



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

21

ARB-ICA-1-2025

Date of decision: 05.03.2025

TALWANDI SABO POWER LIMITED

...PETITIONER

VERSUS

SEPCO ELECTRIC POWER CONSTRUCTION CORPORATION

...RESPONDENT

CORAM: HON'BLE MS. JUSTICE LAPITA BANERJI

Present: Mr. Akshay Bhan, Senior Advocate with
Mr. Venkatesh, Advocate (through video conferencing),
Mr. Bharath Gangadharan, Advocate,
Ms. Manju Tiwari, Advocate,
Mr. Viren Sibal, Advocate,
Mr. Shaurya Khanna, Advocate and
Mr. Harsh Gupta, Advocate
for the petitioner.

Mr. Kapil Arora, Advocate,
Mr. Pravar Mishra, Advocate,
Mr. Shobit Phutela, Advocate,
Ms. Harsheeta Rai Sharma, Advocate
for the respondent.

LAPITA BANERJI, J. (ORAL)

1. In this application filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as "the 1996 Act"), the petitioner has *inter alia* prayed for an order of injunction prohibiting the respondent-SEPCO from initiating and/or continuing proceedings before SIAC - Singapore International Arbitration Centre in application No.039 of 2024, on the ground that under Novated Agreement dated November 17, 2009 (Annexure P-2) read with the amended Umbrella Agreement dated



November 15, 2012 (Annexure P-4) were to be governed by the Laws of India and construed in accordance with Indian Laws. The Courts in India would have jurisdiction over any litigation arising out of the contracts. Furthermore, Clause 5.2 of the Novation Agreement of 2009 clearly stipulated that in case of any dispute arising between the parties under or connected to the agreement, the Courts of India would have exclusive jurisdiction. Furthermore, Clause 6 of the 2009 Agreement, provided that Clause 7 of the Umbrella Agreement of the same date relating to arbitration would be incorporated as if the same was set out in full in the Novated Agreement. Furthermore, it recorded that the reference to the parties in the Umbrella Agreement would deem to be references to the parties in the Novated Agreement. It was clarified that the procedure for appointment of Arbitrators would be as specified in the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act;') as is prevalent in India.

2. Learned Senior counsel appearing on behalf of the petitioner submits that under Sections 11(6) & 11(9) of the 1996 Act, the only way to appoint a third Arbitrator in an International Commercial Arbitration is to refer the same to the Hon'ble Supreme Court when the two nominated Arbitrators of the parties fail to reach an agreement expected of them, under the procedure. He submits that a petition under Section 11 of the 1996 Act has been filed in the Supreme Court by the petitioner as the nominated Arbitrators could not agree on a third Arbitrator. Notice was issued and the respondent has been directed to file a counter-affidavit/reply in the said petition under Section 11.

3. He refers to the Clauses 5, 7 and 9 of the Umbrella Agreement dated November 17, 2009. The relevant clauses are reproduced hereinafter:-



“5. SEPCO'S CO-OPERATION WITH FINANCING AND FOR CDM PROJECT

5.1 SEPCO shall, as and when requested to do so by the Owner/Purchaser at any time after the signing of this Agreement, prepare and provide such information in connection with any of the Novated Project Contracts and/or the Supplies and the Works as a whole (including resolutions, certificates, opinions of counsel or other documents related to any of the Project Contractor's corporate authorisation to enter into the Novated Project Contracts and to undertake the obligations set forth in this Agreement or in the Novated Project Contracts) as may be reasonably required for and/or by any potential Financing Entity to the Owner/Purchaser under any loan agreement. SEPCO shall co-operate with the Owner/Purchaser in good faith in order to satisfy the requirements of the Owner/Purchaser's financing arrangements, including where appropriate impose upon/direct all or any of the Project Contractors to make amendments to the terms of the Novated Project Contracts and execute direct agreement in favour of the Financing Entities ("Direct Agreement"), as may be reasonably required by the Financing Entities and mutually agreed by the Parties.

5.2 The Plant and Equipment being of supercritical technology, the Project shall be entitled for getting CDM benefits. SEPCO shall, as and when requested to do so by the Owner/Purchaser, prepare and provide such information/documents to the Owner/Purchaser, as may be reasonably required in order to enable the Owner/Purchaser to avail such benefits.

