

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

% **Date of decision: 27<sup>th</sup> November, 2020.**

+ **FAO(OS)(COMM) No.136/2019**

**SEPCO ELECTRIC POWER CONSTRUCTION  
CORPORATION**

**.....Appellant**

Through: Mr. P. Chidambaram, Sr. Advocate with  
Mr. Ranjeet Prakash, Mr. Satvik Varma,  
Mr. Anshuman Pandey and Mr. Gaurav  
Lavania, Advocates.

**Versus**

**POWER MECH PROJECTS LIMITED**

**.....Respondent**

Through: Mr. Arvind K. Nigam, Sr. Adv. with Mr.  
Dharmesh Misra, Mr. Siddhant Asthana  
and Mr. Prateek Gupta, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**HON'BLE MS. JUSTICE ASHA MENON**

**[VIA VIDEO CONFERENCING]**

**RAJIV SAHAI ENDLAW, J.**

1. This appeal, under Section 37 of the Arbitration & Conciliation Act, 1996 read with Section 13 of the Commercial Courts Act, 2015, impugns the order dated 16<sup>th</sup> May, 2019 of the Commercial Division of this Court in OMP(I)(COMM) No.523/2017.

2. The facts, as pleaded in the Memorandum of Appeal, to the extent relevant to the present controversy, are (i) the appellant is an entity incorporated in China; (ii) the appellant was awarded various coal-based power projects in India; (iii) the respondent was one of the sub-contractors

engaged by the appellant, to act as an erection contractor in one of the appellant's project; (iv) that subsequent to the execution of the works, at the time of closing the contract, a few disputes arose between the appellant and the respondent and which were referred to Arbitration; (v) that the Arbitral Tribunal, vide Award dated 17<sup>th</sup> October, 2017 awarded a sum of Rs.142,41,14,499/- together with interest in favour of the respondent and against the appellant; (vi) the appellant filed application under Section 34 of the Arbitration Act, for setting aside of the Arbitral Award; (vii) that in the meanwhile the respondent filed OMP(I)(COMM) No.523/2017, from order wherein this appeal has been filed, seeking Court's direction to secure the award amount; (viii) that during the hearing of OMP(I)(COMM) No.523/2017 filed by the respondent under Section 9, on 12<sup>th</sup> February, 2019, the counsel for the appellant herein stated that the appellant herein will file an affidavit stating *inter alia* that the appellant herein will "furnish a bank guarantee in the sum of Rs.30 crores of a scheduled Indian bank" within six weeks; (ix) that the Commercial Division of this Court, vide order dated 12<sup>th</sup> February, 2019 directed the appellant herein to file the affidavit offered to be filed within two weeks and to furnish the Bank Guarantee (BG) "as indicated by the counsel" within six weeks and ordered that, "further, the bank guarantee in the sum of Rs.30 crores will be that of a scheduled bank located in India"; (x) that vide order dated 3<sup>rd</sup> May, 2019 in OMP (I)(COMM) No.523/2017, the Joint Registrar recorded, that the appellant herein had placed on record original of bank guarantee of "Industrial and Commercial Bank of China Limited (ICBC), Mumbai Branch" for a sum of Rs.30 crores, and the submission of the counsel for the respondent herein that the BG furnished was a conditional BG; (xi) that

the petitioner filed IA No.5185/2019 which came up before the Commercial Division on 9<sup>th</sup> April, 2019, when the counsel for the appellant stated that in compliance of the order dated 12<sup>th</sup> February, 2019, the appellant had submitted a BG of ICBC, but the Commercial Division ordered:

“6. *However, a careful perusal of the order would show that Mr. Sethi had offered to furnish a bank guarantee of a Scheduled Indian bank and that while dictating the operative part of the order, I had indicated that it would be a scheduled bank located in India, therefore, the confusion, if any caused is now removed. The respondent will substitute the bank guarantee filed with a guarantee of a Scheduled Indian bank of an equivalent value.*

7. *Pending the substitution, the Registry will hold on to the bank guarantee already submitted and the respondent (i.e. the appellant herein) will ensure that the same is kept alive.*

8. ....

