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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 21.08.2023*

+ **FAO(OS) (COMM) 109/2023 & CM APPL. 26837/2023**

SEPCO ELECTRIC POWER
CONSTRUCTION CORPORATION

..... Appellant

Through: Mr. P.V. Kapur, Senior
Advocate with Mr. Kapil Arora,
Mr. Kunal Tandon, Ms. Palak
Nagar, Mr. Dhananjay Sahai,
Mr. Sidhant Kapur, Mrs. Kaveri
Kapur and Mr. Shiv Raj Syal,
Advs.

versus

M/S POWER MECH PROJECTS
LIMITED

..... Respondent

Through: Mr. Dharmesh Mishra, Mr.
Prateek Gupta & Mr. Raghav
Tiwari, Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. (Oral)

1. The appellant has filed the present intra court appeal under Section 37 the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning a judgment dated 09.05.2023 (hereafter '**the impugned judgment**') passed by the learned Single Judge. By the said judgement, the learned Single Judge rejected the application filed



by the appellant under Section 34 of the A&C Act being *O.M.P. (COMM) 432/2017* captioned *Sepco Electric Power Construction Corporation v. Power Mech Projects Ltd.*, whereby the appellant had impugned an arbitral award dated 17.10.2017 (hereafter '**the impugned award**').

2. After the appellant had filed its application to set aside the impugned award, the respondent had filed an application under Section 9 of the A&C Act being OMP(I)(COMM) 523/2017, *inter alia*, praying that directions be issued to the appellant to deposit the amount awarded in terms of the impugned award.

3. In the application filed by the respondent under Section 9 of the A&C Act, several orders were passed in effect directing the appellant to make deposits with the Registry of this Court. By an order dated 24.07.2018, the appellant was directed to deposit 10% of the amount available in its bank account and 10% of further amounts that may be deposited in the specified bank accounts, with the registry of this Court. Subsequently, by an order dated 12.02.2019, the appellant was directed to furnish a bank guarantee in the sum of ₹30 crores from a scheduled bank. The appellant furnished the bank guarantee and had also deposited a sum of ₹2.7 crores.

4. The respondent's application under Section 9 of the A&C Act [OMP(I)(COMM) 523/2017] was disposed of by an order dated 17.02.2020 directing the appellant to deposit the entire awarded amount aggregating ₹142 crores. The bank guarantee of ₹30 crores and the amount of ₹2.74 crores deposited earlier were required to be



adjusted from the said sum of ₹142 crores.

5. The appellant filed an appeal against the said order dated 17.02.2020 [being FAO(OS)(COMM) 59/2020], which was disposed of by an order dated 11.01.2021. The learned Single Judge had also passed separate order dated 17.02.2020 in the appellant's application under Section 36(2) of the A&C Act [OMP(COMM) 432/2027] staying the enforcement of the impugned award, subject to the appellant depositing the remaining awarded amount in terms of the order dated 17.02.2020 passed in OMP(I)(COMM) 523/2017.

6. The appeals [Civil Appeal Nos. 6789/2022 and 6792/2022] preferred by the appellant were dismissed by the Supreme Court by an order dated 19.09.2022, whereby the Court declined to interfere with the orders passed in the respondent's application under Section 9 of the A&C Act as well as the appellant's application for stay of the enforcement of the award moved under Section 36(2) of the A&C Act. Thereafter, the appellant filed certain clarification applications, which were disposed of by the Supreme Court by an order dated 21.11.2022.

7. In the meantime, there was also a controversy regarding the bank guarantee furnished by the appellant for a sum of ₹30 crores bearing no. LG528501B900075 issued by the Industrial and Commercial Bank of China Limited, Mumbai Branch. By an order dated 09.04.2019, the learned Single Judge had directed the appellant to substitute the said bank guarantee from a scheduled bank in India. The appellant had carried the said order in appeal to the Division Bench and thereafter, to the Supreme Court of India. However, the



said proceedings are not relevant in the present context.

8. The appellant failed to comply with the orders dated 17.02.2020 passed by the learned Single Judge and did not deposit the remaining awarded amount with the Registry of the Court. The appellant thereafter sought liberty to furnish a bank guarantee for the remaining amount. The respondent contested the said proceedings as, according to the respondent, furnishing of the bank guarantee was not a satisfactory compliance of the order dated 17.02.2022 directing the appellant to deposit the remaining awarded amount.

9. In the aforesaid backdrop, the appellant filed an application [being IA No. 21327/2022] on 01.12.2020 before the learned Single judge, *inter alia*, praying that directions be issued to the Registry to take on record the bank guarantee of ₹79,66,95,797/- in compliance with the directions issued by the learned Single Judge in terms of the order dated 17.02.2022 requiring the appellant to deposit the remaining awarded amount.

