

Sepco Electric Power Construction ... vs Power Mech Projects Ltd. on 24 August, 2021

Author: Indira Banerjee

Bench: V. Ramasubramanian, Indira Banerjee

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.4936-4937 OF 2021
(Arising out of SLP (C) NOS. 11476-11477 OF 2021)

SEPCO ELECTRIC POWER CONSTRUCTION CORPORATION

... Appella

VERSUS

POWER MECH PROJECTS LTD.

... Respond

O R D E R

Since we have not been able to agree, let the matter forthwith be placed before Hon'ble the Chief Justice of India for appropriate directions.

.....,J.

[INDIRA BANERJEE],J.

[V. RAMASUBRAMANIAN] NEW DELHI;

AUGUST 24, 2021 REPORTABLE IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION Civil Appeal Nos. 4936-4937 of 2021 (Arising out of SLP(C) Nos. 11476-11477 OF 2021) SEPCO ELECTRIC POWER CONSTRUCTION CORPORATIONAppellant(s) Versus POWER MECH PROJECTS LTD.Respondent(s) JUDGMENT Indira Banerjee, J.

Leave granted.

2. These appeals are against a judgment and order dated 27.11.2020, passed by the Division Bench of Delhi High Court, dismissing the Appeal being FAO(OS) (COMM) No.136 of 2019, filed by the Appellant under Section 37 of the Arbitration and Conciliation Act 1996, hereinafter referred to, in short, as the "A & C Act" read with Section 13(1A) of the Commercial Courts Act 2015, and affirming an order dated 16.05.2019 passed by the Commercial Division of the Delhi High Court in OMP(I)

(COMM) No.523/2017 under Section 9 of the A & C Act, whereby the Court refused to recall its earlier order dated 09.04.2019, directing the Appellant to substitute an irrevocable Bank Guarantee, issued by the Industrial and Commercial Bank of China Limited (ICBC), Mumbai Branch for Rs.30 Crores furnished pursuant to an order dated 12.02.2019 of the Court, with a Bank Guarantee of a “Scheduled Indian Bank” of the same amount. The Appellant has also impugned a judgment and order dated 12.03.2021 passed by the Division Bench dismissing Review Petition No.5/2021 filed by the Appellant for review of the said judgment and order dated 27.11.2020 dismissing the Appeal.

3. The short question in these Appeals is, whether the High Court was right in refusing to accept a legally valid irrevocable Bank Guarantee of Rs.30 Crores, issued by the Industrial and Commercial Bank of China Limited, Mumbai, hereinafter referred to as ‘ICBC’ which is a Scheduled Bank included in the Second Schedule of the Reserve Bank of India Act, 1934, and insisting that the Appellant should furnish a fresh Bank Guarantee of the same amount, with identical terms, issued by a “Scheduled Indian Bank”, notwithstanding the expenditure incurred by the Appellant in obtaining the Bank Guarantee from ICBC.

4. These Appeals are restricted only to the question of legality of the direction of the High Court, requiring the Appellant to substitute a legally valid irrevocable Bank Guarantee, issued by ICBC, which is a Scheduled Bank, carrying on business in India, with a Bank Guarantee of equivalent amount issued by a “Scheduled Indian Bank”.

5. 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. The details of the contract between the Appellant and the Respondent, or the disputes and differences that arose therefrom, are irrelevant to the issues involved in these Appeals. Suffice it to mention that the Arbitration culminated in an Award dated 17.10.2017 of approximately Rs.1,42,00,00,000 (One hundred and forty two crores) in favour of the Respondent.

6. On 03.12.2017, the Appellant filed an application under Section 34 of the A & C Act being O.M.P. (COMM) No. 432 of 2017 challenging the Arbitral Award dated 17.10.2017 in the Commercial Division of the Delhi High Court, which is pending.

7. On the other hand, the Respondent filed an application being OMP (I) (COMM) No. 523/2017 in the Commercial Division of the High Court under Section 9 of the A & C Act seeking, inter alia, directions on the Appellant to secure the amount of the Arbitral Award.

8. On 12.02.2019, a Single Bench of the Commercial Court of the High Court passed an order in O.M.P.(I) (COMM.) No. 523/2017 directing the Appellant to furnish to the Registry of the High Court, a Bank Guarantee for a sum of Rs.30 Crores, from a Scheduled Bank located in India. The operative part of the order dated 12.02.2019 is set out hereinbelow:-

“3. 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.”

9. On 22.03.2019, the Appellant got ICBC to issue an unconditional, irrevocable Bank Guarantee for a sum of Rs.30 Crores payable on demand to the Registrar General of the Delhi High Court. An electronic copy of the Bank Guarantee was filed in the Registry on 26.03.2019.

10. Mr. K.V. Vishwanathan, learned Senior Counsel appearing on behalf of the Appellant submitted that the Appellant incurred expenditure of Rs.30,00,000/- (Thirty Lakhs) approximately towards bank charges for furnishing the Bank guarantee. Furthermore, an amount of Rs.36,40,00,000/- was frozen in the Bank Account of the Appellant with ICBC in China.

11. However, by an order dated 09.04.2019, the Single Bench directed the Appellant to substitute the Bank Guarantee issued by ICBC, which had been filed in the Registry of the High Court, by a Bank Guarantee of equivalent amount from a Scheduled Indian Bank. The relevant paragraphs of the said order are extracted hereinbelow:-

“5. Furthermore, Mr. Sethi says that in compliance of the order dated 12.02.2019 which required the respondent to furnish a bank guarantee of a Scheduled Bank, the respondent has complied with the same and submitted a bank guarantee of Industrial and Commercial Bank of China Limited (in short “ICBC”).

