

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISIDICITION

CIVIL APPEAL NO. _____ OF 2022
(Arising out of SLP(C) No. 4511 of 2021)

**Sepco Electric Power Construction
Corporation**

....Appellant

Versus

Power Mech Projects Ltd.

....Respondent

WITH

CIVIL APPEAL NO _____ OF 2022
(Arising out of SLP(C) No. 5322 of 2021)

J U D G M E N T

Indira Banerjee, J.

Leave granted.

2. The Appellant, an entity incorporated in China was awarded contracts in relation to various coal based power projects in India and the Respondent, a company incorporated in India was engaged as a sub-contractor of the Appellant. Disputes and differences between the

Respondent and the Appellant were referred to Arbitration. Suffice it to mention that the Arbitration culminated in an Award dated 17th October 2017 of approximately Rs. 1,42,00,00,000/- (Rupees One Hundred and Forty Two Crores) in favour of the Respondent.

3. On 3rd December 2017, the Appellant filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Arbitration Act") being O.M.P. (COMM) No. 432 of 2017 challenging the Arbitral Award dated 17th October 2017 in the Commercial Division of the Delhi High Court, which is pending.

4. On the same day, that is, 3rd December 2017, the Appellant filed an interim application being I.A. No. 14342 of 2017 in the said O.M.P. (COMM) No.432 of 2017 under Section 36(2) of the Arbitration Act seeking stay of the arbitral award.

5. After about a week, on 11th December 2017, the Respondent filed an application under Section 9 of the Arbitration Act being O.M.P. (I) (COMM) No. 523 of 2017 in the High Court, *inter alia*, seeking orders on the Appellant to furnish security against the amount awarded by the Arbitral Tribunal.

6. On 14th December 2017, the High Court issued notice in the application filed by the Respondent under Section 9 of the Arbitration Act and directed the Appellant to file an affidavit of assets. In compliance with

the order dated 14th December 2017, the Appellant submitted its affidavit giving details of its assets.

7. On or about 10th May 2018, the Respondent filed an application being I.A. No. 6704 of 2018 praying for deposit of the entire amount due from Talwandi Sabo Power Corporation Limited (TSPL). The said application was disposed of by an order dated 15th May 2018 with the observation that the Court did not see sufficient cause to allow the prayers made by the Respondent.

8. By an order dated 24th July 2018, the High Court directed the Appellant to disclose better particulars of its assets in India. In the meanwhile, the Appellant was directed to deposit 10% of the amount in its bank accounts, which is referred to in its affidavit of assets in the High Court at intervals of every 15 days.

9. Pursuant to the aforesaid order dated 24th July 2018, the Appellant filed its supplementary affidavit of assets. Two days later, on 20th August 2018, the Respondent filed an application being I.A. No. 11128 of 2018 for directions on the Respondent to deposit the awarded amount of Rs. 142,41,14,499/- (Rupees One Hundred Forty-Two Crores, Forty One Lakhs, Fourteen Thousand, Four Hundred Ninety-Nine Only) along with interest @ 12% per annum from the date of the award till realisation of the awarded amount in the High Court.

10. Diverse interim applications were filed from time to time. On 20th March 2019, the Respondent filed another application being IA No.4259 of 2019, seeking orders for deposit of the awarded amount of Rs. 142,41,14,499/- along with interest.

11. By a judgment and order dated 17th February 2020, a Single Judge of the High Court disposed of the application filed by the Respondent under Section 9 of the Arbitration Act being O.M.P (I) (COMM) No.523 of 2017 along with connected interim applications. The operative part of the judgment and order dated 17th February 2020 is set out hereinbelow:-

"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."

12. On that same day, that is, 17th February 2020, the Single Bench passed another order directing notice be issued on respondents on the application of the Appellant under Section 36(2) of the Arbitration Act for stay of the award. The Court directed that, on deposit of Rs.142 Crores, as earlier directed in the application of the Respondent under Section 9 of the

Arbitration Act, within four weeks, the enforcement of the award dated 17th October 2017 would remain stayed.

13. Mr. K. V. Viswanathan, appearing on behalf of the Appellant submitted that the Appellant's application for stay under Section 36(2) of the Arbitration Act had been filed before the Respondent filed its application for interim relief under Section 9 of the said Act. The application of the Appellant having been filed earlier, orders ought not to have been passed on the application of the Respondent for interim relief, without first considering the Appellant's application for stay.

14. Mr. Viswanathan pointed out that the High Court had, by clubbing the order in the Appellant's application under Section 36(2) of the Arbitration Act, with the order in the application of the Respondent under Section 9 of the said Act, deprived the Appellant of its legal remedy of appeal against any order passed under Section 9, since an order under Section 36 is not appealable. Had the later application filed under Section 9 not been clubbed with the earlier application filed by the Appellant under Section 36(2), the Appellant could have filed an intra court appeal from the order under Section 9 of the Arbitration Act.

15. Mr. Viswanathan argued that sub-section (3) of Section 36 enables the court to grant stay of operation of the Award. The Court cannot, however, stay an award for the asking. An award can only be stayed for

reasons to be recorded in writing. Moreover, for grant of stay in the case of an arbitral award for payment of money, the Court is to have due regard to the provisions for grant of stay in a money decree under the provision of the CPC.

