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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision 09th May, 2023

+ O.M.P. (COMM) 432/2017

SEPCO ELECTRIC POWER
CONSTRUCTION CORPORATION Petitioner

Through: Mr. P.V. Kapur, Sr. Adv. with
Mr. Kapil Arora, Mr. Kunal
Tandon, Ms. Palak Nagar, Mr.
Shiv Raj Syal, Mr. Karan
Motiani, Mr. Dhanjay Sahai,
Advocates.

versus

POWER MECH PROJECTS LTD Respondents

Through: Mr. Arvind K. Nigam, Sr. Adv.
with Mr. Dharmesh Misra, Mr.
Prateek Gupta, Mr. Raghav
Tiwari, Advocates.

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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (Oral)

I.A. 21327/2022 [application on behalf of the petitioner seeking appropriate directions to the Registry for taking on record the bank guarantee dated 22.11.2022] & I.A. 2494/2023 [application on behalf of the respondent for dismissal of the objection petition]

1. OMP(COMM) 432/2017 has been filed by SEPCO Electric Power Construction Corporation [hereinafter, "SEPCO"] under

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Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter, “the Act”] challenging an award dated 17.10.2017¹, rendered by a three-member arbitral tribunal adjudicating disputes between SEPCO and Power Mech Projects Ltd. [hereinafter, “Power Mech”] under a contract agreement dated 13.12.2010 and a supplementary agreement dated 13.10.2012.

2. The arbitral tribunal allowed the claim of Power Mech to the extent of ₹142,42,73,979/- and SEPCO’s counter claim to the extent of ₹1,59,480/- [after adjustment of some amount against one of the claims of Power Mech]. Consequently, the tribunal passed an award in the sum of ₹142,41,14,499/- in favour of Power Mech.

Facts

3. After the filing of the present petition by SEPCO, Power Mech also filed a post-award petition under Section 9 of the Act, being OMP (I)(COMM) 523/2017, for a direction upon SEPCO to deposit the awarded amount in Court.

4. During the pendency of the said petition, *inter alia* the following orders were passed: -

- a. By an order dated 14.12.2017 [read with a rectification order dated 09.02.2018], the Court recorded the submission on behalf of SEPCO that it had contracts worth ₹10,000 crores in India. SEPCO was directed to file an affidavit of movable and immovable assets, including details of its bank accounts and amounts lying therein within two weeks.

¹ Annexure P/1 to SEPCO’s list of documents.

- b. It was recorded, in an order dated 09.02.2018, that SEPCO had filed an affidavit stating that there were three work orders with it, and an amount of ₹ 2058.42 crores was due to it, for which it had already executed the work.
- c. By order dated 24.07.2018, the Court noted the contents of SEPCO's further affidavit dated 02.01.2018. The submission of learned counsel was also noted to the effect that SEPCO was in the process of executing several high value projects, and that it would be in a position to satisfy the award in case it was to fail in its petition under Section 34 of the Act. The following directions were passed: -

"7.1 Therefore, for the moment, SEPCO is directed to do the following:

(i) SEPCO will disclose the exact particulars and the location of the assets mentioned in paragraph no.4 of its affidavit dated 2.1.2018.

(ii) 10% of the amount available in the bank accounts referred to in paragraph no.5 of the very same affidavit, as on 24.7.20 18, shall be deposited with the Registry of this Court. Furthermore, deposits, if any, made hereafter in the said accounts to the extent of 10%, will also be deposited with the Registry of this Court every 15 days.

(iii) Liberty is, however, given to SEPCO to seek variation of the direction contained in Clause (ii) above, if security worth Rs. 142 crores is furnished to the Court favouring PMPL.

*(iv) The affidavit, as directed above, will be filed within one week from today."*²

- d. On 12.02.2019, it was directed as follows:-

² Emphasis supplied.

“1. Mr. Sethi, learned senior counsel for the respondent, says that he will file an affidavit stating therein the following:

(i) The list of assets which find mention in the valuers' report alongwith their location and valuation given by the valuer.

(ii) The list of assets which, according to him, the valuer has not valued. In respect of these assets their location and approximate valuation will also be given.