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 will ensure that the same is kept alive.

8. As to whether the bank guarantee already filed is valid, the matter will be placed before Joint Registrar (Judicial) on 23.04.2019.

8.1 It is made clear that as and when the respondent 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 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.”

12. Pursuant to the direction of the Court, the Registrar (Judicial) of the High Court scrutinized the Bank Guarantee furnished by the Appellant, recorded the statement of Mr. Ayush Ganediwala, Vice President of ICBC, who had appeared before him, and passed an order dated 03.05.2019, recording that the said Bank Guarantee was valid with effect from 22.03.2019 till 19.03.2020.

13. Thereafter, the Appellant filed an application being IA No.7096 of 2019 for recall of the order dated 09.04.2019 of the Commercial Division (Single Bench) of the High Court directing the Appellant to substitute the Bank Guarantee issued by ICBC with a Bank Guarantee of equivalent value of a Scheduled Indian Bank.

14. By an order dated 16.05.2019, the learned Single Bench dismissed the said application, inter alia observing:-

“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.”

15. From the orders dated 09.04.2019 and 16.05.2019, it appears that the senior Counsel, representing the Respondent in the High Court had vehemently objected to the Bank Guarantee of ICBC, arguing emphatically, that the Appellant itself had, through Counsel, offered to furnish a Bank Guarantee of a Scheduled Indian Bank, but had retracted from its offer, taking advantage of an inadvertent typographical error in Paragraph 6 of the order dated 12.02.2019, which read “ Further the bank guarantee in the sum of Rs.30 crores will be that of a scheduled bank located in India”.

16. The direction in the operative part of the order dated 12.02.2019 was clear. It required the Appellants to furnish a Bank Guarantee of a Scheduled Bank located in India. The Appellant complied with the direction and furnished a Bank Guarantee of a sum of Rs.30,00,000,00/- (Thirty Crores) from the Mumbai Branch of ICBC.

17. May be, there was a mistake in passing the order dated 12.02.2019, in the sense that the Court had intended to pass an order in terms of the offer of the Appellant, to furnish a Bank Guarantee of a Scheduled Indian Bank. In the order dated 09.04.2019, the learned Judge very fairly stated that while dictating the operative part of the order, the learned Judge had said that the Bank Guarantee would be of a Scheduled Bank located in India. That is what the order read. A party cannot be faulted for acting in terms of the order as issued, particularly when there was no patent or obvious error in the direction to furnish a Bank Guarantee of a Scheduled Bank, located in India.

18. It is true, that the order dated 12.02.2019 records the oral offer made on behalf of the Appellant, through Counsel, to submit a bank guarantee of a Scheduled Indian Bank. However, the direction in the operative part of the order dated 12.02.2019 gives the impression, that the offer of the Appellant to furnish a Bank Guarantee may have persuaded the Court to secure the Arbitral Award by directing the Appellant to furnish a Bank Guarantee of a Scheduled Bank located in India.

19. As recorded in the order dated 09.04.2019, there may have been some confusion by reason of the direction to furnish a Bank Guarantee of a Scheduled Bank located in India. The language and tenor of the order dated 12.02.2019, as also the fact that the Respondent did not make any attempt to have the direction to furnish a Bank Guarantee of a Scheduled Bank located in India rectified and/or altered, shows that use of the expression 'Scheduled Indian Bank' may have been understood by all concerned parties to include an Indian branch of a Scheduled Bank.

20. Contrary to the contention of the Respondent, as recorded in the order dated 16.05.2019 of the Court, there was no typographical error in the order dated 12.02.2019. One can say that there is a typographical error when there is an inadvertent mistake in a figure or the spelling of a word by reason of pressing a wrong key of the keyboard or the omission or duplication of a word or phrase or even a sentence/sentences. A typographical error is obvious. That was not the case here.

21. The direction to furnish a Bank Guarantee of a Scheduled Indian Bank located in India, is perfectly legal. There was no reason for the Appellant to proceed on the basis that the direction had been issued by mistake. The Respondent also did not take any steps to get the direction rectified or altered. The direction was allowed to remain intact for almost two months. In the meanwhile, the Appellant furnished a Bank Guarantee of an Indian Branch of ICBC, a Scheduled Bank in India.

22. In this case, perhaps the intention of the Court was not expressed in the order accurately. However, the order was otherwise correctly worded and legally valid. It is not uncommon for Courts to give directions, which might be at variance with an oral offer. The Appellant having acted in accordance with the order dated 12.02.2019 and changed his position to his detriment by incurring an expenditure of about Rs.30 lakhs to comply with the said order, it was not appropriate for the Court to change the order.

23. From the order dated 09.04.2019, it is clear that even the Single Bench accepted that there was a confusion due to the language and tenor of the direction in Paragraph 6 of the said order. Thus the Court, in effect, accepted that there may not have been any deliberateness on the part of the Appellant in furnishing a Bank Guarantee issued by ICBC.

24. Being aggrieved by the order dated 16.05.2019 refusing to recall the earlier order of the Court dated 09.04.2019, directing the Appellant to replace the Bank Guarantee of ICBC, with a Bank Guarantee of a Scheduled Indian Bank, the Appellant filed an appeal under Section 37 of the A & C Act, read with Section 13 (1A) of the Commercial Courts Act, 2015. The appeal was dismissed by the order of the Division Bench dated 27.11.2020 impugned before this Court. The prayer of the Appellant, for review of the Order dated 27.11.2020 was rejected by an order dated 12.03.2021, which is also under challenge before this Court.

