, in purported compliance of orders dated 24.07.2018 read with 21.08.2018.

7. On 10.09.2018, Court appointed M/s PN Chopra & Co. as a Valuer to ascertain the realizable value of the assets mentioned in the two affidavits filed by the petitioner. On 23.10.2018, the Valuer submitted its Report.

8. On 24.12.2018, the petitioner deposited a further sum of Rs. 50,50,113/- with the Registry.

9. On 12.02.2019, Court issued directions to the petitioner for furnishing a Bank Guarantee ('BG') worth Rs. 30 crores of a scheduled Bank in India and also to file an affidavit indicating the list of assets which had not been considered by the Valuer while valuing the assets. The said affidavit was filed by the petitioner on 27.02.2019.

10. The respondent once again filed an application on 20.03.2019 being IA No. 4259/2019 praying inter alia that the petitioner be directed to deposit the complete awarded amount with interest after giving credit of the earlier deposit of Rs. 2.10 crores. It was also pointed out that the

petitioner was to receive an amount of Rs. 231.34 crores from BALCO in terms of Settlement Agreement dated 31.12.2018 and also final payments from TSPL. It was prayed that the awarded amount be directed to be paid from the said receivables. On 22.03.2019 Industrial and Commercial Bank of China, Mumbai Branch, issued a BG for an amount of Rs. 30 crores on behalf of the petitioner, in favour of the Registrar of this Court. On 25.03.2019, petitioner deposited another sum of Rs. 60,00,000/- with the Registry. It is relevant to note that issue of BG is presently pending before a Division Bench of this Court in FAO (OS)(COMM) 136/2019. Petitioner also filed a supplementary affidavit adding to the contents of earlier affidavit dated 27.02.2019.

11. On 05.04.2019, respondent filed an application being IA No. 5185/2019 praying for direction to TSPL not to release the due payments to the petitioner and instead deposit a sum of Rs. 142,41,14,499/- along with interest @12% per annum in this Court, less the amount deposited by the petitioner.

12. It is pertinent to mention here that this petition as well as the petition under Section 34 of the Act O.M.P. (COMM.) 432/2017 were being taken up together by the Court and the orders referred to above were being passed as common orders in the two petitions.

13. The controversy involved in the two petitions at this stage is as to whether the petition under Section 34 of the Act, which is listed alongwith this petition today, can be heard on merits, against the Award without the petitioner first securing the complete awarded amount.

14. The case of the petitioner is that there is no provision in the Act or under any law which mandates that a petition under Section 34 of the

Act cannot be heard till the awarded amount is secured, the contention of the respondent is that till the complete amount under the Award is not secured or deposited in this Court, the petitioner is not even entitled to be heard under Section 34 of the Act.

15. Learned senior counsel for the petitioner contends that if the intention of the legislature was that the objections to the Award could be heard on merits only on a pre-deposit of the Awarded amount then Sections 34 or 36 of the Act would have expressly provided so. A distinction is drawn with the provisions in Section 169 and 170 of the DMC Act which categorically provides that no appeal shall be heard till the amount in dispute is deposited by the appellant. Learned senior counsel argues that it is the discretion of the Court to direct what security must be furnished by an objector in a petition under Section 34 of the Act. There is no hard and fast norm or straight-jacket 'formula' which mandates any percentage of the awarded amount to be furnished as security, least of all 100% deposit. Reliance is placed on paras 21 and 29 of the judgment of the Supreme Court in *Pam Developments Private Limited vs. State of West Bengal (2019) 8 SCC 112*.

16. Learned senior counsel further argues that the absurdity of the argument of the respondent is evident from a mere illustration where an Arbitral Tribunal awards a sum of Rs. 1000 crores against a mere claim of Rs. 1 crore. The Award is exophasia unsustainable. Could it then be contended that even in such a circumstance the Court would insist that the petitioner must deposit the entire amount of Rs. 1000 crores, before the objections are heard. It is purely in the domain and discretion of the Court hearing the petition to take a view on the deposit or security

depending on the facts of the case and by balancing the equities. It is further argued that the respondent has not filed any petition under Section 36 of the Act and what is merely pending is a petition under Section 9 of the Act, post-Award.