5.3 SEPCO shall, as and when requested to do by the Owner/Purchaser, provide all required documentation, information and such other assistance as required for enabling the Owner/ Purchaser to avail Buyer's credit from EXIM Bank or such other financial institution of China.

7. ARBITRATION



7.1 The Parties hereto shall endeavour to settle all disputes and differences relating to and/or arising out of this Agreement amicably.

7.2 In the event of Parties fail to resolve any dispute amicably the same shall be referred to arbitration in accordance with the Arbitration and Conciliation Act 1996, as is prevalent in India. Each party shall be entitled to nominate an arbitrator and the two arbitrators so nominated shall jointly nominate the third presiding Arbitrator. The Arbitrators shall give a reasoned Award.

7.3 The place of arbitration shall be Singapore and the language of the arbitration shall be English.

7.4 The Parties agree that any arbitration award shall be final and binding upon the Parties

7.5 The Parties hereto agree that in the event of the failure of any or all the Project Contractors, SEPCO shall be obliged to carry out the obligations of the Project Contractors under any or all of the concerned Project Contracts, even in the event a dispute is referred to arbitration under this Agreement. It is further clarified that the Owner/Purchaser shall be entitled to retain any sum or portion of Contract Price under any of the Project Contracts which has become due and payable, for any unfinished part of the Facility or any subject matter under arbitration

7.6 This Clause 7 shall survive the termination or expiry of this Agreement.

9. MISCELLANEOUS

9.1 This Agreement shall be construed in accordance with and governed by the laws of India and the Parties hereto agree in the event of any litigation, this Agreement shall be subject to the jurisdiction of the courts in India.

xxxxxx xxxxx xxxxxx”

4. He also refers to Clauses 5 and 6 of the Novated Agreement.



5 GOVERNING LAW AND JURISDICTION

5.1 Governing Law

This Agreement shall be governed by, enforced under and construed in accordance with Indian laws.

5.2 Jurisdiction

In the event of any dispute arising under or connected to this Agreement, the courts of India shall have exclusive jurisdiction.

6. DISPUTE RESOLUTION

The provisions of Clause 7 of the Novated Umbrella Agreement shall be incorporated into this Agreement as if set out in full in this Agreement and as if references in that Clause 7 to "this Agreement" are references to this Agreement and references to "the Parties" are references to the Parties to this Agreement. Provided however that the procedure for appointment of the Arbitrators will be as specified in the Arbitration and Conciliation Act, 1996, as is prevalent in India."

5. He submits that under the aforesaid contracts, the respondent could not have approached SIAC for resolution of disputes. He refers to the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) Rules, 7th Edition dated January 1, 2025 to contend that where the parties have agreed by contract or otherwise to refer their disputes to SIAC for arbitration or to arbitration in accordance with the SIAC Rules, only in that event the parties shall be deemed to have agreed to the Arbitration being conducted pursuant to and administered by SIAC, in accordance with the Rules.

6. Notice was issued by this Court on February 20, 2025. The respondent is represented in Court today. Learned counsel appearing on behalf of the respondent submits that the “*seat*” of the present arbitral



proceedings was in Singapore and not in India. Therefore, the laws of Singapore will apply and consent of the parties was not required for referring the dispute to SIAC, under the SIAC rules. Under the International Arbitration Act, 1994 of Singapore, there is no need to take consent of the petitioner before referring the dispute to SIAC for appointment of an Arbitrator. He refers to Section 8 of the 1994 Act. He relies on the decision in **“BGS SGS Soma JV Vs. NHPC Limited”** (2020) 4 SCC 234 to argue that since the **“place”** of arbitral proceedings was at Singapore, the **“seat”** was also at Singapore.

7. He submits that the umbrella/arbitral agreement was a bipartite one between the petitioner and respondent-Company which was sought to be invoked by the petitioner for adjudication of a dispute that arose of the Novation Agreement which was a tripartite agreement. Therefore, the Clauses of the Novation Agreement (a tripartite agreement), regarding the Courts in India having exclusive jurisdiction or applicability of the 1996 Act for appointment of the learned Arbitrator could not be relied upon for resolution of dispute.

8. He next submits that each day's delay in filing the application under Section 9 of the 1996 Act has not been explained and the issue raised in the application under Section 11 of the 1996 Act before the Hon'ble Supreme Court is the same as the issue before this Court in the Section 9 of the application. Without determining the **“seat”** of the arbitration the Court hearing the application under Section 9 could not restrain the respondent from proceeding before SIAC. He refers to paragraph 24 of the judgment in **“Modi Entertainment Network and another Vs. W.S.G. Cricket PTE.**

Ltd.” (2003) 4 SCC 341 to submit that the preconditions for granting *anti-*



suit injunction are much higher and stringent than for granting an ordinary injunction.