16. The power under sub-section (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.

17. Mr. Viswanathan submitted that while the grant for stay may be discretionary but the exercise of such power is mandatory. The exercise of

discretion requires *ex facie* consideration of the merits of the challenge and therefore a review of the award which regrettably has not been done.

18. The Appellant has unsuccessfully made an attempt to evaluate the impugned award to demonstrate that the award is against the fundamental policy of India. It is contended that no documents were produced during the arbitration proceedings. It is not for this Court to sit in appeal over the impugned award at this stage while deciding an appeal under Article 136 of the Constitution of India and examine the adequacy of the evidence before the Arbitral Tribunal.

19. Section 36 of the Arbitration Act Provides:-

"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).

Provided further that where the Court is satisfied that a prima facie case is made out that,—

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

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under Section 34 to the award.

Explanation.—For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015."

20. On the other hand, Section 9 of the Act provides the amendment as follows:-

"9. Interim measures, etc. by Court.— (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:—

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement:

(b) securing the amount in dispute in the arbitration:

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the

same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the court may determine.

(3) Once the arbitral tribunal has been constituted, the court shall not entertain an application under sub-section (1), unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious."

21. There is no hard and fast rule that an application made earlier in point of time must be heard before an application made later in point of time.

22. Both the applications under Section 9 filed by the Respondent and the application for stay under Section 36(2) filed by the Appellant relate to the same impugned award.

23. Even though, the applications may be independent applications, there are common factors required to be considered for both the applications of the Respondent under Section 9 and the application of the Appellant under Section 36(2). The jurisdiction of this Court under Section 9 is wide. A party may apply to a Court for interim measures before the commencement of Arbitral proceedings, during Arbitral proceedings or at any time after the making of the Arbitral Award, but before it is enforced in accordance with Section 36 of the Arbitration Act.

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.

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.

27. Under Section 36, where the time for making an application to set aside arbitral award has expired, the award might be enforced in accordance with the provisions of the CPC in the same manner as it were a decree of the Court. Section 36(2) makes it clear that filing an application for setting aside of an award under Section 34 is not to render the award unenforceable, unless the Court expressly grants an order of stay of operation of the arbitral award in accordance with the provisions of sub-section (3) of Section 36, on a separate application made for that purpose.

28. Once an application under sub-section (2) of Section 36 is filed for stay of operation of the arbitral award, the Court might subject to such conditions as it may deem fit, grant stay of the operation of such award, for reasons to be recorded in writing. The Court is empowered to impose such conditions as it might deem fit and may grant stay of operation of the award subject to furnishing of security covering entire amount of the award including interest.

29. The proviso to Section 36(3) of the Arbitration Act, makes it clear that while considering an application for grant of stay in the case of an arbitral award for payment of money, due regard has to be given to the provisions for grant of stay of a money decree under the provisions of the CPC.

30. The proviso to Section 36(3) further stipulates that where the Court is satisfied that a *prima facie* case is made out that (a) the arbitration agreement or contract which is the basis of the award or, (b) the making of the award was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under Section 34 of the award.

31. In ***Ajay Singh & Ors. v. Kal Airways Private Limited and Ors.***¹ the Delhi High Court correctly held :

¹ 11 2017 SCC Online Del 8934

"...Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles..."

32. In *Jagdish Ahuja & Anr. v. Cupino Limited*², the Bombay High Court correctly summarised the law in Paragraph 6 extracted hereinbelow:-

*"6. As far as Section 9 of the Act is concerned, it cannot be said that this court, while considering a relief thereunder, is strictly bound by the provisions of Order 38 Rule 5. As held by our Courts, the scope of Section 9 of the Act is very broad; the court has a discretion to grant thereunder a wide range of interim measures of protection "as may appear to the court to be just and convenient", though such discretion has to be exercised judiciously and not arbitrarily. The court is, no doubt, guided by the principles which civil courts ordinarily employ for considering interim relief, particularly, Order 39 Rules 1 and 2 and Order 38 Rule 5; the court, however, is not unduly bound by their texts. As this court held in *Nimbus Communications Limited v. Board of Control for Cricket in India* (Per D.Y. Chandrachud J, as the learned Judge then was), the court, whilst exercising power under Section 9, "must have due regard to the underlying purpose of the conferment of the power under the court which is to promote the efficacy of arbitration as a form of dispute resolution." The learned Judge further observed as follows:*

"Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case."

33. In **Valentine Maritime Ltd. v. Kreuz Subsea Pte Ltd. & Anr.**³, the Bombay High Court held :-

“96. This court held that just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure, 1908, the rigors of every procedural provision in the Code of Civil Procedure, 1908 cannot be put into place to defeat the grant of relief which would sub-serve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b) of the Arbitration Act.”

34. Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the Arbitral proceedings, during the Arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the Court is required to see is, whether the applicant for interim measure has a good *prima facie* case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.

³ 2021 SCC Online Bom 75

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.

.....,J.
[**INDIRA BANERJEE**]

.....,J.
[**KRISHNA MURARI**]

NEW DELHI;
SEPTEMBER 19, 2022.