*(iii) **Furnish a bank guarantee in the sum of Rs.30 crores of a scheduled Indian bank.***

2. Learned senior counsel says that on account of the spring festival in China, it could take at least six (6) weeks to furnish the bank guarantee.

3. Mr. Sethi says, however, the affidavit can be furnished within the next two (2) weeks. It is ordered accordingly.

4. The Judgment Debtor will file the affidavit within two (2) weeks; with a copy being furnished to the counsel for the Decree Holder.

5. Insofar as the bank guarantee is concerned, it will be furnished within 6 weeks as indicated by the counsel.

6. Further, the bank guarantee in the sum of Rs.30 crores will be that of a scheduled bank located in India.

7. Renotify the matter on 31.7.2019.

*8. **In the meanwhile, the Judgment Debtor will continue to make deposit with the Registry of this Court in terms of the order dated 24.7.2018.**”³*

5. Pursuant to these orders, SEPCO furnished a bank guarantee in the sum of ₹30 crores⁴, and also deposited a sum of ₹2.74 crores [being 10% of the amount it claimed to have received towards the projects executed by it].

³ Emphasis supplied.

⁴ A controversy thereafter arose between the parties as to the validity of a bank guarantee for the sum of Rs. 30 crores in terms of the aforesaid orders, principally centering around the question as to whether the guarantee was required of a scheduled Indian bank, or a scheduled bank located in India. This controversy is presently pending in the Supreme Court in Civil Appeal Nos. 4936-37/2021 and need not detain us for the purpose of the present applications.

6. OMP(I)(COMM) 523/2017 was disposed of by a judgment of a coordinate Bench dated 17.02.2020. The Court noted the aforesaid bank guarantee of ₹30 crores and deposit of ₹2.74 crores, and directed SEPCO to deposit the balance amount [making up a total of ₹142 crores] with the Registry within a period of four weeks.

7. On the same day, the Court also issued notice in the present petition [OMP(COMM) 432/2017] and directed that, upon deposit of the amount in terms of the judgment in OMP(I)(COMM) 523/2017, enforcement of the award would remain stayed until the next date of hearing.

8. SEPCO carried the judgment of the learned Single Judge to the Division Bench in FAO(OS)(COMM) 59/2020.

9. When SEPCO's appeal was listed before the Division Bench on 29.06.2020, the Division Bench directed SEPCO to furnish a further bank guarantee of ₹ 30 crores and also directed learned counsel for SEPCO to obtain instructions as to the manner in which SEPCO proposed to secure the awarded amount, less the value of the bank guarantees and deposits already furnished.

10. By a further order dated 30.07.2020, the Division Bench directed as follows:

“7. The appellant is directed to file an affidavit giving the details of the undisputed amounts payable by the owners of the four Projects and the timeline within which the said amount would be received by the appellant, for this court to have a clear idea as to the exact amount receivable by the appellant in respect of the said Projects. The said affidavit would be supported with the affidavits of the employers/owners of the Projects and shall state inter alia, the timeline within which the said amounts would be disbursed to the appellant. It is made clear that if there is no clarity on the amounts receivable by the appellant in respect of the

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four Projects in question, then the receivables from the said Projects will not be taken into consideration to secure the interest of the respondent in respect of the awarded amount. The affidavit shall be filed by the appellant within one week from today with a copy to the counsel for the respondent.”

11. The judgment dated 17.02.2020 was ultimately affirmed by the Division Bench *vide* judgment dated 11.01.2021.

12. The judgment of the Division Bench was challenged in SLP(C) No. 4511/2021. It was heard with SLP(C) No. 5322/2021, against the order of the learned Single Judge dated 17.02.2020 in the present petition. The Supreme Court disposed of both appeals by a judgment dated 19.09.2022 affirming the view taken by this Court.⁵

13. SEPCO thereafter filed a miscellaneous application⁶ seeking clarification of the judgment dated 19.09.2022. The Supreme Court, *vide* order dated 21.11.2022, clarified that the present petition under Section 34 of the Act would 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.*”⁷

14. It is the admitted position that SEPCO has failed to deposit the aforesaid amount in the Registry of this Court. It instead sought to furnish a bank guarantee for the balance amount. This contention was first recorded in the order of this Court dated 14.11.2022, when the Court expressed a *prima facie* view that the directions in the present case require the balance amount to be deposited with the Registry by way of a cash security. SEPCO was granted ten days’ time to comply

⁵ *Sepco Electric Power Construction Corpn. v. Power Mech Projects Ltd.*, 2022 SCC OnLine SC 1243.

