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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION (LODGING) NO.680 OF 2016

Montana Developers Private Limited	)	
A Company incorporated under the	)	
Companies Act, 1956, having its	)	
registered office at "A" Wing, 6 th Floor,	)	
Universal Business, Chandivali Farm	)	
Road, Off Sakivihar Road, Andheri	)	
(East), Mumbai - 400 072.	)	...Petitioner

....Versus....

1). Aditya Developers	)
A Partnership Firm registered under	)
the Indian Partnership Act, 1932	)
having its registered office at C-402,	)
Gokul Divine, Irla, S.V. Road, Vile	)
Parle (West), Mumbai – 400 056	)
2) Shri Binal S. Koradia	)
3) Shri Binal S. Koradia HUF	)
4) Smt.Amisha Binal Koradia	)
5) Shri Arvind Shamji Chedda	)
6) Shri Jayant Shamji Chedda	)
7) Shri Manish Mulchand Chedda	)
8) Ms.Heena Parag Chedda	)
All partners of Aditya Developers	)
A Partnership Firm registered under	)
the Indian Partnership Act, 1932	)
having its registered office at C-402,	)

Gokul Divine, Irla, S.V. Road, Vile)
Parle (West), Mumbai – 400 056) ...Respondents

Mr.Virag Tulzapurkar, Senior Counsel with Mr.Farid Karachiwala and Mr.Sahil Sayed i/b M/s.Wadia Ghandy & Co. for the Petitioner.

Mr.Pradeep Sancheti, Senior Counsel with Dr.Birendra Saraf, Ms.Pooja Kshirsagar, Mr.Yogesh Adhia and Mr.Anand Chovatia i/b Mr.Yogesh Adhia for the Respondents.

CORAM : R.D. DHANUKA, J.
DATE : 22ND JUNE, 2016.

ORAL JUDGMENT :-

1. By this petition filed under section 27 of the Arbitration & Conciliation Act, 1996 (for short the “Arbitration Act”) the petitioner seeks an order and direction for issuance of witness summons against various persons / entities with a direction to produce various documents set out in prayer clauses (a) and (b) of the petition before the learned arbitrator on 11th July, 2016 at 11:00 a.m. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioner is the claimant in the arbitration proceedings, whereas the respondents are the original respondents.

3. On 17th September, 2013 and 1st October, 2013, by consent of parties, a former Chief Justice of India was appointed as a sole arbitrator to adjudicate upon the disputes and differences between the parties. The petitioner filed a statement of claim on 30th November, 2013. The statement of claim was resisted by the

respondents by filing statement of defence. The parties led oral evidence before the learned arbitrator. The evidence of the petitioner was closed. The respondents have commenced the evidence of their witnesses. During the pendency of the evidence of the respondents, the petitioner applied for permission to examine more witnesses and to produce various documents.

4. The said application filed by the petitioner was vehemently opposed by the respondents before the learned arbitrator on various grounds.

5. After hearing both the parties, the learned arbitrator passed an order on 29th April, 2016, thereby granting approval to the petitioner for filing an application before this Court for issuance of witness summons to various witnesses described in the said application before the learned arbitrator. Pursuant to the said approval granted by the learned arbitrator in the order dated 29th April, 2016, the petitioner has filed this application under section 27 of the Arbitration Act for issuance of witness summons and for production of documents by invoking section 27 of the Arbitration Act. The application is vehemently opposed by the respondents. Since the application is opposed by the respondents, I have heard the learned senior counsel appearing for the respondents first.

6. Mr.Sancheti, the learned senior counsel for the

respondents submits that merely because the learned arbitrator was of the opinion that certain witnesses were required to be examined and various documents were required to be produced through the said witnesses, this Court cannot pass an order mechanically under section 27 of the Arbitration Act. He submits that the said order cannot be implemented by this Court by exercising powers under section 27 of the Arbitration Act in view of various objections which were raised by the respondents before the learned arbitrator in a detailed affidavit filed in the said proceedings. He submits that one of the objection raised by the respondents before the learned arbitrator was that the petitioner had already closed its evidence and the respondents had already commenced the evidence. The cross-examination of the witness examined by the respondent had already commenced by the petitioner. He submits that there were several other objections raised by the respondents before the learned arbitrator for opposing the permission sought by the petitioner for taking the assistance of this Court under section 27 of the Arbitration Act.

7. It is submitted by the learned senior counsel that this Court can go into the validity of the order passed by the learned arbitrator thereby granting permission to the petitioner to examine further witnesses after closing of evidence of the petitioner and for

production of documents. My attention is invited to section 27 of the Arbitration Act and it is submitted that under the said provision, the learned arbitrator may apply to the Court for assistance in taking evidence. Under section 27(3) of the Arbitration Act, it is at the discretion of the Court to provide assistance and to order issuance of witness summons or for production of documents.