10. The respondent also filed an application [being IA No. 2494/2023] seeking dismissal of the appellant's application under Section 34 of the A&C Act for setting aside the impugned award on the ground that the appellant had not complied with the directions to deposit the remaining awarded amount as directed by the order dated 17.02.2022.

11. The learned Single Judge accepted the respondent's application (being IA No.2494/2023) and dismissed the appellant's application (being IA No.21327/2022) under Section 34 of the A&C Act. The



learned Single Judge had referred to an order dated 21.11.2022, passed by the Hon'ble Supreme Court, whereby the application preferred by the appellant, seeking clarifications in respect of the order dated 19.09.2022 passed by the Supreme Court, was disposed of with the following observations:

“38.

*We dispose of the present interlocutory applications with a **clarification that the application under Section 34 of the Arbitration and Conciliation Act 1996 against the award passed by the Arbitral Tribunal shall be decided in accordance with law and on its own merits, however, subject to compliance of Section 36 of the Arbitration and Conciliation Act 1996 and order of this Court.***

The present miscellaneous applications stand disposed of accordingly.”

12. In view of the aforesaid observations, the learned Single Judge, held that since the appellant had not deposited the awarded amount, the petition under Section 34 of the A&C Act was required to be dismissed.

13. Mr. Dharmesh Mishra, learned counsel appearing for the respondent referred to the order dated 17.02.2020, passed by the learned Single Judge in O.M.P.(I) (COMM.) 523/2017 and submitted that although the said order was passed in a petition under Section 9 of the A&C Act, the said petition was taken up for hearing alongwith the appellant's petition under Section 34 of the A&C Act being O.M.P. (COMM) 432/2017. He submitted that the learned Single Judge, in terms of the said order, had directed the appellant to deposit 100% of



the awarded amount in the peculiar circumstances of the case and had not taken up the appellant's application under Section 34 of the A&C Act, which was also evident from the order dated 17.02.2020, passed in O.M.P (COMM) 432/2017.

14. He submitted that it was apparent from a plain reading of the orders that the learned Single Judge had proceeded on the basis that appellant's application under Section 34 of the A&C Act was required to be dismissed if it failed to deposit the awarded amount with the Registry of this Court. He also submitted that the earlier orders passed by the learned Single Judge had attained finality as the appeals emanating from the said orders were dismissed by the Supreme Court by an order dated 19.09.2022. He also referred to the operative part of the said order, which reads as under:

"37. We find no ground at all to interfere. The Appeals are dismissed. We, however, request the High Court to dispose of the pending applications of the Appellant under Section 34 for setting aside the award as expeditiously as possible, preferably within 3 months from the date of communication of this judgment and order."

15. He contended that it was settled law that orders passed in inter party litigation were binding on the parties.

16. The present appeal was listed for hearing before this Court on 10.07.2023 and on that date this Court considered the appellant's application for revival of its application under Section 34 of the A&C Act for setting aside the impugned order, and passed the following order:



CM APPL. 34301/2023 (of the appellant for directions)

3. The appellant has filed the present application, *inter alia*, praying as under:

- “(a) Pass directions to revive the petition bearing no. OMP (COMM) 432 of 2017 filed under Section 34 of the Act and stay the enforcement of the arbitral award dated October 17, 2017, by taking on record the original bank guarantee bearing no.LG5172622000026 dated November 22, 2022 issued by the Bank of China Limited, Mumbai branch in favour of the Registrar General, Hon’ble Delhi High Court amounting to INR 79,66,95,797/- (Indian Rupees Seventy-Nine Crore Sixty-Six Lakh Ninety-Five Thousand Seven Hundred and Ninety Seven only) and encashing the above bank guarantee to keep the aforesaid amount deposited in cash with the Registry in an interest bearing FDR;
- (b) In the alternative to Prayer (a), pass directions to revive the petition bearing no. OMP (COMM) 432 of 2017 filed under Section 34 of the Act and stay the enforcement of the arbitral award dated October 17, 2017, while granting a period of 8 (eight) weeks to the Appellant to deposit an amount of INR 79,66,95,797/- (Indian Rupees Seventy-Nine Crore Sixty-Six Lakh Ninety-Five Thousand Seven Hundred and Ninety Seven only) in cash with the Registry, which amount be kept in an interest bearing FDR pending the hearing of the Section 34 Petition. While granting a period of 8 (eight) weeks to deposit the balance award amount in cash, this Hon’ble Court be pleased to clarify that there is no claim on bank guarantee bearing no. LG5172622000026 dated November 22, 2022 issued by the Bank of China Limited, Mumbai branch and the Appellant may be allowed to treat the above bank guarantee as closed for all purposes;



(c) The ICBC BG bearing no. LG528501B900075 issued by ICBC Bank, Mumbai Branch of INR 30 Crores dated March 22, 2019 and BOC BG bearing no.LG5172620000015 issued by Bank of China Limited, Mumbai branch of INR 30 Crores dated July 17, 2020, as encashed and kept in interest bearing FDR be considered as the amount deposited towards the stay on the enforcement of the arbitral award dated October 17, 2017 and towards revival of the Section 34 Petition;”

4. The appellant, essentially, prays that the present appeal be heard and in the meantime the proceedings for enforcement of the impugned award be stayed.