⁶ Misc. App. No. 1852/2022 in C.A. No. 6789/2022

⁷ Order dated 21.11.2022 in M.A. No. 1852/2022 in C.A. No. 6789/2022.

with the directions in paragraph 33 of the judgment dated 17.02.2020. It was also made clear that, if SEPCO was not able to satisfy the Court that a bank guarantee constitutes compliance with the directions of the Court, no further time was liable to be granted for depositing the due amount.

15. It is in this factual background that the parties have filed the captioned applications. I.A. No. 21327/2022 has been filed by SEPCO on 01.12.2022 for a direction upon the Registry to take on record a bank guarantee [BG No. LG5172622000026 dated 22.11.2022 issued by the Bank of China, Mumbai Branch] in the sum of ₹79,66,95,797/- in satisfaction of the aforementioned directions. Power Mech, on the other hand, has filed I.A. No. 2494/2023 on 06.02.2023 seeking dismissal of OMP(COMM) 432/2017 for want of deposit in terms of the aforementioned directions.

Submissions of the parties

16. I have heard both the applications together as the outcome of I.A. No. 2494/2023 is dependent upon the outcome of I.A. No. 21327/2022.

17. In support of SEPCO's application, Mr. P.V. Kapur, learned Senior Counsel, submits that the controversy before the Court, which was decided by the judgments of this Court dated 17.02.2020 and 11.01.2021, and of the Supreme Court dated 19.09.2022, centered around whether SEPCO was required to secure 100% of the awarded amount, but not on the form that the security would take. Although the orders of the Court require "*deposit*" of the amount, Mr. Kapur

submits that a bank guarantee is sufficient security within the contemplation of Order XLI Rule 5(5) of the Code of Civil Procedure, 1908 [hereinafter, “CPC”], read with Order XLI Rule 1(3) of the CPC. He cites judgments of the Bombay High Court⁸, Gujarat High Court⁹, Calcutta High Court¹⁰ and High Court of Jammu and Kashmir¹¹ in support of the proposition that security by way of a bank guarantee is treated virtually at par with cash security.

18. Mr. Kapur submits that SEPCO, being a company incorporated in China, has certain regulatory difficulties which disable it from making a cash deposit in this Court. SEPCO has, however, filed an additional affidavit before this Court stating that it is willing to furnish a bank guarantee issued by the Bank of China, Beijing, which has been obtained on the strength of a cash deposit in the said bank in excess of the full amount of the bank guarantee.

19. Mr. Arvind Nigam, learned Senior Counsel for Power Mech, submits that the orders of this Court, affirmed by the Supreme Court, do not permit this leeway to SEPCO. He draws my attention to the orders of the learned Single Judge and the Division Bench referred to above, to submit that SEPCO’s assurances from time to time with regard to its financial capacity to discharge the award, did not fructify. It is in light of this conduct that the Court made a specific and unequivocal direction for a cash deposit. That direction having been

⁸ *Bhadani Associates v. Kamlini Dharamraj Ashar*, 2017 SCC OnLine Bom 249.

⁹ *Shandong Tiejun Electric Power vs. Paharpur Cooling Towers Limited* [Judgment dated 18.12.2019 in Arbi. P. 113/2019].

¹⁰ Order dated 29.11.2013 in F.M.A.T 1213 of 2013.

¹¹ *Mashooq Ahmad Lone vs. Mohammad Saleem Ganaeie* [Order dated 29.12.2020 in CM No. 6713/2020 in CM(M) 121/2020.]