8.1 *It is made clear that as and when the respondent (i.e. the appellant herein) is ready to replace the bank guarantee furnished by ICBC with a bank guarantee of a Scheduled Indian Bank, on a request being made in that behalf via an appropriate application, the Joint Registrar (Judicial) will release the bank guarantee furnished by ICBC provided the request is backed by an undertaking of the duly authorized representative of the respondent (i.e. the appellant herein) that it shall place the bank guarantee of the Scheduled Indian Bank on record within a defined time line not exceeding 10 days from the date of the request”.*

(xi) that the appellant filed IA No.7096/2019 seeking recall of the directions aforesaid in the order dated 9<sup>th</sup> April, 2019 and seeking that the BG issued by the ICBC be accepted; and, (xii) that the aforesaid application came up

for hearing before the Commercial Division on 16<sup>th</sup> May, 2019, when the following order was made:-

*“1. This is an application seeking recall of the directions contained in paragraph 6 of the order dated 09.04.2019.*

*2. In sum, the applicant/respondent makes a prayer that the bank guarantee dated 22.03.2019 issued by the Industrial and Commercial Bank of China Ltd. (in short ICBC) bearing No. LG28501B900075 be accepted.*

*3. Mr. Nigam, learned senior counsel, opposes the prayer and draws my attention to the orders dated 12.02.2019 and 09.04.2019. It is Mr. Nigam's contention that the offer to furnish a bank guarantee of a scheduled Indian Bank was made by the learned senior counsel appearing on behalf of the applicant/respondent.*

*3.1 Learned counsel goes on to submit that because of an inadvertent typographical error having crept in paragraph 6 of the order dated 12.02.2019, which adverted to a "Scheduled Bank located in India" that the applicant/respondent furnished a bank guarantee of ICBC by taking advantage of the error.*

*3.2 This aspect learned senior counsel says was clarified by the court on 09.04.2019.*

*4. Mr. Chidambaram, on the other hand, with much emphasis argues that there is no good reason why this court ought not to accept the bank guarantee furnished by ICBC which is one of the largest banks in the world.*

*4.1 It is also Mr. Chidambaram's submission that non-acceptance of the bank guarantee furnished by ICBC, in a sense, impugns the reputation of ICBC.*

*5. I may clarify, at the outset, that it is not this court's endeavour to doubt in any manner the credentials of ICBC. The record, however, shows that the*

*applicant/respondent had in fact, on its own, offered to furnish a bank guarantee of a Scheduled Indian Bank. The confusion, if any, in the mind of the applicant/respondent, as rightly pointed out by Mr. Nigam, was removed on 09.04.2019. The applicant/respondent has moved this application after nearly four weeks of the clarification issued in that behalf. Thus, having passed an order based, essentially, on the offer made by the counsel for the applicant/respondent, I do not see any good reason to recall the direction.*

6. *At this stage, Mr. Chidambaram submits that he would enquire from the applicant/respondent as to whether it could instead of furnishing a bank guarantee deposit a sum of Rs.30 crores with the Registry of this court.*

6.1 *Given this submission of the learned senior counsel, I may indicate that in case the applicant/respondent is in a position to deposit a sum of Rs.30 crores with the Registry of this court it would have liberty to move the court for appropriate directions.*

7. *The application is, accordingly, dismissed”.*

3. Aggrieved from the aforesaid order, the present appeal has been filed.

4. The present appeal came up before this Court first on 31<sup>st</sup> May, 2019, when notice thereof was issued and the counsel for the respondent appearing on advance notice was given time to explain the objections of the respondent to the BG issued by ICBC and status quo as regards the BG issued by ICBC was directed to be maintained and the directions in para 6 of the order dated 9<sup>th</sup> April, 2019 of the Commercial Division were ordered to be kept in abeyance. Thereafter the appeal was adjourned from time to time and the interim order continued.