25. There may not be any infirmity in the order dated 12.03.2021, rejecting the prayer of the Appellant for review, having regard to the limited scope of an application for review. A matter cannot be re-argued in the garb of an application for review. Nor does the Review Court exercise appellate powers. All applications for review are governed by the principles enshrined in Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908. A court is empowered to review its own order only if the conditions precedent for a review, as laid down in Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure exist. In this case the prerequisites for a review did not exist. The appeal from the order dated 12.03.2021, rejecting the application for review, is therefore, dismissed.

26. Therefore, the question is whether the Division Bench, after having held that the order impugned before it was appealable, should have dismissed the appeal and allowed the direction on the Appellant to substitute the Bank Guarantee of ICBC with a fresh bank guarantee of a Scheduled Indian Bank, to stand.

27. Even in the proceedings before the Division Bench, the Respondent only harped on the offer of the Appellant to furnish a Bank Guarantee of a Scheduled Indian Bank and further contended that the Bank Guarantee of ICBC being conditional, the Respondent feared that the purpose of the Bank Guarantee might not be served.

28. Significantly, there is no finding of the Single Bench that the bank guarantee is conditional. A copy of the Bank Guarantee is included in the Paper Book. The Bank Guarantee reads:

“NOW THESE PRESENTS WITNESSETH THAT THE SAID BANK DOTH HEREBY STAND SURETY IN PURSUANCE OF THE SAID ORDER DATED 12 TH FEBRUARY 2019 FOR THE SUM OF RS. 300,00,000/- (RUPEES THIRTY CRORES ONLY) AND THE SAID BANK DOTH HEREBY GUARANTEE TO AND COVENANT WITH THE REGISTRAR GENERAL, DELHI HIGH COURT THAT THE SAID BANK SHALL FORTHWITH PAY THE SAID SUM OF RS. 300,00,000/- (RUPEES THIRTY CRORES ONLY) TO THE REGISTRAR GENERAL, DELHI HIGH COURT IN TERMS OF THE ORDER/JUDGEMENT OF THE HON’BLE HIGH COURT OF

DELHI ALLOWING THE ENFORCEMENT OF THE ARBITRAL AWARD DATED 17TH OCTOBER, 2017 AND AS PER ORDER/DIRECTION/JUDGMENT BY THE HON'BLE HIGH COURT OF DELHI IN THE MATTER ARISING OUT OF ABOVE MENTIONED LEGAL PROCEEDINGS.

AND THE SAID BANK DOTH HEREBY FURTHER COVENANT AND DECLARE THAT THE BANK GUARANTEE HEREIN SHALL REMAIN IN FORCE UP TO AND INCLUSIVE OF A PERIOD OF ONE YEAR AND THE SAID BANK SHALL IN CIRCUMSTANCES AS ABOVE, WITHOUT ANY DEMUR OR DEMAND, ACTION, NOTICE OR OBJECTION FORTHWITH PAY TO THE REGISTRAR GENERAL, DELHI HIGH COURT THE SAID AMOUNT OF RS.300,00,000/- (RUPEES THIRTY CRORES ONLY).

AND IT IS HEREBY FURTHER RECORDED THAT THE SAID BANK GUARANTEE GIVEN HEREIN IS IRREVOCABLE AND SHALL NOT BE REVOKED BY NOTICE OR OTHERWISE AND IT IS IN ACCORDANCE WITH THE ORDER DATED 12 TH FEBRUARY, 2019 PASSED BY THE HON'BLE HIGH COURT OF DELHI IN PETITION NO. O.M.P.(I) (COMM) NO.523/2017 TITLED M/S. POWER MECH PROJECTS LTD. VS. SEPCO ELECTRIC POWER CONSTRUCTION CORPORATION AND O.M.P. (COMM) NO.432/2017 TITLED SEPCO ELECTRIC POWER CONSTRUCTION CORPORATION VS M/S. POWER MECH PROJECTS LTD. NOTWITHSTANDING ANYTHING CONTAINED HEREIN ABOVE THE LIABILITY OF THE SAID BANK IS RESTRICTED TO THE SUM OF RS.300,00,000/- (RUPEES THIRTY CRORES ONLY). IN WITNESS WHEREOF WE, INDUSTRIAL AND COMMERCIAL BANK OF CHINA LIMITED, MUMBAI BRANCH NAME OF THE SCHEDULED BANK, BRANCH AND ADDRESS) HAVE EXECUTED THESE PRESENT AT NEW DELHI THIS 22ND DAY OF MARH 2019.

THE GUARANTEE IS SUBJECT TO THE UNIFORM RULES FOR DEMAND GUARANTEES(URDG) 2010 REVISION, ICC PUBLICATION NO.758.”

29. The ICBC has unequivocally agreed to honour the Bank Guarantee on an order and/or judgment of the High Court allowing enforcement of the Arbitral Award, and as per Order/Direction/Judgment by the High Court in the pending legal proceedings. The statement that the Bank Guarantee is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, does not dilute the terms of the Bank Guarantee. Nor does the URDG render the Bank Guarantee any less effective. Furthermore, the High Court did not direct the Appellant to furnish an unconditional guarantee.