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affirmed, in equally unequivocal terms, by the Supreme Court, Mr. Nigam submits that it is not open to SEPCO to seek a modification of that order. He points out that SEPCO had, in fact, applied for a modification of the order¹², which was dismissed as withdrawn *vide* order dated 27.03.2023. It is Mr. Nigam's contention that the attempt of SEPCO here is to re-visit the final order passed by the Court, both under Section 9 of the Act and in the present proceedings, which is not permissible, whether in later proceedings, or even at a subsequent stage of the same proceedings. For this purpose, he relies upon the judgment of the Supreme Court in *Arjun Singh vs. Mohindra Kumar and Others.*¹³

20. In support of the application filed by Power Mech, Mr. Nigam submits that the judgments of the learned Single Judge dated 17.02.2020 and the Division Bench dated 11.01.2021, read with order of the Supreme Court dated 21.11.2022, make it quite clear that SEPCO was not entitled to be heard on merits in the present petition, until and unless it complied with the orders of deposit. He draws my attention to order dated 14.11.2022 passed in this petition, to submit that no further time is to be granted to SEPCO for this purpose and the petition, as it stands, is liable to be dismissed.

21. In meeting Mr. Nigam's contention on the application by Power Mech, Mr. Kapur suggests that the order of the Supreme Court dated 21.11.2022 is contrary to the settled legal position that a failure to deposit an amount under Section 36(2) of the Act cannot lead to a

¹² I.A. No. 5957/2023 in OMP(I)(COMM) 523/2017.

¹³ (1964) 5 SCR 946.

dismissal of the petition under Section 34 of the Act, but only to rejection of an application for stay of the impugned award. He draws my attention to three judgments of the Supreme Court on this point, being *Kayamuddin Shamsuddin Khan vs. State Bank of India*¹⁴, *Devi Theatre vs. Vishwanath Raju*¹⁵ and order dated 26.11.2021 in *Maharashtra Krishna Valley Development Corporation, Pune vs. M/s B.T. Patil and Sons (Construction) Pvt. Ltd. & Anr.*¹⁶

22. Mr. Kapur lastly commends to the Court the approach of the Division Bench of the Bombay High Court in *The State of Bombay vs. R.M.D. Chamarbaugwalla & Anr.*¹⁷, wherein the Division Bench indicated its opinion that a judgment of the Supreme Court was contrary to the Constitutional position. He also urges that, presented with the contrary view of the Supreme Court in order dated 21.11.2022 *vis-a-vis* the three judgments referred to above, the High Court is entitled to take the view which it considers to be more appropriate in law and on facts.

Analysis

(a) Re: I.A. No. 21327/2022

23. As far as furnishing of a bank guarantee in lieu of cash deposit is concerned, Mr. Kapur submits that Order XLI of the CPC, particularly Rules 1(3) and 5(5), permit security to be offered in a form other than cash. The said provisions read as follows: -

“Order XLI: Appeals from Original Decrees

¹⁴ (1998) 8 SCC 676.

¹⁵ (2004) 7 SCC 337.

¹⁶ Order dated 26.11.2021 in SLP(C) No. 18891/2021.

¹⁷ AIR 1956 Bom 1 at 17 (paragraph 39).

1. Form of appeal-What to accompany memorandum-

*(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, **deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit.***

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5. Stay by Appellate Court-

*(5) Notwithstanding anything contained in the foregoing sub-rules, **where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree.***¹⁸

Learned Senior Counsel further submits that the following observation of the Supreme Court in the judgment dated 19.09.2022, is a misreading of the statute:

*“36. **Order 41 Rule 5 of the CPC provides for stay of decree upon furnishing of cash security.** The High Court acted within the scope of its powers under Section 9 in passing the impugned judgment and order.”*¹⁹

As mentioned above, Mr. Kapur also relies upon several judgments of other High Courts to persuade the Court that a bank guarantee is in all practical terms, equivalent to furnishing of cash security.

24. In my view, these submissions are misconceived, and neither the statutory position nor the judicial precedents are of much assistance to SEPCO. At best, even according to Mr. Kapur, the statute provides for deposit of cash or furnishing of security as a condition for stay of a money decree. Security by way of a cash deposit is clearly one of the directions which the Court can pass. As elaborated below, it is clear from the judgments of this Court dated 17.02.2020 and 11.01.2021, and of the Supreme Court dated

¹⁸ Emphasis supplied.

¹⁹ Emphasis supplied.

19.09.2022, that this was the option chosen by the Court. In such an eventuality, the fact that the Court *could have chosen* another form of security, which would have been as good according to the cited judgments, is neither here nor there.

25. In the judgment of the learned Single Judge dated 17.02.2020, the following observations are relevant in this regard:-

“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

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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.