17. Learned senior counsel vehemently contends that in any case the petitioner has secured the awarded amount. A BG for an amount of Rs. 30 crores has been furnished. The value of the assets as assigned by the Valuer appointed by this Court as on 30.09.2018 is Rs. 20 Crores. The Court has directed the petitioner to deposit 10% of the money lying in its Bank accounts as disclosed in the affidavits every fortnight, till it totals up to the awarded amount. In addition, it is also pointed out that the Valuer in fact has not even assessed assets worth Rs. 32,64,37,251/-.

18. It is further contended that the petitioner is a Central Govt. owned entity registered in China and is affiliated to Power Construction Corporation of China (Fortune 500 entity) and is currently the largest construction Corporation on conventional power projects in China and is not a flyby night operator. It is submitted that since 1952, petitioner has completed construction of 685 power generation units. It commenced its commercial operations in India in the year 1998 and has been engaged in the construction of large-scale Power Plant Projects and Superb Critical Power Projects. It has been awarded various Coal-Based Power Projects in India at various locations, the details of which have been mentioned in the affidavits. It is further submitted that the project being TSPL is presently under construction. The petitioner has furnished details of payments due from the respective projects as well as the value of

unexecuted work under the said project being Rs. 38,86,91,450/- and Rs.75,57,18,086/- respectively.

19. Learned senior counsel for the petitioner argues that this Court has in the past, passed several orders where the award has been stayed subject to deposit of only 50% of the awarded amount. Learned senior counsel relies on order dated 07.09.2018 in OMP (COMM) 382/2018 titled ***Bihar Rajya Pul Niram Nigam Ltd. vs. SDB-SPS (JV)***, where the direction was to deposit 50% of the awarded amount, as well as to the order dated 08.08.2018 in OMP (COMM) 347/2018 titled ***NHAI vs. Jogbani Highways Private Ltd.*** and order dated 07.05.2019 in in OMP (COMM) 185/2019 titled ***V. Cubed Private Limited & Anr. Vs. M/s. Unique Infoways Private Limited***, where 50% has been directed to be deposited. Learned senior counsel therefore vehemently contends that it is not legally correct for the respondent to argue that 100% of the awarded amount must be deposited before the petitioner is heard on its petition under Section 34 of the Act and the argument by the respondent that the petitioner has financial constraints is not a legal argument. The question that the Court has to consider is whether in view of the fact that the petitioner has furnished a BG and is making 10% deposit, apart from the valuation of its assets having been conducted, has a prima facie case for interference by this Court, under Section 34 of the Act. The Court has to look into the merits of the argument on the objections filed to the Award and not the lack of prejudice in depositing the amount.

20. Learned senior counsel has also sought to argue on the merits of the case in order to establish that the Award is perverse and deserves to be set aside and thus there is no reason why before hearing the

petitioner, a pre-deposit should be insisted upon. Learned senior counsel contends that the Tribunal has re-determined the price under the contract at Rs.91,22,48,971/-. It acknowledges that out of the enhanced price, petitioner has paid to the respondent Rs.82,72,84,115/- and therefore at best should have awarded the differential price. However, the Tribunal has irrationally added to this figure a sum of Rs.7,89,29,754/- and has virtually doubled the amount payable over and above the contract price determined itself.