30. The Uniform Rules for Demand Guarantees (URDG) 758 is a set of voluntary contractual rules, published by the International Chamber of Commerce (ICC) with the aim of regularising and creating a set standard of international banking practice on demand guarantees and counter demand guarantees.

31. The URDG balances the legitimate and competing interests of the applicant, the guarantor and the beneficiary and limits the risk of unfair calls and demands on guarantors and counter-guarantors, just like the ICC's Uniform Customs and Practice for Documentary Credits (UCP) 600 which applies to Letters of Credit (LCs) and other documentary credits.

32. The URDG, being a voluntary instrument, lacks the force of law, and must thus be expressly incorporated by the parties in order for it to apply to a demand guarantee or counter-guarantee. Guarantees issued by guarantors and counter-guarantors, which incorporate the URDG, are entirely subject to their own terms, while incorporating beneficial terms of the URDG.

33. It is important to note that the URDG may apply without the parties expressly including it in certain instances, where it is in the general usage of a particular trade, where the applicable law provides for its application; or where it has been in consistent use in the course of a transaction or dealings between the parties.

34. The provisions of the URDG are limited to the scope of the matters upon which the contracting parties are free to contract on, and is subject to mandatory national laws of the governing jurisdiction, which is the law and jurisdiction of the guarantor or counter-guarantor, unless otherwise agreed by the parties.

35. Under the URDG, guarantees are completely independent of any underlying relationship between the applicant and beneficiary, and subject to only the terms contained in it, thereby limiting the liabilities and rights of the guarantor bank to only matters to which it voluntarily commits itself.

36. URDG 758 is a revised version of URDG 458. The revision was conducted under the aegis of ICC Banking Commission and the ICC Commission on Commercial Law and Practice.

37. The ICC Task Force on Guarantees, the standing expert body created by ICC in 2003 to monitor international guarantee practice, acted as a consultative body to the Drafting Group that produced five comprehensive drafts during the two-and-a-half-year revision process.

38. The resulting URDG 758 were adopted unanimously by the ICC Executive Board at its meeting in New Delhi on 3 December 2009, following their endorsement by the members of the two sponsoring ICC Commissions. They came into force on 1 July 2010, whereupon a considerable number of demand guarantees and counter-guarantees started being issued all over the world subject to the new URDG 758.

39. It appears that all the concerned parties proceeded on the understanding that there was no difference between a 'Scheduled Indian Bank' and 'Scheduled Bank located in India', in the absence of any specific definition of the expression 'Scheduled Indian Bank' in the RBI or the Banking Regulation Act.

40. Incorporated on 01.01.1984, ICBC is a Chinese State-owned multi national banking company, with capital provided by the Ministry of Finance of China. ICBC is a banking company within the

meaning of Section 5(c) of the Banking Regulation Act, 1949, read with Section 45A

(a) of the Reserve Bank of India Act, 1934, hereinafter referred to as the RBI Act. Sections 5(c) of the Banking Regulation Act and Section 45A(a) of the RBI Act are set out hereinbelow for convenience”-

“Section 5(c) of Banking Regulation Act, 1949 5(c) “banking company” means any company which transacts the business of banking in India ;

Explanation.—Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause;

xxx xxx xxx Section 45A (a) of the Reserve Bank of India Act, 1934 45A(a) “banking company” means a banking company as defined in Section 5 of the Banking Regulation Act, 1949, and includes the State Bank of India, any subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959, any corresponding new bank constituted by Section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, and any other financial institution notified by the Central Government in this behalf...”

41. ICBC is also a Scheduled Bank within the meaning of Section 2 (e) of the RBI Act, which defines a ‘Scheduled Bank’ to mean a bank included in the Second Schedule to the RBI Act. ICBC has its branch office at the Bandra Kurla Complex, Mumbai, India. The Mumbai branch of ICBC has been granted license by RBI to carry on banking business in India pursuant to a Memorandum of Understanding between the Governments of India and China.

42. The Mumbai branch of ICBC commenced operations in September 2011 and was included in the Second Schedule to the RBI Act by Notification DBOD IBD. No.8137/23.03.026/2011-12 dated 01.12.2011 published in the Gazette of India (Part III Section 4).

43. ICBC evidently continues to be in the Second Schedule to the RBI Act till date. In this context, it may be pertinent to point out that some banks have been excluded from the Second Schedule to the RBI Act by Gazette Notifications.

44. Banks have been listed in the Second Schedule to the RBI Act, by Gazette Notifications issued from time to time, under the following categories:-

1. Scheduled Public Sector Banks
2. Scheduled Private Sector Banks.
3. Scheduled Small Finance Banks
4. Scheduled Payments Banks

5. Scheduled Regional Rural Banks

6. Scheduled Foreign Banks in India

45. In terms of Annexure-1 to the notification dated 13 th April 2020, mentioned in Paragraph 2(b) thereof the following Scheduled Commercial Banks have been included in the Schedule to the RBI Act:-

“Annexure I (Refer to para 2(b) of notification dated April 13, 2020) List of Scheduled Commercial Banks PUBLIC SECTOR BANKS PRIVATE BANKS 1 State Bank of India 1 Axis Bank Ltd.

2 Bank of Baroda 2 Catholic Syrian Bank Ltd.

(Including Vijaya Bank and Dena Bank) 3 Bank of India 3 City Union Bank Ltd.

4 Bank of Maharashtra 4 Development Credit Bank Ltd. 5 Canara Bank 5 Dhanlaxmi Bank Ltd.

(Including Syndicate Bank) 6 Central Bank of India 6 Federal Bank Ltd.

