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

Date of Decision:11.01.2021

\+ FAO(OS) (COMM) 59/2020 & C.M. No.13545/2020

SEPCO ELECTRIC POWER CONSTRUCTION CORPORATION
..... Appellant

Through Mr.P.Chidambaram, Sr. Adv. with Mr.Ranjit Prakash, Mr.Satvik Varma, Mr.Anshuman Pande, Mr.Gaurav Lavania, Mr.Tanveer Oberoi, Advs.

versus

POWER MECH PROJECTS LTD ..... Respondent

Through Mr. Arvind K. Nigam Sr. Adv. with Mr. Dharmesh Misra, Mr. Siddhant Asthana & Mr. Prateek Gupta, Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

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.

2. The facts relevant to decide this petition may be briefly noted at the outset. To begin with, SEPCO is a Chinese construction company specialising in thermal power plant projects and is a Chinese Central Government owned entity, registered in the Shandong Province, People's Republic of china. It has been engaged in the construction of several thermal power plants in India; the dispute between the parties arises out of the Talwandi Sabo thermal power plant project based in Mansa, Punjab bearing a total power generation capacity of 1980 MW, comprising of three units with a generating capacity of 660 MW each. SEPCO was the EPC contractor engaged for the Talwandi project, wherein Power Mech was the sub-contractor engaged by it, for Erection works of the Boiler, TG and other BOP systems. Disputes arose between SEPCO and Power Mech regarding the delays occasioned in the execution of these works. Consequently, their dispute was referred for arbitration to a three-member Tribunal before which Power Mech raised eight claims amounting to INR 227,68,34,427/-. The learned Tribunal passed an award on 17.10.2017 in favour of Power Mech by holding SEPCO liable for the delays occasioned, and awarded a sum of INR 142,41,14,499/- in favour of Power Mech.

3. A challenge to the award on merits has been raised by SEPCO under Section 34 of the Act vide OMP(Comm) 432/2017 which is presently pending adjudication, whereas Power Mech preferred a petition under Section 9 of the Act being OMP(I)(Comm) 523/2017; as noted above, the judgment impugned herein was passed in the latter petition. Since Power

Mech, by way of the Section 9 petition, was seeking to secure the entire principal amount awarded in its favour on 17.10.2017, several directions for deposit of amount were passed in those proceedings in the period between 2017 and 2020. The deposits made/security created by SEPCO, in the form of deposits and bank guarantees under orders of the Court may be summarised as under:

a) A sum of INR 1,63,68,589/- deposited on 01.09.2018
b) A sum of INR 50,50,113/- deposited on 24.12.2018
c) A sum of INR 60,00,000/- deposited on 25.03.2019
d) A bank guarantee for a sum of INR 30,00,00,000/- issued by the Industrial and Commercial Bank of China, Mumbai Branch on 22.03.2019 which is currently a subject of dispute being considered by this Court in separate proceedings being FAO(OS)(Comm) 136/2019.

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 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.

5. Per contra, Power Mech insisted on the pre-deposit on the following three broad grounds; (i) the petitioner, being a company owned by the People's Republic of China, had no realizable assets in India to satisfy the enormous amount due under the award, (ii) the direction for pre-deposit was not a discretionary measure and had a statutory backing to it, which has been established by past precedent, and that, (iii) SEPCO had been failing to adhere to the directions for deposit which have already been made by this Court and showed its lack of bonafides.

6. The learned Single Judge considered the rival contentions of the parties and passed the impugned order on 17.02.2020; the relevant extracts of her findings read as under:

> *"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 in fact 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 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.***

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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 fact; 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.l42 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."

(emphasis supplied)

7. Assailing this judgment, Mr. P. Chidambaram learned senior counsel for SEPCO has primarily raised two contentions; the first being, it is a settled principle of law that any direction for pre-deposit under Section 9 of the Act ought to be made in the light of a proper appreciation of the financial health of the entity who would be liable under such a direction. He submits that although the learned Single Judge has recorded the submissions of SEPCO pertaining to its strong financial health and liquidity, the same were given a go-by at the time of rendering its findings. SEPCO is an entity owned by the Government of People's Republic of China and is an affiliate of the Power Construction Corporation of China which is a Fortune 500 entity. Being a thermal power plant specialist, SEPCO is one of the largest players in the thermal power plant construction field. Till date, SEPCO has been involved in the construction of over 685 power generation units since its inception in 1952. He submits that SEPCO's participation in Indian power-generation projects began in 1998 and is, as on date, engaged in the construction of four coal-based power plant generation projects. In fact, its contender in these proceedings, Power Mech is its subcontractor in a few of the concurrent projects which are presently in construction. He, thus submits that all of these facts, which are easily verifiable from the record, show that SEPCO is no fly-by night operator, and has adequate commercial footing in the country. He further submits that against this background position, there is absolutely no basis for any apprehension on the part of Power Mech ,or this Court, with respect to SEPCO's bonafide or its ability to satisfy the