5. The senior counsel for the appellant, at the outset contends that the respondent has not filed any reply or other writing disclosing its objections to the BG issued by ICBC furnished by the appellant.

6. The senior counsel for the respondent has contended that no reply is required to be filed. It is contended that the appeal is not maintainable under Section 13(1A) of the Commercial Courts Act. Reference is made to *Kandla Export Corporation & Ors. Vs. OCI Corporation & Ors.* (2018) 14 SCC 715. Else, on merits it is contended that the offer made on 12<sup>th</sup> February, 2019 to furnish a BG “of a Scheduled Indian Bank” was of the appellant itself, but taking advantage of the error which crept in the order dated 12<sup>th</sup> February, 2019, while accepting the offer of the appellant and issuing direction, recording the BG to be of “a Scheduled Bank located in India”, the appellant furnished the BG of ICBC which is not a Scheduled Indian Bank. It is further argued that vide order dated 9<sup>th</sup> April, 2019, the Commercial Division only rectified the said error and thus there is no error in the impugned order dated 16<sup>th</sup> May, 2019.

7. The senior counsel for the respondent has further contended that the Commercial Division, seized of the application under Section 9 filed by the respondent and the application under Section 34 filed by the appellant, has, vide subsequent order dated 17<sup>th</sup> February, 2020, directed the appellant to secure the entire award amount, and of which direction also the appellant is in default.

8. The senior counsel for the appellant has contended that with respect to the subsequent direction for securing the entire award amount, another appeal, before a different bench is pending and the same has no bearing as far as this appeal is concerned. He has also controverted that the appeal is

not maintainable. It is contended that the appeal is maintainable under Section 37(1)(b) of the Arbitration Act. It is further contended that unless any prejudice is shown to have been suffered by the respondent from the BG being issued by ICBC, and which the respondent has not shown, the insistence on the BG being of a Scheduled Indian Bank is whimsical and without any basis.

9. The senior counsel for the respondent has contended that the BG furnished by the appellants of ICBC is also conditional and the respondent fears that the purpose of the BG will not be served. It is further contended that the order dated 16<sup>th</sup> May, 2019 of the Commercial Division, impugned in this appeal, is a discretionary order, not interfereable in appeal.

10. We have enquired from the senior counsel for the respondent, that now that there is an order in the application under Section 34 of the Arbitration Act for furnishing security for the entire award amount and of which direction, according to the respondent, the appellant is in default, whether not the purpose of the respondent is served better by seeking an order for invocation of the BG already furnished by ICBC and which according to the senior counsel for the appellant, has been kept alive.

11. The senior counsel for the respondent contends that the conditionality of the BG may come in the way.

12. We have considered the respective arguments. With respect to the objection as to the maintainability of the appeal, Section 37(1)(b) of the Arbitration Act provides for an appeal from the order granting or refusing to grant any measure under Section 9 of the Arbitration Act. Section 2(c)(vi) of the Commercial Courts Act constitutes disputes arising out of construction and infrastructure contracts, as the contract between the parties

in the present case was, as a commercial dispute. Section 13(1A) of the Commercial Courts Act provides that any person aggrieved by the judgment or order of a Commercial Division of the High Court may appeal to the Commercial Appellate Division of that High Court, provided that the appeal shall lie from such orders as are specifically enumerated under Order 43 of the Code of Civil Procedure, 1908 (CPC) and Section 37 of the Arbitration Act. The order of the Commercial Division, which is appealed before us, is an order granting interim relief under Section 9 of the Arbitration Act, directing the appellant to furnish a BG issued by a Scheduled Indian Bank, as offered by the appellant itself on 12<sup>th</sup> February, 2019. Though the appellant is not aggrieved from the direction of furnishing a BG but is aggrieved from the direction, that the BG be of a Scheduled Indian Bank only. In our opinion, the same would be covered within the meaning of an order granting “any” measure under Section 9, within the meaning of Section 37(1)(b) of the Arbitration Act and within the meaning of “judgment or order” of a Commercial Division of a High Court within the meaning of Section 13(1A) of the Commercial Courts Act. The order, though not final, is nevertheless an order under Section 9. One of us (Rajiv Sahai Endlaw, J), sitting singly, in *Deepak Mittal Vs. Geeta Sharma* MANU/DE/5257, for the reasons given therein, held that it is not the final order on an application under Section 9 alone which has been made appealable under Section 37(1)(b) but even the interim orders during the pendency of an application under Section 9. As far as the reliance by the senior counsel for the respondent on *Kandla Export Corporation* is concerned, what was for adjudication therein was, whether an appeal, not maintainable under Section 50 of the Arbitration Act, is nonetheless