9. This Court has heard the contentions of the learned counsel for the parties and perused the material on record and finds it pertinent to note certain dates relating to the dispute between the parties.

10. Notice invoking arbitration was issued by the petitioner to the respondent-Corporation on June 13, 2024 (Annexure P-11). The learned Arbitrator was nominated by the petitioner in terms of Clause 7.2 of the Umbrella Agreement on November 17, 2009. The respondent was called upon to nominate its Arbitrator under the same clause at the earliest to expedite the constitution of the Arbitral Tribunal without any delay. Admittedly, vide letter dated November 22, 2024, the nominee Arbitrator of the respondent-Corporation was appointed without raising any dispute with regard to the 1996 Act not being applicable to the present parties or dispute.

11. Thereafter, on December 27, 2024, the respondent made an application (Annexure P-15) to SIAC for appointment of the third Arbitrator as the nominee Arbitrators could not decide on the personnel of the same. The respondent intimated Arbitrators' inability to jointly appoint the third Arbitrator and made a request for appointment of a third Arbitrator. An application under Section 11 of the 1996 Act was filed before the Supreme Court of India by the petitioner herein on January 7, 2025, immediately upon reopening of the Court after the winter vacation. Notice in the application was issued on February 3, 2025. The application under Section 9 was filed on February 14, 2025 before this Court. Admittedly, the "***seat***" was not stipulated in the arbitration agreement. Therefore, the question is whether



the “**place**” of arbitration being Singapore could be construed as the “**seat**” of the arbitration.

12. Upon perusal of the judgment of *BGS SGS Soma (supra)*, it appears that unless contrary indicia is evidenced, the “**place**” of arbitration would normally be construed as the “**seat**”.

13. Paragraph 82 of the said judgment is reproduced hereunder:-

82. *On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the “venue” of the arbitration proceedings, the expression “arbitration proceedings” would make it clear that the “venue” is really the “seat” of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as “tribunals are to meet or have witnesses, experts or the parties” where only hearings are to take place in the “venue”, which may lead to the conclusion, other things being equal, that the venue so stated is not the “seat” of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings “shall be held” at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a “venue” and not the “seat” of the arbitral proceedings, would then conclusively show that such a clause designates a “seat” of the arbitral proceedings. In an International context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that “the venue”, so stated, would be the seat of the arbitral proceedings. In a national context,*



*this would be replaced by the Arbitration Act, 1996 as applying to the “**stated venue**”, which then becomes the “**seat**” for the purposes of arbitration.”*

14. Upon perusal of the Umbrella Agreement and the Novation Agreement, it is apparent that the Novation Agreement was entered into between three parties in continuation with the Umbrella Agreement entered into by two parties. Clause 9 of the Umbrella Agreement is reproduced hereunder:-

9 MISCELLANEOUS

9.1 This Agreement shall be construed in accordance with and governed by the laws of India and the Parties hereto agree in the event of any litigation, this Agreement shall be subject to the jurisdiction of the courts in India.

9.2 All documents and correspondence with respect with execution of this Agreement shall be in English language.

9.3 SEPCO shall not without the prior written consent of the Owner/Purchaser assign to any person any benefit of or obligation under this Agreement. SEPCO hereby consents to the creation by the Owner/Purchaser of a security assignment of this agreement/or the Novated Project Contracts in favour of any Financing Entity (or a trustee acting on behalf of one or more Financing Entities) and hereby undertakes to execute upon the request of the Owner/Purchaser, such documents as may be reasonably and customarily required to give effect to any such assignment provided that the SEPCO's consent, which shall not be unreasonably withheld or delayed. shall be required for the inclusion in such documents of any terms other than a simple confirmation of the consent given above or a simple acknowledgement of a notice of an assignment pursuant to this Clause 9.3. Any stamp duty and all costs and expenses payable in respect of such



documents shall be to the account of the Owner/Purchaser in respect of any such documents required to be signed by the SEPCO.