7 Indian Bank 7 HDFC Bank Ltd.

(Including Allahabad Bank) 8 Indian Overseas Bank 8 ICICI Bank Ltd.

9 Punjab National Bank (including 9 IndusInd Bank Ltd.

Oriental Bank of Commerce and United Bank of India) 10 Punjab & Sind Bank 10 Jammu & Kashmir Bank Ltd. 11 Union Bank of India (including Andhra 11 Karnataka Bank Ltd.

Bank and Corporation Bank) 12 UCO Bank 12 Karur Vysya Bank Ltd.

13 Kotak Mahindra Bank Ltd.

14 Lakshmi Vilas Bank Ltd.

15 Nainital Bank Ltd.

16 Ratnakar Bank Ltd.

17 South Indian Bank Ltd.

18 Tamilnad Mercantile Bank Ltd.

19 Yes Bank Ltd.

20 Bandhan Bank 21 IDFC Bank Ltd.

22 IDBI Bank Ltd FOREIGN BANKS 1 The Royal Bank of Scotland N.V. 23 Mizuho Corporate Bank Ltd. 2 Abu Dhabi Commercial Bank Ltd. 24 Oman International Bank 3 Antwerp Diamond Bank N.V. 25 Societe Generale 4 Arab Bangladesh Bank Ltd. (AB Bank) 26 Sonali Bank 5 Bank International Indonesia 27 Standard Chartered Bank 6 Bank of America 28 State Bank of Mauritius 7 Bank of Bahrain & Kuwait B.S.C. 29 JSC-VTB Bank 8 Bank of Ceylon 30 UBS-AG 9 Bank of Nova Scotia 31 American Express Banking Corporation 10 Bank of Tokyo-Mitsubishi Ltd. 32 First Rand Bank Ltd. 11 Barclays Bank 33 Commonwealth Bank of Australia 12 BNP Paribas 34 United Overseas Bank Ltd.

13 China Trust Bank 35 Credit Suisse A.G. 14 Shinhan Bank 36 Sberbank 15 Citibank N.A. 37 Australia and New Zealand Banking Group Ltd.

16 Credit Agricole Corporate and 38 Rabobank International Investment Bank 17 Deutsche Bank 39 National Australia Bank 18 DBS Bank Ltd. 40 Woori Bank 19 Hongkong and Shanghai Banking 41 Industrial & Commercial Bank of China Corp'n. Ltd.

20 J.P. Morgan Chase Bank N.A. 42 Sumitomo Mitsui Banking Corporation 21 Krung Thai Bank 43 Westpac Banking Corporation 22 Mashreqbank 44 Doha Bank

46. As a Scheduled Bank and a banking company within the meaning of the Banking Regulation Act, ICBC is governed by the regulatory provisions of the RBI Act and the Banking Regulation Act and the Rules, Regulations, Orders, Notifications etc. issued thereunder. The circulars and directives of the Reserve Bank of India with regard to Bank Guarantees/ Demand Guarantees are binding on ICBC.

47. The RBI Act only defines 'Scheduled Banks' which includes Scheduled Foreign Banks operating in India. The RBI Act or the Second Schedule thereto does not segregate Scheduled Indian Banks. There is no definition of Scheduled Indian Bank in the RBI Act. The regulatory provisions of the RBI Act apply equally to all scheduled banks.

48. However, since there is a list of Scheduled Foreign Banks in India categorized separately in the Second Schedule by Gazette Notifications, it may be presumed that all other banks listed in the Second Schedule in the various categories except the category of Scheduled Foreign Banks, that is, Scheduled Public Sector Banks, Scheduled Private Sector Banks, Scheduled Small Finance Banks, Scheduled Payments Banks, Scheduled Regional Rural Banks are all Scheduled Indian Banks, even though Scheduled Indian Banks do not constitute any distinct category in the Second Schedule to the RBI Act. Since ICBC has its principal branch registered in the People's Republic of China and is listed in the category of Scheduled Foreign Banks in India, the High Court made a distinction between ICBC and a 'Scheduled Indian Bank'.

49. The Annexures to the Special Leave Petition filed in this Court, which form part of the Paper Book in these appeals show that ICBC is not only a Scheduled Bank in India, but it also ranks very

high in terms of asset value in atleast three extremely authoritative lists being ‘The Banker’s Top 1000 World Banks 2018’, ‘The Forbes Global 2000 2019’ and ‘The Fortune Global 500 Sub-list of Commercial Banks’.

50. It is stated by the Appellant that ICBC realized a net profit of RMB 298.7 Billion in the year 2018 with the total value of its assets assessed at 27,699,540 (in RMB Millions). Mr. Vishwanathan submits that ICBC continues to hold the largest total net profit in the global banking industry.

51. It appears that the Mumbai branch of ICBC has set up a fund for an amount of 200 million US Dollars for investment in Indian Micro, Small and Medium Enterprises (MSMEs). It is contended on behalf of the Appellant that this establishes the credibility of ICBC within the Indian Commercial Market.

52. In the Second Schedule to the RBI Act, ICBC is listed in the same category of Scheduled Foreign Banks in India as Standard Chartered Bank, Citi Bank, American Express Banking Corporation, HSBC Limited etc. which are household names in India in the arena of banking. On the other hand, Scheduled Indian Bank, as stated above would include all categories of banks in the Second Schedule except those in the category of Scheduled Foreign Banks. Scheduled Banks would therefore, include Scheduled Private Sector Banks such as Bandhan Bank Limited, City Union Bank Limited, Ratnakar Bank Limited, Dhanalaxmi Bank Limited, Kotak Mahindra Bank Limited, Lakshmi Vilas Bank Limited, Nainital Bank Limited, Yes Bank Limited etc.