award amount. He submits that SEPCO's primary grievance with respect to the direction for deposit is stemming from the fact that the principal amount liability of INR 142,41,14,499/- under the award, being a substantial sum, if required to be paid by way of deposit or Bank Guarantees at this stage would adversely impact its overall liquidity and, therefore, cause snags in its presently pending construction projects which demand regular cash inflow. He submits that no such direction for deposit of the entire principle awarded amount could have been made by the learned Single Judge, without considering the relevant factors pointed out by SEPCO at the time of arguments.

8. Mr. Chidambaram further submits that the impugned judgment proceeds on the erroneous presumption that the decision in ***Hindustan Construction Company Limited Vs. Union of India****(2019) SCC Online SC 1520* contains a fleeting mandate to direct deposit of 100% awarded amount in all cases involving a challenge to an award under Section 34 of the Act. He submits that the decision merely reiterates the need to secure the awarded amount to ensure that the fruits of arbitration do not stand compromised at the time of enforcement, and all Section 9 proceedings instituted post arbitration serve as a step-in-aid of that purpose. However, considering that the financial health of SEPCO is sound and adequately secured as on date, there is no question of the awarded amount being unsecured as on date. He submits that, in fact, any directions for deposit of the entire awarded sums, on a misinterpretation of the decision in ***Hindustan Construction*** *(supra)*, would be an excessive step against SEPCO, not a step in aid of enforcement of the award.

9. Lastly, Mr. Chidambaram submits that Power Mech had attempted to mislead the learned Single Judge into believing that SEPCO had acted in an improper manner by accepting payments in its off-shore bank accounts to avoid complying with the directions passed on 27.04.2018, which in substance required SEPCO to deposit 10% of the amounts deposited in its Indian bank accounts before this Court every fifteen days in order to secure the awarded amount. He submits that this was merely a bald assertion by Power Mech which remained completely unsubstantiated by any evidence and could not be taken into account at all.

10. On the other hand, Mr. Arvind Nigam, learned senior counsel for Power Mech supports the findings of the learned Single Judge by contending that the same suffer from no infirmity and are based on a correct appreciation of the facts on record. He submits that all claims of sound financial health made by SEPCO fall flat in the face of the findings of the Court-appointed Valuer who had examined the assets of SEPCO which were present within the territory of India. While SEPCO, in its affidavit before this Court, had claimed having immovable and movable assets worth INR 92.67 crores comprising of furniture, electrical fitting, plant and machineries including cars, computers and software, and books within the territory of India, the Valuer had estimated the same to be worth INR 20 crores. Even the machineries held in India have been overestimated in value by SEPCO which has claimed it as one of its assets, when in reality they are in a junk condition, unfit to even fetch the cost of scrap and cannot be regarded as an asset in any respect.

11. Mr. Nigam draws our attention to the cycle of events which ensued following the passing of the order dated 24.07.2018. On that date SEPCO

had pleaded before this Court that it was executing several high value construction projects in the country which were likely to yield significant receivables in the bank accounts which were mentioned in its affidavit of assets dated 02.01.2018. The Court had, thus, directed SEPCO to make deposits of 10% of the receivables deposited in these accounts every fifteen days, but SEPCO began the practice of receiving all amounts in its off-shore accounts in order to bypass the directions of this Court. This led to a complete failure on SEPCO's part to meet its obligations under the directions of this Court, which in itself is proof of the fact that SEPCO is incapable of meeting its liabilities under the award. He further submits that insofar as the remaining contentions of SEPCO are concerned, the learned Single Judge did not at all misinterpret the decision in ***Hindustan Construction Limited*** (*supra)* at all, but only relied on the same to draw attention to the important function served by pre-deposit directions, in principle, especially in post award situations. However, since the entire case of SEPCO relies entirely on its own financially sound position in India, which stands sufficiently rebutted, there is absolutely no merit in this appeal preferred by SEPCO. He, thus, prays for this appeal to be dismissed with costs.