9.4 Contractor/Supplier shall be liable to pay Income Tax applicable on all the Novated Project Contracts. No tax/lower rate tax will be deducted at source if a tax exemption/lower rate certificate from the tax authorities is provided to the Owner/Purchaser by the Contractor/Supplier. If a tax exemption/lower rate certificate is not provided by the Contractor/Supplier and in the event that the Owner/Purchaser is required to pay the withholding tax applicable on the Novated Project Contracts, the Owner/Purchaser shall deduct such taxes from the Contract value of the Contractor/Supplier's invoice and remit the net amount taking into account such deductions. However, the Owner/Purchaser shall furnish a TDS certificate to this effect in favour of the Contractor/Supplier so as to enable him to take the tax credit as per Double Taxation Avoidance Treaty between India and China. Such deduction of tax or withholding by the Owner/Purchaser shall have no effect on the Contract Price and the Contract Price shall not be liable to increase because of such deduction of tax or withholding.

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9.6 In the event of conflict between this Agreement and any of the Novated Project Contracts, this Agreement shall prevail.

9.7 Capitalised terms used and not defined herein shall have the same meaning as ascribed to it under the Novated Project Contracts unless otherwise specified.”

15. Admittedly, the petitioner and respondent were parties to the Umbrella Agreement. Clause 9.1 clearly indicates that the Umbrella Agreement shall be construed in accordance with and governed by the laws



of India and the parties agreed that any litigation would be subject to jurisdiction of the Courts of India. Clause 6 of the Novation Agreement incorporated the provisions of Clause 7 of the Umbrella Agreement.

16. It is clear from the perusal of both the agreements that the Novation Agreement was in continuation of the Umbrella Agreement and the parties consented to subject themselves to the laws of India. Moreover, the respondent had also nominated its Arbitrator without raising any objection to being subjected to 1996 Act laws of India. It is only because of the exigency arising out of the fact that the two nominated Arbitrators could not appoint a third Arbitrator that recourse to Section 11 of the 1996 Act had to be taken by the petitioner. It is enough contrary indicia to the mind of this Court, at this *prima facie* stage, to hold that the “*place*” of arbitration was not intended to be the “*seat*” of arbitration.

17. Next is the issue raised by the learned counsel with regard to the parameters for grant of “anti-suit injunction” not being met in the present case. In **Modi Entertainment Network (supra)**, three pre-conditions were laid down. The relevant extract is reproduced hereunder:-

24. From the above discussion the following principles emerge :

(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects : -

(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;

(b) if the injunction is declined the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity - respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained - must be borne in mind;



XXXXXXXXXX”

18. When the respondent itself has nominated an Arbitrator under the 1996 Act, then it cannot lie in its mouth to contend that it was not amenable to the jurisdiction of Indian Courts. On the second issue, this Court is *prima facie* of the view that in the event of SIAC appoints a Presiding Arbitrator and the Supreme Court also allows the Section 11 application then it would lead to an anomalous situation which is incumbent on this Court to avoid. On the question of comity of Courts also, this Court is of the view that once proceedings have been initiated under the 1996 Act and two learned Arbitrators are nominated by the parties, the principle of comity would require the respect for the Courts in which commencement of the action has taken place.

19. Therefore, this Court is of the opinion that a *prima facie* case has been made out by the petitioner to restrain the respondent from continuing with SIAC application No.039 of 2024 till such time a decision is arrived at by the Hon’ble Supreme Court as no consent was given by the petitioner to subject itself to the jurisdiction of SIAC which is pre-requisite for its jurisdiction. On the contrary, by nominating an Arbitrator in terms of Umbrella Agreement, the respondent had subjected itself to the jurisdiction of the Indian Courts by following the procedure prescribed under the 1996 Act.

20. On the same issue of delay, this Court is of the view that there was no unnecessary delay or laches on the part of the petitioner in approaching the Court which would disentitle him from grant of an interim prayer, taking into account the dates mentioned in paragraph 10 herein above.



21. In view of the aforesaid discussions, this Court **disposes of** ARB-ICA-1-2025 by granting an order of injunction restraining the respondents from proceeding with the application No.039 of 2024 before SIAC till such time the application under Section 11 of the 1996 Act is disposed of by the Hon’ble Supreme Court of India.

22. Needless to mention that only *prima facie* observations have been made by this Court and the same will have no reflection on the merits of the case, which will ultimately be decided by the arbitral Tribunal.

05.03.2025

Nisha Yadav

(LAPITA BANERJI)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No