53. Mr. Abhishek Manu Singhvi, learned Senior Counsel opposing these appeals on behalf of the respondents could not demonstrate any real prejudice likely to be caused by reason of furnishing of a Bank Guarantee of ICBC in preference to Scheduled Indian Banks nor could he show any plausible reason for preference of Scheduled Private Sector Banks in India to Scheduled Foreign Banks like ICBC.

54. As pleaded in the appeal being FAO (OS) (COMM) No.136 of 2019 the Respondents have not been able to advert to a single instance of default, fraud or any other malpractice of ICBC which could cast any doubt over ICBC’s ability or inclination to honour the Bank Guarantee issued by it.

55. It is incomprehensible why Scheduled Private Banks in India should be preferred to Scheduled Foreign Banks in India with high global rating, even though, some Scheduled Private Sector Banks have not even been running well. It would perhaps not be out of place to take judicial notice of reports that in March, 2020, Yes Bank, a private Sector bank, which was on the brink of complete financial collapse, had to be placed under a moratorium by RBI. Yes Bank has been cited by this Court as an example only to illustrate the fallacy of insistence upon the Bank Guarantee of a Scheduled Indian Bank in preference to that of Scheduled Foreign Bank in India, and not to cast any aspersion on the present functioning of Yes bank or any other Scheduled Bank in the Private Sector in India.

56. There can be no doubt that the Court has the discretion to insist on a Bank Guarantee from any specific bank or class of banks to safeguard the interests of the beneficiary of the Bank Guarantee.

The Court may legitimately disapprove a Bank Guarantee of a bank with a history which raises doubts with regard to its credibility. In this case, there is nothing on record to give rise to any doubts with regard to the credibility of ICBC or its financial ability or willingness to honour guarantees.

57. In the absence of any adverse material against ICBC and in the light of a plethora of reports showing its financial soundness, I am of the view that the High Court erred in directing the Appellant to replace the Bank Guarantee of ICBC, already furnished pursuant to an order of Court passed on 12.02.2019, with another Bank Guarantee, oblivious of the practical realities in the arena of banking activities, specially the difficulties in obtaining a Bank Guarantee from banks with which the applicant has no transaction and ignoring the cost already incurred by the Appellant by way of bank charges for obtaining the guarantee.

58. Mr. Singhvi, more as an argument in desperation, submitted that the Petitioner would not have incurred so much expenditure if it had complied with the order dated 09.04.2019 instead of taking recourse to different proceedings before Court. Prompt compliance with the order of 09.04.2019 may have saved the Appellant the costs of renewal of the Bank Guarantee. However, the initial amount of about Rs.30 lakhs had already been spent long before the order dated 09.04.2019 was passed.

59. As discussed above, all that is required for invocation of the Bank Guarantee is an order of the High Court in the proceedings relating to the Arbitral Award. The statement that the guarantee is subject to the URDG does not dilute the guarantee or make it conditional. Mr. Singhvi's client has not been able to demonstrate how the URDG can cause any prejudice to the beneficiary of the Bank Guarantee. Having passed an order on 12.02.2019 which directed "...Further, the bank guarantee in the sum of Rs.30 crores will be that of a scheduled bank located in India..." on the basis of which the Appellant altered its position to its detriment by extending Rs.30 lakhs in obtaining a Bank Guarantee of ICBC. The High Court was not justified in altering and/or modifying the said direction after almost two months and after its compliance.

60. For the reasons discussed above, the appeal from the impugned judgment and order of the Division Bench dated 27.11.2020 in FAO(OS) (COMM) No. 136 of 2019 is allowed. The impugned judgment and order of the Division Bench dated 27.11.2020 in FAO(OS) (COMM) No. 136 of 2019 and orders dated 09.04.2019 and 16.05.2019 in OMP (I) (COMM) 523/2017 are set aside.

..... J.

[INDIRA BANERJEE] New Delhi;

August 24, 2021 IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION (CIVIL) NO. 11476-77 OF 2021 SEPCO ELECTRIC POWER
CONSTRUCTION CORPORATION ... PETITIONER(S) VERSUS POWER MECH PROJECTS LTD.
... RESPONDENT(S) ORDER

1. Despite a fine analysis by my learned sister, of the relevant provisions of the Reserve Bank of India Act, 1934 and the Banking Regulation Act, 1949 and the fine distinction that the Hon'ble Judge has brought out between a 'scheduled Bank' defined in the Act, in contrast to a 'scheduled Indian Bank' not defined anywhere statutorily, I regret my inability to persuade myself to agree to the view taken by my learned sister. In my considered view, the special leave petitions deserve to be dismissed. The reasons are provided herein below.

2. As pointed out by my sister, the award debtor has come up with these Special Leave Petitions challenging (i) the dismissal of an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'); and (ii) the dismissal of a review petition arising there from. The appeal under section 37 of the Act arose out of the rejection of a petition for recalling an order passed in an application for interim measure under Section 9 of the Act.

3. The petitioner suffered an arbitration award dated 17.10.2017 in a sum of Rs.142,41,14,499/- The award is the subject matter of challenge in a petition OMP(COMM.)No.432 of 2017 under Section 34 of the Act. It appears that the petition under Section 34 was accompanied by an application for stay of execution of the award, but the same has not yet been finally disposed of.