21. It is further contended that in terms of Article 4 no price escalation formula was ever agreed upon and yet the Tribunal has awarded the escalation cost. Mr. Sethi argues that the findings of the Tribunal are against the evidence as according to the indices relied upon by the respondent itself there was only a 12% increase in the labour prices and the prices for high speed diesel had decreased. Yet, the Tribunal has granted the escalation which is also in disregard of the supplementary agreement whereby the respondent had undertaken that all its claims till December 2013 had been settled. Learned senior counsel has relied on the judgment in the case of *Ssangyong Engineering & Construction Co. Ltd. vs. NHAI (2017) 5 SCC 743* to argue that a unilateral alteration to a contract can never be foisted upon an unwilling party.

22. Learned senior counsel further argues that Clause 37 of the GCC expressly bars any claim for consequential loss. Petitioner has paid a one time lumpsum payment of Rs.2 Crores till December 2013, towards idling loss and this was not meant as a novation but a settlement in good faith. Yet, it is argued that, the Tribunal has ruled that there was a

novation of Clause 37 of the original Contract by Clause 10 of the Supplementary Agreement and has come to a finding that owing to a fundamental breach consequential losses of idling can be awarded. It is argued that the Clause barring claims for consequential losses was a commercial bargain between the parties and the restrictive covenant could not have been overlooked by the Tribunal. Reliance is placed on ***Indraprastha Power Generation vs. M/s. Harvinder Singh & Co. & Anr., (2011) 2 Arb.LR 290*** and ***Sharma and Associate Contractors (P) Ltd. vs. Progressive Constructions Ltd., (2017) 5 SCC 743*** to argue that the Arbitrator is a creature of the contract and if he ignores the terms of the Contract, it is a jurisdictional error which the Court can correct. Moreover, the damages for idling have been awarded without any proof of loss incurred by the respondent. The respondent could never prove any actual loss incurred by it towards the alleged idling of the machinery and the award is in the teeth of Section 73 of the Indian Contract Act. Reliance is placed on the judgments in the case of ***All India Radio vs. Unibros, 2002 SCC Online Del 601***, ***Municipal Corporation of Delhi vs. M/s. Asian Techs – Progressive Constructions Joint Venture & Ors. (2017) 241 DLT 42.***

23. Mr. Arvind Nigam, learned senior counsel for the respondent, arguing to the contrary, submits that the petitioner should be directed to deposit atleast the entire principal amount of Rs.142,41,14,499/- awarded to the respondent in order to secure and ensure that the enforcement of the Award results in a realizable claim and the respondent is able to reap the fruits of the Award in its favour. It is contended that the petitioner is a foreign company registered in China

and has no realizable assets in India. Attention is drawn to an affidavit filed by the petitioner on 02.01.2018. It is submitted that the affidavit is nothing but gross mis-representation before this Court. As per para 3 of the affidavit, the petitioner has represented as having three existing and ongoing projects under construction. It has made a self-serving representation that an amount of Rs.2580.42 Crores is due from the three projects and the value of unexecuted work under the three contracts is Rs.5510.77 Crores. It is submitted that there is no clarity as to whether the same is due under a certified bill or arises out of the claims against the employers or are counter claims against the petitioner. No certificate of payment outstanding has been filed. There is no break-up of the amount stated to be due against the unexecuted work. It is argued that the falsity of the affidavit is evident from the fact that the work pertaining to BALCO Units had been completed way-back in 2016. With respect to KMPCL Project, the work pertaining to two Units was completed by 2013 and with respect to the fourth unit, in 2015. These facts are reflected in the petitioner's own official website. Even with reference to TSPL Contract, no balance work is left and the affidavit is false. The reference to fixed assets also merits no consideration as no valuation certificate is filed and the deposition is only a self-serving statement. No bank accounts have been disclosed evidencing the account balances. Reference to Bank Guarantees is irrelevant since that is an independent contract between the drawer, drawee and the beneficiary and is not a liquid asset. In so far as tax receivables are concerned, the petitioner has not filed any refund orders issued by the Income Tax Department to construe such amount as receivables.