12. We have considered the submissions of the parties and perused the record, including the judgment impugned herein.

13. What emerges is that the parties are ad idem to the extent of the general principle apropos a direction for pre-deposit in proceedings for interim reliefs instituted pursuant to the making of an arbitral Award for money, and that the same can be made in order to ensure that the amounts awarded in arbitration are secured for the purpose of enforcement. It appears

that SEPCO is, however, aggrieved that the learned Single Judge has proceeded to pass the impugned order without dealing with its contentions that this was not a case which necessitated the issuance of directions for any sort of deposit of the awarded amount, much less 100% of the principle awarded amount. An ancillary grievance arising therefrom is that its submissions pertaining to its ability of satisfying the liability arising under the award, were not duly considered by the learned Single Judge while passing the impugned judgment. The second primary grievance raised by SEPCO in this appeal is that the findings in the impugned judgment are based on a misinterpretation of the decision in ***Hindustan Construction*** (*supra*) to arrive upon the erroneous conclusion that the decision mandated 100% deposit of awarded amount by the judgment debtor in all cases.

14. During arguments, extensive submissions have been made on behalf of SEPCO regarding its sound financial health and its genesis as a Government-owned entity of the People's Republic of China, its past projects and its market reputation as a testament to this averment. In its sworn affidavit filed before the Court on 02.01.2018 in the proceedings under Section 9 of the Act, it even claimed to have movable and immovable assets within the territory of India worth INR 92.67 crores which included furniture, electrical fittings, plant and machinery, cars, computers and software, and books. However, notwithstanding the veracity of this valuation, a prima facie consideration of the same itself reveals that the purported value of these assets claimed to be held by SEPCO in India, even as per its own estimates, is significantly less than the amount of INR 142,41,14,499/- required to be secured for the purpose of enforcement.

15. We also find that, even in the initial stages of the Section 9 proceedings, SEPCO had repeatedly asserted its sound financial health before the Court and, to that effect, went on to submit that it was regularly receiving monies in its Indian bank accounts as receivables from the projects it was engaged in at the time, as proof of its liquidity. This was the basis of the order passed on 27.04.2018 by the Court directing SEPCO to deposit 10% of the amounts received in these accounts every fifteen days with the Registry, until the sums required to be secured stood deposited. However, since the affidavit dated 02.01.2018 filed by SEPCO had failed to set out the exact particulars and location of the assets it claimed to have, it was required to furnish an additional affidavit furnishing these details as well. The relevant extracts of the order passed on 27.04.2018 read as under:

> *"1. I have been taken through the affidavit dated 2.1.2018, filed on behalf of the Sepco Electric Power Construction Corporation ('SEPCO'). This affidavit, it appears, has been wrongly filed in O.M.P. (COMM) 432/2017, which is listed as item no.30 on my Board, today.*
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> *2. A perusal of paragraph 4 of the affidavit shows that SEPCO claims that it owns immovable and movable assets, such as, furniture, electrical fittings, plant and machinery including cars and computers, softwares, books, etc. worth Rs.92.67 crores approximately.*
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> *2.1 What is, however, not disclosed in the affidavit is the exact particulars and the location of these assets.*
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> *xxx*
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> *7. As indicated above, the affidavit filed on behalf of SEPCO does*

not inspire confidence at least not at present that it has sufficient resources available at its command to satisfy the award if it were to fail in its challenge to the same.

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 24.7.2018, 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."

16. A cursory reading of this order shows that even this direction for deposit given by the Court which required SEPCO to deposit the amount in gradual deposits, instead of the entire sum in the form of a lump sum, was a form of accommodation made for SEPCO by the Court; thus granting it time to secure the total principal award amount of INR 142,41,14,499/-. Yet, over the subsequent months, SEPCO failed to make the deposits as required which is a matter of record. Only a small amount of Rs.2.74 crores has been deposited towards 10% of the contractual receipts. Therefore, if SEPCO is to be believed that it has not diverted its receivables in India

overseas, it has received only about Rs.27 crores in India in over 2 ½ years. This itself belies the claim of SEPCO that it has large ongoing projects in India with huge receivables. Else, it points to diversion of receivables in India to overseas locations. In either case, this raises various doubts about the bonafides and the intentions of SEPCO to honour the Award, in the eventuality of its objections thereto being dismissed.