8. It is submitted that merely because the learned arbitrator was of the view that production of documents and issuance of witness summons would be necessary, if after hearing the parties on merits, this Court comes to the conclusion that production of such witnesses or documents was not warranted, this Court can refuse to grant such assistance to the petitioner under section 27 of the Arbitration Act. He submits that in the facts of this case, the learned arbitrator could not have taken a view that examination of additional witness and production of documents was warranted. In support of his submission, the learned senior counsel made an attempt to distinguish the judgment dated 16th October, 2015 delivered by this Court in case of **National Insurance Company Limited vs. S.A. Enterprises** in Review Petition (Lodging) No.51 of 2015 in Arbitration Petition No.1544 of 2015 on the ground that the facts considered by this Court in the said judgment were different. My attention is also invited to paragraph 36 of the said judgment and it is submitted that

this Court in the said order took a view that once the Court comes to a conclusion that documents were required for adjudication of the issues in the peculiar facts and circumstances of the case, the Court in that event could issue direction or pass appropriate order under section 27 of the Arbitration Act. He submits that thus this Court will have to independently decide whether the order passed by the learned arbitrator for production of documents or for production of witness was warranted in the facts and circumstances before the learned arbitrator in each case.

9. My attention is also invited to the judgment of the Delhi High Court in case of **Reliance Polycrete Limited vs. National Agricultural Co-operative Marketing Federation of India, (2008) SCC OnLine Delhi 837**. He submits that the Delhi High Court has held that though the learned arbitrator had opined that production of witnesses and documents was necessary, it is for the Court to decide under section 27 as to whether production of documents or witness was necessary or not. He also placed reliance on the judgment of the Division Bench of the Delhi High Court in case of **Bharat Heavy Electricals Limited v. Silor Associates S.A, (2014) SCC OnLine Delhi 4442** and in particular paragraphs 2, 16 and 19 in support of the submission that the Court while hearing an application under section 27 of the Arbitration Act is empowered to decide the

relevancy of the documents and the effect of the order passed by the learned arbitrator. Reliance is also placed on the judgment of the Delhi High Court in case of **Silor Associates SA vs. Bharat Heavy Electrical Limited** delivered on 1st July, 2014 in O.M.P. No.1037 of 2013 and more particularly paragraph 15.

10. Mr.Tulzapurkar, the learned senior counsel appearing for the petitioner on the other hand placed reliance on the judgment of this Court in case of **National Insurance Company Limited** (supra) and more particularly paragraphs 30, 40 to 42 and would submit that the learned arbitrator after hearing the parties has opined that production of additional witnesses and documents was warranted in the facts of this case. He submits that if a civil suit would have been filed under the provisions of the Code of Civil Procedure, 1908 for issuance of witness summons to a party or for production of documents, the petitioner was not required to serve the respondent and the respondent was not required to be heard. He submits that merely because the parties in this case had agreed to refer the disputes and differences to arbitration, parties cannot be put to disadvantage because the learned arbitrator is not empowered to issue such witness summons to a witness or to produce a document. He submits that to obviate this difficulty caused, a provision is made for providing assistance by the Court for issuance of witness summons

under section 27 of the Arbitration Act or for production of documents to a party.

11. Learned senior counsel also invited my attention to a judgment of this Court in case of **United Spirits Limited, Bangalore vs. Delta Distilleries Limited, Mumbai & Anr., 2012 (6) Mh.L.J. 522** and in particular paragraphs 11 and 15, in an unreported judgment of this Court delivered on 2nd April, 2007 in case of **M/s.Rasiklal Ratilal vs. Fancy Corporation Limited & Anr.** in Arbitration Petition No.64 of 2007 and in particular paragraphs 9 and 10. Reliance is also placed on the judgment of the Delhi High Court delivered on 28th March, 2016 in case of **Thiess Iviinecs India vs. NTPC Limited & Anr., O.M.P. (E) (COMM.) 12/2016** and in particular paragraphs 25 to 28. He submits that the Delhi High Court has followed the judgment of this Court in case of **National Insurance Company Limited** (supra) and also interpreted the judgment of the Delhi High Court in case of **Bharat Heavy Electricals Limited** (supra) relied upon by the learned senior counsel for the respondents.

12. It is submitted by the learned senior counsel that the powers of the Court under section 27 of the Arbitration Act is not adjudicatory power but the said section provides machinery for issuance of witness summons to the parties and for production of

documents which power did not vest in the arbitral tribunal. He submits that various tribunals and quasi judicial authorities are granted various powers under the provisions of the Code of Civil Procedure for issuance of witness summons and for production of documents similar to the powers vests in Courts under Code of Civil Procedure. However, there are no such powers prescribed under the Arbitration Act empowering the learned arbitrator to issue witness summons and for production of documents.

13. It is submitted that the learned arbitrator once having taken a view that production of such documents or witness was warranted in the facts of this case, the Court cannot go into the validity of such order passed by the learned arbitrator at the stage of hearing the application under section 27 of the Arbitration Act filed by such a party. He submits that if the learned arbitrator ultimately decides the matter by rendering an award, the party aggrieved by the said award made by the learned arbitrator can challenge the said award under section 34 of the Arbitration Act along with the order passed by the learned arbitrator under section 27 of the Arbitration Act.