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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.**²⁰

26. The judgment was affirmed by the Division Bench on 11.01.2021 with the following observations:-

*“20. The contention of SEPCO that deposit/security of the Awarded amount, or any part thereof is not mandatory in all cases cannot be disputed. It would need examination on a case by case basis as to what arrangement should be worked out by the Court to secure the Awarded amount. In this regard, the learned Single Judge, in the impugned judgment has considered and, we too have considered, the matter hereinabove. **Considering the fact that SEPCO is a foreign entity having negligible assets within the jurisdiction of this Court, or even within the territory of India, as confirmed by the report of the Valuer dated 23.10.2018, it is of utmost import and urgency to secure the amounts awarded in arbitration to prevent the possibility of rendering the enforcement proceedings a farce. Not to mention, the interest component of the award, as on date, has escalated to a sum of INR 50,00,00,000/-, to secure which no directions have been passed in the impugned***

²⁰ Emphasis supplied.

order. Add to that SEPCO's inability to comply with previous directions of deposit, or overall failure in satisfying the Court of its financial health, the learned Single judge found this to be a fit case to direct deposit of 100% of the principal awarded amount and, in our opinion, rightly so. It is the bounden duty of this Court in these proceedings to protect the enforceability of the award and pass directions which are intended to ensure that the judgment debtor cannot evade payment under the award in case the objections raised by it under Section 34 of the Act are ultimately dismissed.

21. In the light of the aforesaid, we find absolutely no reason to interfere with the discretion exercised by the learned Single judge while passing the impugned judgment. The appeal, being meritless, is dismissed with no order as to costs.”²¹

27. The judgment of the Supreme Court dated 19.09.2022 also makes it clear that the Court contemplated security to be furnished by way of cash:

“16. The power under subsection (3) of Section 36 to grant stay of an award is coupled with the duty to impose conditions which could include the condition of securing the award by deposit in Court, of the amount of the Award. It may be true as argued by Mr. Vishwanathan that the Court may not impose condition for stay, if it deems appropriate not to do so. The power of Court to grant unconditional stay of an Award is not unfettered. The power of unconditional stay is subject to the condition in the second proviso that is:

The Court is satisfied that a prima facie is made out that

(i) the arbitration agreement or contract which is the basis of the award; or

(ii) the making of the award, was induced or effected by fraud or corruption.

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24. Section 9 expressly empowers the Court to pass orders securing the amount in dispute in the arbitration and/or any interim measure or protection as may appear to the Court to be just and convenient.

²¹ Emphasis supplied.

25. For grant of interim relief under Section 9, the Court would have to consider the prima facie case. In this case, prima facie there is an award for a huge amount of Rs. 142 Crores against the Appellant. The Respondent has a strong case for interim relief.

26. It is settled law that grounds for interference with an award is restricted. Even before this Court, the Appellant has not been able to advert to any cogent and glaring error which goes to the root of the award. The contention of the award being opposed to the public policy of India, is devoid of any particulars whatsoever.

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35. It is not in dispute that there is an award of Rs. 142 Crores in favour of the Respondent. No cogent ground has been made out even prima facie, for interference with the impugned award.

36. Order 41 Rule 5 of the CPC provides for stay of decree upon furnishing of cash security. The High Court acted within the scope of its powers under Section 9 in passing the impugned judgment and order.

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.”²²

28. A proper reading of the aforesaid judgments show that Court’s intention was to require a deposit in cash and no other form of security. When a Court directs “deposit” of a specific amount, the litigant does not have a choice of furnishing a bank guarantee instead. It may well be that, in a given case, the Court gives such an option to the litigant, but such an option is not implicit in the direction for a monetary deposit.

29. In the context of the present case, there would also be a significant difference in the two situations in respect of Power Mech’s ability to avail of the awarded amount during the pendency of

²² Emphasis supplied.

SEPCO's challenge to the award. If SEPCO were to deposit the amount in cash, it would be possible for Power Mech to apply for withdrawal of the amount subject to such conditions as the Court may impose. Furnishing of a bank guarantee does not leave that option open.