24. Mr. Nigam further contends that the petitioner has entered into a settlement with BALCO admittedly vide Settlement Agreement dated 31.12.2018 whereby it was to receive USD 24.7 Million Overseas and INR 53.50 Crores in India by 31.03.2019. It is thus submitted that BALCO should be directed to deposit the said amount in Court so as to secure the award in favour of the respondent. In the affidavit, the petitioner has claimed Rs.92.67 Crores worth moveable assets but the valuer appointed by this Court has ascribed a written down value of Rs.20 Crores only as on 30.09.2018 which is not even the realizable market value. The site has 10 years old machinery in a junk condition and would not fetch even the value of a scrap and thus these cannot be termed as assets of the petitioner.

25. Mr. Nigam further argues that vide order dated 24.07.2018, this Court had directed the petitioner to make a deposit of 10% of the amount in the bank every 15 days, however, as against the total awarded amount of Rs.142 Crores, the petitioner has only deposit a meagre amount of Rs.2.74 Crores, and thus, the order of this Court is not complied with till date. It is argued that in terms of the recent orders by the Supreme Court, petitioner should be directed to deposit the complete awarded amount, atleast the principal sum of Rs.142 Crores. Reliance is placed on the judgment of the Supreme Court in ***Hindustan Construction Company Limited vs. Union of India (2019) SCC OnLine SC 1520*** to contend that Section 9, post Award, as a measure of protection, is a step in aid of the enforcement of the Award and the Award should not be rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement. It is also contended that there is no

discretion in the Court in directing deposit of an amount lesser than the principal amount, since provisions of order 41 Rule 5 CPC are not applicable by reason of Section 36 of the Act, in a petition under Section 34 of the Act. Reliance is placed on para 50 of the judgment in the case of *Hindustan Construction Company Limited (supra)*. Learned senior counsel for the respondent further argues that in terms of the judgment in the case of *Sharma and Associate Contractors (supra)* and *Ssangyong Engineering (supra)*, a petition under Section 34 of the Act is not an appeal and a mere summary proceeding and the arguments on merits, made by the petitioner would require the Court to sit like an appellate Court over the Award, which is impermissible.

26. I have heard the learned counsels for the parties.

27. The question that arises for consideration before this Court at this stage is whether the petitioner should be directed to deposit the entire awarded amount to the extent of Rs.142 Crores, which is the principal amount awarded by the Tribunal or the deposit already made in the sum of Rs.2.7 Crores alongwith a BG of Rs.30 Crores is enough to secure the respondent who has an Award in its favour before the petitioner is heard on merits.

28. The contention of Mr. Arvind Nigam, learned senior counsel for the respondent in the opinion of this Court has merit. While it cannot be said as a principle of law that there is a mandate that in every case the Court must insist on a 100% deposit, before hearing a petition under Section 34 of the Act or before staying the enforcement of the Award, as the amount of deposit would depend on the facts of the case and is in the discretion of the Court hearing the petition, Mr. Nigam is correct in his

submission that the circumstances and the facts of the present case warrants that the petitioner should be directed to deposit the principal amount awarded to the respondent before the petitioner is heard on merits. The chronology of facts of this case reveals that the petitioner infact does not have any immovable assets in India. Though the petitioner had filed an affidavit that it has ongoing projects in India, which of course was rebutted by the respondent, but in the opinion of this Court even if the projects are ongoing, for the sake of arguments, that cannot be accepted as a security which would ensure that the Award would be enforceable. Much has been argued on the valuation report with regard to certain machinery and other assets lying at the project site of the petitioner. This Court does not think it appropriate at this stage to go into the disputed questions on the valuation of the machinery. Suffice would it be to state that in terms of the law laid down by the Supreme Court, more particularly in the case of ***Hindustan Construction Company Limited (supra)***, the machinery for whatever it is worth, cannot be taken as a solvent security, since the Award to be treated as a money decree and cannot be secured by moveable assets such as plant and machinery. This Court is not delving into the issue of the money due to the petitioner under the Settlement Agreement with BALCO since the said settlement is irrelevant to the present case. Whether or not the petitioner takes steps to realize the money due to it from BALCO is not the concern of this Court in securing the present Award.