4. However the respondent filed an independent petition under Section 9 of the Act, and sought a direction to the petitioner to secure the award amount. In the said petition in I.A.No.11128 of 2018 in OMP (I)(COMM.)No.523 of 2017, an order was passed on 12.02.2019. Since the genesis of the dispute before us could be traced to the said order, it is extracted as follows: "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 along with 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.”

5. Pursuant to the aforesaid order, the petitioner furnished a bank guarantee issued by the Industrial and Commercial Bank of China Limited, Mumbai Branch dated 22.03.2019 (hereinafter referred to ICBC).

6. It appears that thereafter the respondent moved another application in I.A.No.5185 of 2019 in OMP(I)(COMM.) No.523 of 2017 seeking Garnishee Orders in respect of the amounts that the petitioner was entitled to receive under a settlement agreement entered into with one of their customers. While dealing with the said application, the learned Judge found that instead of furnishing a bank guarantee of a scheduled Indian bank, the petitioner had furnished bank guarantee of ICBC, in view of the confusion created in paragraph 6 of the order dated 12.02.2019. Therefore, by an order passed on 09.04.2019, in I.A.No.5185 of 2019, the learned Judge directed the petitioner to substitute the bank guarantee of ICBC, with a bank guarantee of a scheduled Indian bank. The relevant portion of the order passed by the learned judge in I.A.No.5185 of 2019 dated 09.04.2019 reads as follows:□“... ..

5. Furthermore, Mr. Sethi says that in compliance of the order dated 12.02.2019 which required the respondent to furnish a bank guarantee of a Scheduled Bank, the respondent has complied with the same and submitted a bank guarantee of Industrial and Commercial Bank of china Limited (in short “ICBC”)

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. It is relevant to point out here that the order dated 09.04.2019 was passed by the very same Judge who passed the order dated 12.02.2019. The learned Judge was thus aware of what transpired in court on 12.02.2019 and hence recorded in the order dated 09.04.2019 as to what happened in court on 12.02.2019. It is needless to emphasize that what is recorded in a judicial order about what transpired during the hearing in court, is to be taken to be a correct reflection of what transpired.

8. However, the petitioner filed an application in I.A.No.7096 of 2019 seeking to recall the directions contained in paragraph 6 of the order dated 09.04.2019. The main grievance as projected

by the petitioner in the said petition was that the non-acceptance of the bank guarantee furnished by ICBC may be taken as a reflection on the reputation of the bank.

9. But by an order dated 16.05.2019, the learned Judge dismissed I.A.No.7096 of 2019, clarifying that the credentials of ICBC are not at all doubted and that what was sought to be done by the order dated 09.04.2019, was merely to correct an error that crept in the order dated 12.02.2019. Paragraph 5 of the order dated 16.05.2019 reads as follows: “... ..

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. ...”

10. Challenging the order dated 16.05.2019, passed in I.A.No. 7096 of 2019, the petitioner moved an intra-court appeal in FAO(OS) (COMM.)No.136 of 2019 under Section 37 of the Act read with Section 13 of the Commercial Courts Act, 2015. This appeal was dismissed by the Division Bench by an order dated 27.11.2020 primarily on the ground that the order under appeal was an interim one which is largely discretionary and that the scope and power of the appellate court in appeals against interim orders is limited to certain factors.

11. The petitioner thereafter moved an application for review in R.P.No.5 of 2021 seeking a review of the order dated 27.11.2020. The review petition was dismissed by an order dated 12.03.2021. Therefore, challenging the dismissal of the appeal and the dismissal of the review petition, the petitioner has come up with these Special Leave Petitions.

12. Thus we have 2 Special Leave Petitions, one challenging the dismissal of the appeal under section 37 and another challenging the dismissal of the review petition. The SLP arising out of the order passed in the review petition deserves to be thrown out without much ado, since the refusal of a court to review its order due to the absence of the parameters prescribed in Order 47 Rule 1 CPC, cannot give rise to a substantial question of law of public importance, warranting our interference under Article 136.

13. In so far as the other SLP challenging the order passed in the appeal under Section 37 of the Act is concerned, the same arises out of an interim order passed under Section 9 of the Act. As rightly observed by the Division Bench of the High Court, interim orders are discretionary and there is no question of interference with the exercise of the discretion, even in an intra-court appeal, much less in an SLP under Article 136.

14. All that the learned Judge did on 09.04.2019, was to correct a mistake that inadvertently crept in his order. The correction that the learned Judge sought to make, was in tune with the very offer made by the petitioner at the first instance on 12.02.2019. When an interim order has been passed

particularly in a fact situation arising out of an offer made by one of the parties, especially by the very same learned Judge, I fail to understand how the case can be elevated to the status of one raising a substantial question of law warranting our interference under Article 136.

15. I have extracted in full, the first order dated 12.02.2019 and the relevant portions of the orders dated 09.04.2019 and 16.05.2019. The order dated 12.02.2019 shows (i) that it was not an adjudicatory order but passed entirely on the basis of an offer made by the petitioner herein; and (ii) that paragraphs 4 and 5 of the order gave two weeks time to the petitioner to file an affidavit and six weeks time to furnish bank guarantee. The statement of the learned senior counsel for the petitioner to file an affidavit is recorded in paragraph 1 of the order dated 12.02.2019. Paragraph 1 of the order dated 12.2.2019 indicates three items with respect to which the petitioner undertook to file an affidavit. Item no. (iii) of paragraph 1 is very specific that one of the contents of the affidavit should be to furnish a bank guarantee in a sum of Rs.30 crores of a 'scheduled Indian bank'. Paragraph 5 directs the petitioner to furnish bank guarantee within six weeks 'as indicated by the counsel'.