30. During the pendency of proceedings under Section 9 of the Act, as mentioned above, SEPCO was directed to furnish a bank guarantee for ₹30 crores and also deposited ₹2.74 crores in cash. Mr. Kapur submits that a reading of paragraph 33 of the judgment dated 17.02.2020 shows that the Court regarded the furnishing of a bank guarantee and a cash deposit as equivalent. This reading does not commend to me. Paragraph 33 of the judgment, in fact, shows that the Court mentioned both separately, in contradistinction to each other. Both options – furnishing of a bank guarantee and a deposit - were alive to the mind of the Court, and the Court directed a deposit.

31. Mr. Kapur is perhaps right in submitting that both this Court and the Supreme Court were concerned more with the quantum of security than with the form in which the security must be provided. However, that too is a point that prevails against SEPCO. Neither in its appeal against the judgment dated 17.02.2020, nor in its petition before the Supreme Court, did SEPCO make an attempt to seek modification of the direction for deposit on the grounds now sought to be urged. Indeed, even after the judgment dated 19.09.2022, SEPCO approached the Supreme Court for clarification, but not on this point.

32. In a case of an *inter partes* order, SEPCO cannot, in my view, now be heard to say that a bank guarantee would satisfy the conditions

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NAGPAL
Signing Date: 11.05.2023
19:05:52

of the orders passed by this Court and the judgment of the Supreme Court dated 19.09.2022, by which it is bound. To this extent, the observations of the Supreme Court in *Arjun Singh*²³, cited by Mr. Nigam, are apposite: -

*“11. That the question of fact which arose in the two proceedings was indetical would not be in doubt. Of course, they were not in successive suits so as to make the provisions Section 11 of the Civil Procedure Code, applicable in terms. That the scope of the principle of res judicata is not confined to what, is contained in Section 11 but is of more general application is also not in dispute. Again, res judicata could be as much applicable to different stages of the same suit as to findings on issues in different suits. In this connection we were ‘referred to what this Court said in *Satyadhan Ghosal v. Smt Deorajin Debi* where *Das Gupta, J.* speaking for the Court expressed himself thus:*

“The principle of res judicata-is based on the need of giving a finality, to judicial decisions. What it says is that once resjudicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question, of fact or on a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.... The principle of res judicata applies also as between the two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.”²⁴

(b) **Re: I.A. No. 2494/2023**

33. I turn now to the second aspect of the matter i.e., whether the petition filed by SEPCO under Section 34 of the Act is liable to be dismissed on account of its failure to abide by the orders of deposit.

34. Mr. Kapur strenuously urges that Section 36 of the Act does not

²³ Supra (note 13).

²⁴ Emphasis supplied.

so provide; the only consequence of a failure to furnish security as directed is that the award would remain enforceable at the hands of the award holder during the pendency of the award debtor's challenge. He relies upon three judgments of the Supreme Court in this connection:

- (a) In *Kayamuddin Shamsuddin Khan*²⁵, the Court held that non-compliance with a direction of deposit under Order XLI Rule 1(3) of the CPC would result in the Court refusing the stay of execution of a decree but not in dismissal of the appeal.
- (b) In *Devi Theatre*²⁶, the Supreme Court was concerned with an order admitting a first appeal, subject to the appellant making a monetary deposit. The Court held that admission of an appeal could not be made contingent upon a deposit, although a direction to deposit an amount into Court can well be made as a condition for stay of the decree.
- (c) Both the aforesaid judgments were considered by the Supreme Court in *Maharashtra Krishna Valley*²⁷, wherein the Court set aside a direction that an appeal under Section 37 of the Act would not be heard until the entire awarded amount had been deposited.

35. I am unable to agree with Mr. Kapur's submission in this regard. In the present case, it appears clear from the orders of this Court and the Supreme Court that arguments proceeded on the basis that hearing of the petition under Section 34 of the Act was conditional upon the deposit being made.

²⁵ Supra (note 14).

²⁶ Supra (note 15).

²⁷ Supra (note 16).

36. This is evident from the following observations in the judgment dated 17.02.2020, and the arguments of counsel recorded therein:-

“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.