29. Learned senior counsel for the petitioner may be right in his submission that the petitioner is a Central Government owned entity

registered in China and presently the largest construction Corporation, but the fact of the matter is that this Court has to follow the law as laid down by the Supreme Court in the recent past. The credibility of the petitioner Company in China cannot be enough to secure the Award in favour of the respondent if it was to succeed in the present petition.

30. The Supreme Court in the recent case of ***Hindustan Construction Company Limited (supra)*** has held as under :-

22. “*Shri Dewan has argued that under the UNCITRAL Model Law, Articles 34 and 35 provide for two bites at the cherry: (i) in cases in which an award is sought to be set aside, and (ii) thereafter when not set aside, sought to be recognised and enforced in the same country in which it has been made. He is right in stating that Section 36 of the Arbitration Act, 1996 does not follow the two bites at the cherry doctrine, for the reason that when an award made in India becomes final and binding, it shall straightaway be enforced under the CPC, and in the same manner as if it were a decree of the Court, there being no recourse to the self-same grounds when it comes to recognition and enforcement. In point of fact, the raison d’etre for Section 36 is only to make it clear that when an arbitral award is not susceptible to challenge, either because the time for making an application to set it aside has expired, or such application having been made is refused, the award, being final and binding, shall be enforced under the CPC as if it were a decree of the court. This becomes clear when Section 36 and 35 of the Arbitration Act, 1996 are read together. Section 35 of the Arbitration Act, 1996 reads as follows:*

“**35. Finality of arbitral awards.-** Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.”

XXX

XXX

XXX

24. When this court speaks of “the mandatory language of Section 34” of the Arbitration Act, 1996 obviously what is meant is the language of Section 36 of the Arbitration Act, 1996, as noted by *National Buildings Construction Corporation Ltd. v. Lloyds Insulation India Ltd.* (2005) 2 SCC 367 (in paragraph 6). In *Fiza Developers and Inter-trade Pvt. Ltd. v. AMCI (India) Pvt. Ltd.* (2009) 17 SCC 796, this Court held:

“20. Section 36 provides that an award shall be enforced in the same manner as if it were a decree of the court, but only on the expiry of the time for making an application to set aside the arbitral award under Section 34, or such application having been made, only after it has been refused. Thus, until the disposal of the application under Section 34 of the Act, there is an implied prohibition of enforcement of the arbitral award. The very filing and pendency of an application under Section 34, in effect, operates as a stay of the enforcement of the award.”

25. To state that an award when challenged under Section 34 becomes unexecutable merely by virtue of such challenge being made because of the language of Section 36 is plainly incorrect. As has been pointed out hereinabove, Section 36 was enacted for a different purpose. When read with Section 35, all that Section 36 states is that enforcement of a final award will be under the CPC, and in the same manner as if it were a decree of the Court. In fact, this is how Section 36 has been read by a three-judge bench in *Leela Hotels Ltd. v. Housing and Urban Development Corporation Ltd.* (2012) 1 SCC 302 as follows:

“45. Regarding the question as to whether the award of the learned arbitrator tantamounts to a decree or not, the language used in Section 36 of the Arbitration and Conciliation Act, 1996, makes it very clear that such an award has to be enforced under the Code of Civil Procedure in the same

manner as it were a decree of the court. The said language leaves no room for doubt as to the manner in which the award of the learned arbitrator was to be accepted.”

26. To read Section 36 as inferring something negative, namely, that where the time for making an application under Section 34 has not expired and therefore, on such application being made within time, an automatic-stay ensues, is to read something into Section 36 which is not there at all. Also, this construction omits to consider the rest of Section 36, which deals with applications under Section 34 that have been dismissed, which leads to an award being final and binding (when read with Section 35 of the Arbitration Act, 1996) which then becomes enforceable under the CPC, the award being treated as a decree for this purpose.