16. To a pointed question whether an affidavit containing all the three items mentioned in paragraph 1 was filed or not, as directed in paragraph 4 of the order dated 12.02.2019, the reply of Mr. K.V. Vishwanathan, learned senior counsel for the petitioner was that an affidavit containing the matters indicated in Item Nos. (i) and (ii) of paragraph 1 of the order was filed and that in view of the directions contained in paragraph 6 to furnish a bank guarantee of a scheduled bank located in India, there was no necessity to incorporate in the affidavit, the matter covered by Item No.(iii) of paragraph 1.

17. But I do not agree. If a party to a proceeding invites an order by making an offer, he is obliged to honour the commitment made in the form of the offer. The contention of Mr. K.V. Vishwanathan that his client's offer in paragraph 1(iii) of the order dated 12.02.2019 to furnish a bank guarantee of a scheduled Indian bank stood modified by paragraph 6 of the order, is not acceptable. This is for the reason that the very same learned Judge from whom the order dated 12.02.2019 was invited, clarified on 09.04.2019 that what he had in mind was what was actually offered by the petitioner. Once the same learned Judge has clarified that there was no intention to accept the offer made by the petitioner with a modification, it is not open to the appellate court to upset the discretion exercised by the learned Judge.

18. Both in the orders dated 09.04.2019 and 16.05.2019, the very same learned Judge had clarified (i) as to what transpired in court; (ii) as to what was offered; and (iii) as to what was the purport of the order dated 12.02.2019. Therefore, the matter should be allowed to rest there.

19. Even the contention that the credentials of ICBC will be taken to have been doubted, was considered by the learned Judge in his order dated 09.04.2019 and the matter was clarified. Therefore, the question of any harm to the reputation of ICBC does not arise.

20. Lastly it is contended by Mr. K.V. Vishwanathan, learned senior counsel for the petitioner that the bank guarantee was taken by the petitioner from ICBC, upon payment of a non-refundable charge of Rs.30 lakhs and that therefore assuming that there was a mistake on the part of the Court,

it cannot be corrected by the Court resulting in a financial loss of Rs.30 lakhs to the petitioner. The maxim “*actus curiae neminem gravabit*” is sought to be invoked by the learned senior counsel for the petitioner.

21. But in my considered view the petitioner has to blame itself, for the loss if any. The order dated 12.02.2019 gave (i) two weeks time to the petitioner to file an affidavit incorporating all the three items of matters indicated in paragraph 1 of the order dated 12.02.2019; and

(ii) six weeks time to furnish bank guarantee as indicated by the counsel. Therefore the petitioner ought to have filed an affidavit containing all the three ingredients, before taking the bank guarantee from ICBC. If they had done so, the affidavit would have contained a statement, in tune either with what was undertaken by them or with what was mentioned in the order. The filing of an affidavit in such a manner, would have given a wake up call to the respondents and shown the bonafides of the petitioner. But without doing so, the petitioner filed an affidavit containing only those matters covered by Items (i) and (ii) of paragraph 1 and thereafter furnished a bank guarantee of ICBC. Since the petitioner did not adopt a course of action as undertaken by them, it is not open to them to say that they were misled by the direction in paragraph 6 of the order dated 12.02.2019 and that therefore they should not be prejudiced on account of a mistake committed by the court.

22. This is a case where the petitioner, after making a clear offer to furnish a bank guarantee of a scheduled Indian bank, has chosen to take advantage of a mistake that crept in paragraph 6 of the order. Therefore, he is not entitled to take advantage of the Latin maxim “*actus curiae neminem gravabit*”.

23. In my humble considered view, these special leave petitions do not deserve to be entertained under Article 136 of the Constitution of India in view of the fact (i) that the very same Judge who passed the first Order dated 12.02.2019, clarified the same by his subsequent Order dated 09.04.2019; (ii) that the same learned Judge dismissed on 16.05.2019, the petition to recall the Order dated 09.04.2019; (iii) that the Commercial Division Bench of the High Court dismissed the appeal arising out of the Order dated 16.05.2019; and (iv) that the Commercial Division Bench again reiterated its orders, by dismissing the review petition. We must remember that all this arose out of an interim measure under Section 9 of the Act and the petitioner is seeking to upset all of this in a petition under Article 136 of the Constitution as though there is a substantial question of law of great importance.

24. The question whether there exists statutorily, a distinction between “a Scheduled Indian Bank” and “a Scheduled Bank located in India” does not arise for consideration in this case, as the dispute primarily revolves around what was offered in Court by one of the parties, what was accepted in Court, and what was recorded in the Order and clarified later. If without any offer from the petitioner, an adjudication had been made by the Court directing the petitioner to furnish bank guarantee of a particular type of bank and a dispute had been raised thereafter, it is only then that a question of law as to the status of such a bank with reference to the statutory provisions, would have arisen.

25. Therefore, in my considered view and with the greatest of respect for my learned Sister, I deem it fit to dismiss the Special Leave Petitions as not giving rise to any substantial question of law warranting our interference under Article 136 of the Constitution.

.....J. (V. Ramasubramanian) New Delhi August 24, 2021