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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

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*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.”*

37. Before the Division Bench also, the arguments were framed in this manner, as noticed in paragraphs 1 and 4 of judgment dated 11.01.2021, extracted below:-

*“1. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ‘the Act’) preferred by SEPCO Electric Power Construction Corporation against the judgment passed by the learned Single Judge on 17.02.2020 in OMP(I)(Comm) 523/2017, which was the Section 9 petition moved by the respondent/Power Mech to secure the entire amount granted in its favour by the three-member arbitral Tribunal by way of the award dated 17.10.2017. The impugned judgment only decided whether SEPCO was required to deposit the awarded amount before this Court, **as a pre-condition for having its challenge to the award under Section 34 of the Act heard.** For the sake of convenience, throughout this decision the appellant and the respondent shall be referred to as SEPCO and Power Mech respectively.*

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*4. As noted hereinabove, the limited controversy decided by the learned Judge in the impugned judgment was **whether SEPCO’s challenge to the award under Section 34 of the Act could be considered on merits at all, without it securing the complete awarded amount. SEPCO, of course, vehemently opposed any direction for deposit of 100% of the awarded amount as pre-deposit on the following four broad grounds (i) there is no statutory provision within the Act which explicitly bars the consideration of a Section 34 petition without securing***

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***the awarded amount,** (ii) there have been several instances in the past where the Court has directed deposit of 50% of the awarded amount, rather than 100% of it, (iii) SEPCO is solvent and, thus, fully capable of satisfying the amount at a later date even if the Section 34 petition is dismissed upon final adjudication and that, finally, (iv) the impugned award was prima facie perverse and the amounts granted thereunder did not merit to be secured at all.”*

38. The matter is placed beyond the pale of doubt by the order of the Supreme Court dated 21.11.2022 passed on SEPCO’s application for clarification of the judgment dated 19.09.2022. The order is reproduced in full below:

“Having heard Mr. K. V. Vishwanathan, learned Senior Counsel appearing on behalf of the applicant(s) and Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of the contesting respondents.

*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.***²⁸

The present miscellaneous applications stand disposed of accordingly.”

39. The Supreme Court thus made SEPCO’s challenge to the award contingent upon compliance of the directions for deposit. I am of the view that this is an unequivocal and clear direction which admits of no interpretative difficulty. It is not open to SEPCO - or indeed, to this Court - to proceed in a manner inconsistent with these directions of the Supreme Court.

40. Mr. Kapur’s submission that it is open to this Court to choose whether to follow the order of the Supreme Court dated 21.11.2022 or

²⁸ Emphasis supplied.

the line of authority relied upon by him, is also rejected. If at all the Court were faced with such a dilemma, it would be in a case where irreconcilable, but equally binding, authorities are cited *as precedent* to guide the Court's determination of a pending case. No such situation exists in this case, where the Supreme Court has already given a binding *inter partes* direction. This is not a case where Mr. Nigam urges this Court to follow the order of the Supreme Court dated 21.11.2022 as a precedent, in preference to the judgments cited by Mr. Kapur. He instead submits that it is a consequence of the binding direction of the Supreme Court *in this very case* that the present petition must be dismissed.

41. For the same reason, the judgment of the Division Bench of the Bombay High Court in *RMD Chamarbaugwalla*²⁹ is wholly inapplicable. In that case, the cited judgment of the Supreme Court was being used as authority in a different case, and did not partake of the character of a binding direction between the parties.

42. In view of the above, I am of the opinion that SEPCO's failure to comply with the directions of this Court and the Supreme Court regarding deposit of the awarded amount, must result in dismissal of its challenge to the impugned award.

Conclusion

43. For the aforesaid reasons, I.A. No. 21327/2022 is rejected, and I.A. No. 2494/2023 is allowed.

²⁹ Supra (note 17).

OMP(COMM) 432/2017

44. As a result of the orders passed in I.A. Nos. 21327/2022 and 2494/2023 above, OMP(COMM) 432/2017 stands dismissed, and all pending applications are disposed of.

45. The bank guarantees furnished by SEPCO, pursuant to order dated 12.02.2019 of this Court and order dated 29.06.2020 of the Division Bench, and the amount deposited pursuant to order dated 24.07.2018, will be held in the Registry in aid of any proceedings for enforcement that may be filed by Power Mech. *Status quo* with regard to the bank guarantees and deposit made in this Court be maintained for a period of two weeks from today.

PRATEEK JALAN, J.

MAY 09, 2023

'pv/Bhupi/Ananya'/'

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