27. This also finds support from the language of Section 9 of the Arbitration Act, 1996, which specifically enables a party to apply to a Court for reliefs “...after the making of the arbitration award but before it is enforced in accordance with Section 36.” The decisions in NALCO (supra) and Fiza Developers and Intra-trade Pvt. Ltd. (supra) overlook this statutory position. These words in Section 9 have not undergone any change by reason of the 2015 or 2019 Amendment Acts.

28. Interpreting Section 9 of the Arbitration Act, 1996, a Division Bench of the Bombay High Court in Dirk India Pvt. Ltd. v. Maharashtra State Power Generation Company Ltd. 2013 SCC OnLine Bom 481 held that:

“13....The second facet of Section 9 is the proximate nexus between the orders that are sought and the arbitral proceedings. When an interim measure of protection is sought before or during arbitral proceedings, such a measure is a step in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the

proceedings until the eventual enforcement of the award. Here again the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement.”

29. This being the legislative intent, the observation in NALCO (supra) that once a Section 34 application is filed, “there is no discretion left with the Court to pass any interlocutory order in regard to the said Award...” flies in the face of the opening words of Section 9 of the Arbitration Act, 1996, extracted above.

30. Thus, the reasoning of the judgments in NALCO (supra), and Fiza Developers and Intra-trade Pvt. Ltd. (supra) being per incuriam in not noticing Sections 9, 35 and the second part of Section 36 of the Arbitration Act, 1996, do not commend themselves to us and do not state the law correctly.¹ The fact that NALCO (supra) has been followed in National Buildings Construction Corporation Ltd. v. Lloyds Insulation India Ltd. (supra) does not take us any further, as National Buildings Construction Corporation Ltd. (supra) in following NALCO (supra), a per incuriam judgement, also does not state the law correctly. Thus, it is clear that the automatic-stay of an award, as laid down by these decisions, is incorrect. The resultant position is that Section 36 - even as originally enacted - is not meant to do away with Article 36(2) of the UNCITRAL Model Law, but is really meant to do away with the two bites at the cherry doctrine in the context of awards made in India, and the fact that enforcement of a final award, when read with Section 35, is to be under the CPC, treating the award as if it were a decree of the court.

XXX

XXX

XXX

34. Section 36, as amended by the 2015 Amendment Act, now reads as follows:

“36. Enforcement --(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under subsection (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).”

35. Given the fact that we have declared that the judgments in NALCO (supra), National Buildings Construction Corporation Ltd. (supra) and Fiza Developers (supra) have laid down the law incorrectly, it is also clear that the amended Section 36, being clarificatory in nature, merely restates the position that the unamended Section 36 does not stand in the way of the law as to grant of stay of a money decree under the provisions of the CPC.

XXX

XXX

XXX

56....The anomaly, therefore, of Order XLI Rule 5 of the CPC applying in the case of full-blown appeals, and not being

applicable by reason of Section 36 of the Arbitration Act, 1996 when it comes to review of arbitral awards, (where an appeal is in the nature of a rehearing of the original proceeding, where the chance of succeeding is far greater than in a restricted review of arbitral awards under Section 34), is itself a circumstance which militates against the enactment of Section 87, placing the amendments made in the 2015 Amendment Act, in particular Section 36, on a backburner. For this reason also, Section 87 must be struck down as manifestly arbitrary under Article 14. The petitioners are also correct in stating that when the mischief of the misconstruction of Section 36 was corrected after a period of more than 19 years by legislative intervention in 2015, to now work in the reverse direction and bring back the aforesaid mischief itself results in manifest arbitrariness. The retrospective resurrection of an automatic-stay not only turns the clock backwards contrary to the object of the Arbitration Act, 1996 and the 2015 Amendment Act, but also results in payments already made under the amended Section 36 to award-holders in a situation of no-stay or conditional-stay now being reversed. In fact, refund applications have been filed in some of the cases before us, praying that monies that have been released for payment as a result of conditional stay orders be returned to the judgment-debtor.