maintainable under Section 13(1) of the Commercial Courts Act. Section 50 is contained in Part-II titled “Enforcement of Certain Foreign Awards” of the Arbitration Act. During the hearing it was mentioned that the place of arbitration between the parties was in India. Thus the question of applicability of Section 50 does not arise. Else, *Kandla Export Corporation* holds that it is the provisions of the Arbitration Act which govern the right of appeal and the provisions of the Commercial Courts Act merely lay down the forum which will hear the appeal. Here, the right of appeal has been placed to Section 37(1)(b) of the Arbitration Act and not to any provision of the Commercial Courts Act. We thus overrule the objection of the senior counsel for the respondent as to the maintainability of the appeal.

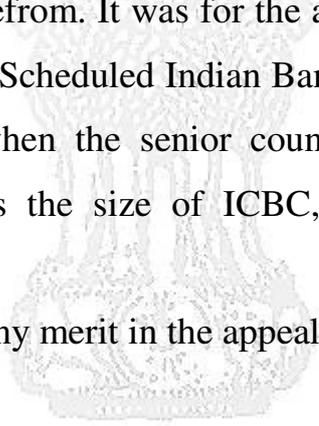
13. However on merits, we agree with the senior counsel for the respondent that the order impugned is a discretionary order and there is no perversity in discretion exercised by the Commercial Division, for this Court to interfere in appeal. The scope of interference in appeals under Section 37, in the context of Section 37(1)(c), has been held to be much restricted. As far as appeals under Section 37(1)(b) are concerned, since the order appealed is an interim order, which is largely discretionary, in any case the law laid down in *Wander Limited Vs. Antox India (P) Ltd.* 1990 (Supp) SCC 727 relating to scope and power of Appellate Court in appeals against interim order, would apply and interference with the discretion exercised by the Court of first instance would be only when discretion is shown to have been exercised arbitrarily or capriciously or perversely or where the Court has ignored the settled principles of law regulating the grant or refusal of interim orders. The Commercial Division, in the impugned order, refusing to accede to the relief claimed by the appellant,

has merely bound the appellant to its own offer of furnishing a BG of a Scheduled Indian Bank and which offer was accepted by the Commercial Division, and has merely refused to allow the appellant to take advantage of the error which had crept in the order dated 12<sup>th</sup> February, 2019 and attributable to the Court and not to the respondent.

14. We also do not agree with the contention of the senior counsel for the appellant that it is for the respondent herein to inform this Court the prejudice in accepting the BG of ICBC. Rather, the appellant, on 12<sup>th</sup> February, 2019 having persuaded the Court to defer passing any order by offering to file an affidavit to furnish a BG of a Scheduled Indian Bank, is now wanting to renege therefrom. It was for the appellant to explain why it is unable to offer a BG of a Scheduled Indian Bank as offered and accepted by the Court, especially when the senior counsel for the appellant has sought to impress upon us the size of ICBC, of which BG has been furnished.

15. We thus do not find any merit in the appeal.

Dismissed.

  
राजिव सहै इन्डलाव, ज.

ASHA MENON, J.

**NOVEMBER 27, 2020**

‘pp’