

+ OMP 496/2009 & OMP No.497/2009

AIDS HEALTHCARE FOUNDATION
- INDIA CARES Petitioner

Versus

Through: Mr. A.S. Chandiok, ASG with Mr. Sanjay Katyal, Mr. Ritesh and Mr. Tanveer, Advocates

1.	Whether reporters of Local papers may be allowed to see the judgment?	Yes
2.	To be referred to the reporter or not?	Yes
3.	Whether the judgment should be reported in the Digest?	Yes

+ IA No.10930/2009 in OMP No.497/2009 (U/s.151 CPC for exemption)

Exemption allowed subject to just exceptions.

1. The parties are in arbitration before an arbitral tribunal. The petitioner in both the petitions approached the tribunal for an order directing the respondent to disclose and file before the arbitral tribunal. Documents in support of the pleas taken by the respondent before the arbitral tribunal. The arbitral tribunal vide order dated 7th July, 2009 came to a conclusion that no case was made out for the

petitioner to claim such disclosure and no direction as sought by the petitioner ought to be issued against the respondent. The tribunal in this regard also noted the contention of the respondent that besides the documents already filed by the respondent, the respondent was not in custody of any other documents. The tribunal held that any endeavor to call for any material document/files (unspecified) from the custody of the respondent would be a leap in the dark and an exercise in futility; and then, if ultimately it transpires that some relevant and material has been unfairly held up by the respondent, claimant can legitimately pray for an adverse inference against the formal. The tribunal in this regard also noticed the plea of the respondent about the confidentiality of some of the records sought to be summoned.

2. The tribunal however while turning down the request of the petitioner, considered the alternative request of the petitioner before the tribunal to permit the petitioner to approach the court under Section 27 of the Act and to seek redressal. Thus the application of the petitioner was rejected with liberty to the petitioner to approach the court under Section 27 of the Act.

3 The petitioner has now filed OMP No.497/2009 seeking a direction to the respondent to produce the same records/documents before the arbitral tribunal, the request for direction with respect thereto made before the arbitral tribunal was rejected vide order aforesaid.

4 OMP No.496/2009 has been preferred under Section 9 for stay of recording respondent's evidence before the arbitral tribunal pending the disposal of OMP No.497/2009.

5. Section 27 of the Act permits a party to the arbitration to “with the approval of the arbitral tribunal” apply to the court for assistance in taking evidence.

6. In the present case there is no approval of the arbitral tribunal for seeking assistance of this court for taking the evidence sought. Though the tribunal has considered the alternative prayer of the petitioner for approaching the court under Section 27 of the Act but as pointed out by the ASG, that is also not an approval but is qualified with the words “ if so advised”. Once the tribunal itself has vide order aforesaid held that the said documents cannot be directed to be produced, the tribunal has not approved the prayer of the petitioner for summoning of the said documents and in the face of the same this application under Section 27 is not maintainable. The ASG has also drawn attention to Section 27 (3) and rightly urged that the court assistance is only in executing the request for recording of the evidence and the court has no power to on its own to direct evidence to be produced, without the approval of the tribunal, even if a request in that regard is made by a party.

7. The counsel for the petitioner has urged that in fact the application ought to have been made before the court only and did not lie before the arbitral tribunal. However in view of the what has been observed above that argument is not tenable in law.

8. As far as the petition under Section 9 is concerned, since the petition under Section 27 is found to be not maintainable, the question of any interim measures awaiting the decision in the other petition does not arise. Even otherwise it may be noticed that the

Supreme Court in ***Bhatia International Vs. Bulk Trading S.A.*** AIR 2002 SC 1432 has held that the power under Section 9 of the Act cannot be exercised for stay of the arbitration proceedings.

9. No merits are found in either of the petitions. The same are dismissed. The arbitral tribunal while assessing the costs of the arbitration proceedings shall also take note of the costs of the present petition incurred by the respondent.

**RAJIV SAHAI ENDLAW
(JUDGE)**

August 28th, 2009
J