17. Thereafter on 10.09.2018, in the light of SEPCO's apparent failure to secure the awarded amount, the Court passed another interim order appointing M/s P.N. Chopra & Co. as the Valuer, this time with the purpose of ascertaining the realisable value of the assets of SEPCO in the country, notwithstanding its own claims in the affidavits dated 02.01.2018 and 18.08.2018. The Valuer furnished its report on 23.10.2018 after conducting a thorough analysis of SEPCO's assets which were mentioned in its two affidavits and estimated the true value of the same at INR 20 crores at the time. Thus, the summary of the Valuer's findings even at that stage, echoed the observations of the Court as contained in paragraph 7 of its order dated 27.04.2018, in that the value of SEPCO's assets failed to inspire any confidence in its financial capabilities. The position at the time of the passing of the impugned judgment, i.e. 17.02.2020, had not changed much and the total amount deposited by SEPCO, barring the bank guarantees submitted, stood at approximately INR 2.70 crore. This amount, evidently, is barely a fraction of the total principal amount of INR 142,41,14,499/- payable under the award. Over and above that amount, the interest is also awarded, and is mounting. As things stand today, a major portion of the amount accruing to Power Mech under the award stands unsecured.

18. In response to Power Mech's contention that SEPCO was deliberately diverting payments, being made for its ongoing projects, to its offshore bank accounts from its Indian ones, SEPCO has contended that these are baseless assertions as the payments received in the off-shore accounts are receivables from off-shore projects. But we find that SEPCO has not offered any explanation as to why its Indian Bank accounts, assured to be in regular receipt of receivables from its ongoing construction projects, dried up and/or were insufficient to satisfy the directions for deposit. We also cannot lose sight of the line of argument adopted by SEPCO before this Court to the effect that depositing the principal amount liability of INR 142,41,14,499/- under the award, being a substantial sum, is likely to have an adverse impact on SEPCO's liquidity and cause snags in its presently pending construction projects. Were SEPCO as financially capable of securing the awarded amount from its assets in India, as it claims, the same would have been reflected either in the report furnished by the Valuer or in its actions, in complying with the orders of this Court. Unfortunately, mere market presence or commercial standing is not sufficient on its own for SEPCO to establish that it has enough financial resources in India to satisfy the amount payable under the award in case it fails in its Section 34 challenge to the same, especially in the absence of any documentary evidence or judicially-compliant action in support thereof. The claim of SEPCO that it is a Government company of the Peoples Republic of China, or that it is a part of a fortune 500 company is no solace to the respondent, since it cannot be expected to chase SEPCO around the globe to recover its dues under the Award in question.

19. Moving on to the submissions made on the grounds of law, SEPCO has contended that the impugned judgment suffers from a misinterpretation of the decision in ***Hindustan Construction****(supra)* to arrive upon the decision to direct 100% deposit of the awarded amount. We have carefully considered that part of the impugned judgment, which dealt with this aspect, and find that this contention arises out of SEPCO's own failure to appreciate the reason for which the decision in ***Hindustan Construction*** *(supra)* had been invoked in the first place. As noted previously, a primary ground adopted by SEPCO in the Section 9 petition was that the award, which had already been challenged by it in OMP(Comm) 432/2017 under Section 34 of the Act, was so perverse and bereft of reason that it was unlikely to withstand the scrutiny of the Court. For this reason, SEPCO had claimed that it was all but sure of succeeding in its Section 34 challenge and, therefore, any direction to secure the awarded amount was a mere formality which could be done away with, especially since the same involved an enormous amount. The learned Single Judge, in response to this line of argument, invoked the ratio of the decision in ***Hindustan Construction*** *(supra)* to reiterate a few principles that form the settled legal position today, viz. (i) mere institution of Section 34 proceedings do not warrant automatic stay of the award sought to be impugned, (ii) any decisions which lay down otherwise are per incuriam, and that (iii) a stay is a creature of a judicial decision, which can be made at the discretion of the Court and made subject to certain conditions like those passed at the time of granting a stay on a money decree. In effect, the learned Judge sought to make it clear to SEPCO, that any of its submissions on the perversity of the award could only hold water before the Court dealing with the Section 34 petition, and its

simple act of filing a Section 34 petition, neither nullified the principles espoused by the scheme of the Act, nor dissolved the duty of the Court, in post-arbitration Section 9 proceedings, to secure the amount under the award. Another key point that we would like to add here is that a Court exercising jurisdiction under Section 34 of the Act wields a limited scope of interference, which means that the award remains binding for all intents and purposes until it is tested against certain parameters within the limited scope of Section 34. So, in the present case, when the award dated 17.10.2017 is yet to be put to such a test, SEPCO cannot attempt to shrug off its liabilities thereunder. For these reasons, we are in complete agreement with the interpretation of the learned Single Judge of the decision in ***Hindustan Construction****(supra),* and find absolutely no infirmity in the manner in which the same was applied in the impugned judgment.

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 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.

REKHA PALLI, J

VIPIN SANGHI, J

JANUARY 11, 2021
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