57. Also, it is important to notice that the Srikrishna Committee Report did not refer to the provisions of the Insolvency Code. After the advent of the Insolvency Code on 01.12.2016, the consequence of applying Section 87 is that due to the automatic-stay doctrine laid down by judgments of this Court - which have only been reversed today by the present judgment - the award-holder may become insolvent by defaulting on its payment to its suppliers, when such payments would be forthcoming from arbitral awards in cases where there is no stay, or even in cases where conditional stays are granted. Also, an arbitral award-holder is deprived of the fruits of its award - which is usually obtained after several years of litigating - as a result of the automatic-stay, whereas it would be faced with immediate payment to its operational

creditors, which payments may not be forthcoming due to monies not being released on account of automatic-stays of arbitral awards, exposing such award-holders to the rigors of the Insolvency Code....”

31. Learned senior counsel for the respondent has also drawn the attention of this Court to a recent order passed by the Supreme Court in ***SREI Infrastructure Finance Limited vs. Candor Gurgaon Two Developers and Projects Pvt. Ltd. being SLP(C) No(s). 20895-20897/2018*** where in an appeal filed against the judgment of the Calcutta High Court, the Supreme Court has directed 100% deposit of the amount viz. 60% by cash deposit and remaining 40% to be secured by a BG of a nationalized bank. In the case of ***Manish vs. Godawari Marathawada Irrigation Development Corporation, being SPL(C) Nos. 11760-11761/2018***, the Bombay High Court had ordered 60% deposit but the Supreme Court held that there should be a 100% deposit being a money decree. Relevant order of Supreme Court in ***SREI Infrastructure Finance Limited (supra)*** reads as under:-

“Heard learned counsel on both sides.

In the circumstances of the case, we consider it appropriate, in the interest of justice, that the following interim order shall be in force during the pendency of proceedings under Section 34 of the Arbitration and Conciliation Act, 1996:-

There shall be interim stay of the award subject to the petitioner’s depositing 60% of the amount of the decree. The remaining 40% of the amount shall be secured by way of bank guarantee(s) of the nationalized bank within eight weeks. The respondent shall be at liberty to withdraw the said amount on furnishing appropriate security.

The proceedings under Section 34 of the Arbitration and conciliation Act, 1966 may be decided as expeditiously as possible, not later than six months.

The special leave petitions are disposed of accordingly.”

Relevant order of Supreme Court in **Manish (supra)** reads as under:-

“No one appears for the respondent, even though served.

The Bombay High Court has ordered 60% deposit, pending the Section 37 appeal. We have passed orders stating that since these are money decrees there should be 100% deposit, with the respondent being entitled to withdraw the amount deposited and furnish solvent security to the satisfaction of the High Court.

Accordingly, we set aside the impugned orders dated 19.03.2018 and mandate a 100% deposit be made within a period of eight weeks from today.

The Special Leave Petitions are disposed of accordingly.”

32. While it is true that in some of the orders shown by the learned senior counsel for the petitioner, co-ordinate Benches of this Court have been directing a deposit of 50%, but going by the recent judgments of the Supreme Court as well as the facts of the present case, I am of the opinion that the petitioner must deposit 100% of the awarded amount of Rs.142 Crores (principal amount) to secure the respondent.

33. Since the petitioner has already furnished BG of Rs.30 Crores and has deposited a further amount of Rs.2.74 Crores, the said amount would be adjusted and the balance amount from Rs.142 Crores will be deposited by the petitioner with the Registry of this Court within a period of four weeks from today. With the aforesaid directions, the present petition is hereby disposed of along with all the pending applications.

JYOTI SINGH, J

FEBRUARY 17th, 2020/rd/yo/ylg/

OMP(1)(COMM) 523/2017