5. Mr. Kapur, learned senior counsel appearing for the appellant submits that the appellant is willing to deposit the entire principal awarded amount of approximately ₹142 crores. He states that the appellant is also willing to secure the respondent for 50% of the accrued interest, that is, ₹48 crores (50% of the ₹96 crores) by furnishing an unconditional bank guarantee in favour of the Registrar General of this Court. He submits that subject to the aforesaid deposit being made, the enforcement proceedings be stayed till the above-captioned appeal is disposed of.

6. Mr. Darmesh Mishra, learned counsel appearing for the respondent opposes the same. He submits that at the present stage the Enforcement Court has only passed an order directing deposit of the principal amount but the respondent has a right to seek further orders for recovery of the interest as well.

7. The application preferred by the appellant under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter the ‘A&C Act’) impugning the arbitral award dated 17.10.2017 was dismissed principally on the ground that the applicant / appellant had not complied with the directions to deposit the principal awarded amount. According to the appellant, no such conditions could have been imposed by the Court while considering the application under Section 34 of the A&C Act.



8. Mr. Kapur states that notwithstanding the appellant's aforesaid contention, the appellant is now willing to deposit the principal amount of ₹142 crores as well as to secure the respondent for 50% of the interest amount.

9. The suggestion made by Mr. Kapur commends to this Court.

10. Subject to the appellant depositing the sum of ₹142 crores with the Registry of this Court and furnishing an unconditional bank guarantee for a sum of ₹48 crores (50% of the ₹96 crores) as offered by Mr. Kapur, the enforcement proceedings shall be stayed till the disposal of the present appeal.

11. Mr. Kapur states that the appellant already holds a bank guarantee for a sum of ₹79,66,95,797/- (Rupees Seventy-nine Crores Sixty-six Lacs Ninety-five Thousand Seven Hundred & Ninety-seven Only) in favour of the Registrar General of this Court. He submits that the appellant would deposit the said bank guarantee with the Registrar General of this Court and the said bank guarantee can be encashed forthwith by the respondent and the amount realised can be kept in an interest-bearing fixed deposit. He further submits that an amount of ₹62,74,00,000/- (Rupees Sixty-two Crores Seventy-four Lac Only) has already been deposited by the appellant with the Registry of this Court and the same has been kept in an interest-bearing fixed deposit.

12. He, thus, submits that the aforesaid amount of ₹79,66,95,797/- and ₹62,74,00,000/- be treated as part of the deposit required to be made by the appellant towards the principal amount of ₹142 crores. It is so directed.

13. The application is disposed of in the aforesaid terms."

17. On the next date of hearing, that is, on 17.07.2023, the learned counsel appearing for the appellant informed the Court that it had deposited the bank guarantee for a sum of ₹79,66,95,797/- with the Registry of this Court and requested that the Registrar be directed to



invoke the said bank guarantee and place an amount in a fixed deposit. He also requested that the time provided for furnishing the unconditional bank guarantee in the sum of ₹48 crores, be extended. The said request was acceded to and this Court granted two weeks' time to the appellant to furnish the bank guarantee and further directed that the bank guarantee for a sum of ₹79,66,95,797/- be invoked and the proceeds be kept in a fixed deposit.

18. This Court is informed that the said order has been complied with.

19. Notwithstanding the above, it is contended on behalf of the respondent that the appellant cannot be permitted to press its challenge to the impugned award as the appellant had failed to deposit the amount within the time as provided by the learned Single Judge.

20. There is no provision in the A&C Act, which mandates that hearing of an application to set aside an arbitral award under Section 34 A&C Act is contingent upon the deposit of the awarded amount. Prior to the issuance of the Arbitration and Conciliation (Amendment) Ordinance, 2015, an arbitral award could be enforced under Section 36 of the A&C Act, as a decree of a court, only after the time for making an application under Section 34 of the A&C Act to set aside the award had expired, and if such application was made, it had been refused. Thus, if an application to set aside an award was made within the prescribed period, the arbitral award was unenforceable till the said application was disposed of.

21. Section 36 of the A&C Act was substituted by the Arbitration



and Conciliation (Amendment) Act, 2015 with retrospective effect from 23.10.2015 and reads as under:

“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 filed in the Court 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 sub-section (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).”

22. Sub-section (3) of Section 36 of the A&C Act makes it amply clear that on an application filed under Sub-section (2) of Section 36, the Court may, subject to such conditions as it deems fit, grant a stay of the operation of such award for the reasons to be recorded in writing. It also follows that if the conditions as imposed by the Court are not complied with, the arbitral award, which is the subject of the proceedings under Section 34 of the A&C Act, is required to be



enforced. However, the same does not lead to the conclusion that the application under Section 34 of A&C Act is liable to be dismissed for want of compliance with the conditions as imposed under Section 36(2) of the Act. In case of a conditional stay of the arbitral award, the failure to satisfactorily comply with the conditions as imposed means that there is no impediment in proceeding to enforce the award; it does not follow that the challenge to the arbitral award is required to be rejected.

23. In the facts of the present case, the orders passed by the learned Single Judge indicate that the Court had decided not to hear the petition under Section 34 of the A&C Act till the appellant complied with the condition of making the necessary deposit, being the condition as imposed under Section 36(2) of the A&C Act as well as the direction issued in the application filed by the respondent under Section 9 of the A&C Act.

24. We are unable to accept that the respondent's application under Section 34 of the A&C Act was liable to be rejected on the ground that the appellant had not complied with the conditions imposed under Section 36(2) of the A&C Act. The consequences of failure to comply with the conditions subject to which the impugned award was stayed – that is, deposit of the awarded amount – is that the impugned award the liable to be enforced notwithstanding the appellant's challenge to the same is pending consideration. As noted above, with the substitution of Section 36 of the A&C Act with effect from 23.10.2015, the pendency of an application under Section 34 of the A&C Act is no longer a bar for enforcement of an arbitral award.



25. Mr Kapur, learned senior counsel had referred to an order passed by the Supreme Court in *Maharashtra Krishna Valley Development Corporation, Pune v. M/s B.T. Patil and Sons (Construction) Pvt. Ltd. & Anr.: SLP(C) No. 18891/2021, decided on 26.11.2021*. In that case, the Bombay High Court had passed an order dated 23.09.2021 in an application filed under Section 37 of the A&C Act declining to hear an appeal from an order dismissing the appellant's application to set aside an award under Section 34 of the A&C Act till the principal amount as awarded was deposited in the Court.

26. The said directions were appealed before the Supreme Court. In this context, the Supreme Court held as under:

“The direction in paragraph 3 of the impugned order dated 23rd September, 2021 that the appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, ‘Arbitration Act’) will not be heard till the entire amount with interest is deposited before the executing court cannot be sustained in view of the judgments of this Court in ‘*Kayamuddin Shamsuddin Khan Versus State Bank Of India*’ [1998] 8 SCC 676 and ‘*Devi Theatre Versus Vishwanath Raju*’ [2004] 7 SCC 337. These directions are, therefore, set aside. “

27. In view of the above, it is not open for the Court to decline to hear an application under Section 34 of the A&C Act on the ground that the appellant has not complied with the conditions under Section 36(2) of the A&C Act for staying the enforcement of the arbitral award.



28. Having stated the above, it is also relevant to note that in the present case, the learned Single Judge had also directed payment of the award in an application filed under Section 9 of the A&C Act by the respondent. The appellant had unsuccessfully challenged the order before the Division Bench of this Court and the Supreme Court. Thus, in addition to the order of deposit being a condition for staying the enforcement of the arbitral award amount under Section 36(2) of the A&C Act, there was an affirmative direction by the Court to deposit the said amount in a separate order passed under Section 9 of the A&C Act.

29. It is relevant to note that the opening sentence of Section 34(2) of the A&C Act indicates that the arbitral award ‘may’ be set aside by the Court if the grounds are satisfied. The use of the word ‘may’ indicate that there is some discretion of the court in the matter of setting aside an award. Thus, the appellant’s contention that an application under Section 34 of the A&C Act must be determined on merits in all cases and cannot be rejected even if the conduct of the party applying for setting aside the arbitral award is contumacious and it has acted in wilful defiance of the orders of this Court, is unmerited.

30. However, we are of the view that it is not necessary to examine this question in this case as the appellant has deposited the entire awarded amount and has also furnished bank guarantee for 50% of the interest due (as calculated up to 31.05.2023). By the order dated 21.11.2022, the Supreme Court had directed that the application “be decided in accordance with law and on its own merits, however, subject to compliance of Section 36 of the Arbitration and



Conciliation Act 1996 and order of this Court.”

31. In the given circumstances, we are of the view that the appellant’s application under Section 34 of the A&C Act is required to be heard on merits. We, accordingly, set aside the impugned order and remand the matter to the learned Single Judge to consider the appellant’s application under Section 34 of the A&C Act on merits.

32. The appeal is disposed of in aforementioned terms. The pending application is also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

AUGUST 21, 2023
RK