14. It is submitted that in view of section 5 of the Arbitration Act, if the respondents could not have challenged the order passed by the learned arbitrator by filing any proceedings in this Court at this stage, the respondents cannot be allowed to challenge the validity of

the said order passed by the learned arbitrator at this stage by opposing the present application under section 27 of the Arbitration Act on the ground that the learned arbitrator could not have passed such order granting permission to the petitioner to take the assistance of this Court to examine any witness or to produce documents.

15. This Court in case of **National Insurance Company Limited** (supra) after adverting the judgment of this Court in case of **M/s. Rasiklal Ratilal** (supra) and in case of **United Spirits Limited, Bangalore** (supra) has held that it is not possible for the Court to interfere with the proceedings which are pending before the learned arbitrator while hearing an application under section 27 of the Arbitration Act. Paragraphs 36, 40 to 42 of the said judgment read thus :-

“36. This Court has also held that considering the scheme of the Arbitration Act, it is not possible for the Court to interfere with the proceedings which are pending before the arbitral tribunal. The Arbitrator is a master of his own proceeding. The Court normally should not direct or re-schedule the proceeding of the learned arbitrator. It is also held that considering the scheme of Section 27 of the Arbitration Act, there is no procedure available whereby the Court should give hearing to the witness or a party against whom the Court wants to issue directions to produce record or to issue summons for witness. Such hearing is not at all contemplated under this provision and/or even in any other provision of Code of Civil Procedure, 1908. Once the Court comes to a conclusion that these documents are required for adjudication of the issues in the peculiar facts and circumstances of the case, it can issue direction or pass such an order to produce

the original documents before the learned arbitrator directly. It is held that the Court's assistance in taking evidence as contemplated is restricted only to this extent of giving direction to the parties to produce the documents or issue summons to witnesses. In the said judgment, however, this Court directed the bank for production and deposit of the original documents with the learned arbitrator.

40. In my view, the arbitral tribunal cannot issue a witness summons itself or cannot enforce its own order of producing certain documents or cannot force a party or a third party to lead evidence or to produce documents. The arbitral tribunal or a party to the proceedings with the approval of the arbitral tribunal may apply to the Court for assistance in taking evidence. In my view, at this stage, this Court cannot go into the validity and correctness of the order passed by the learned arbitrator granting permission to the respondent herein for seeking assistance of this Court in taking evidence under Section 27 of the Arbitration Act. It is for the arbitrator to decide as to whether particular documents or presence of a particular witness would be necessary for the proper adjudication of the dispute between the parties or not, if any such application is made by the parties to the arbitral proceedings. In these proceedings under Section 27 of the Arbitration Act, this Court cannot decide whether production of such documents or presence of such witness was warranted or not.

41. The purpose of Section 27 of the Arbitration Act, in my view, is to provide assistance to the arbitral tribunal or to a party in taking evidence with a view to expedite the arbitral proceedings. Merely because the arbitral tribunal has no power to issue a witness summons or to compel the attendance of the witnesses, the parties should not suffer. The legislature has inserted the Section 27 of the Arbitration Act to avoid this inconvenience to the parties to the arbitral proceedings and has thus empowered the arbitral tribunal as well as the parties to take assistance of the Court. The Court is

empowered to issue direction to a party or even third party to produce documents or witnesses by summoning the party or even third party if the arbitral tribunal has granted permission and is of the opinion that production of such documents or evidence of such party including third party would be necessary for proper and effective adjudication of the dispute before it.

42. In so far as the illustration given by the learned counsel for the review petitioner that even if the learned arbitrator would have granted permission to the respondent herein to examine the President of India, whether this Court could have directed the office to issue witness summons upon the President of India is concerned, in my view, that is not the situation in this case. The illustration given by the learned counsel for the review petitioner, in my view, is totally irrelevant for the purpose of deciding this review petition. A perusal of the order passed by the arbitral tribunal indicates that the learned arbitrator has directed the review petitioner to produce certain documents and has permitted the respondent herein for issuance of the witness summons upon two of the Surveyors and the Branch, which according to the learned arbitrator, would be relevant for the purpose of adjudication of the dispute between the parties.”

16. I am thus inclined to accept the submission of Mr.Tulzapurkar, the learned senior counsel for the petitioner that the powers under section 27 of the Arbitration Act are not adjudicatory powers. In my view, the said provision provides a procedure for providing assistance to a party in whose favour the learned arbitrator has opined that the production of documents or witness was warranted in the facts of his case. Under section 19 of the Arbitration Act, it is clearly provided that the learned arbitrator shall not be bound

by the Code of Civil Procedure, 1908 or Evidence Act, 1872. In my view, the arbitral tribunal is thus not empowered to issue any witness summons itself or to compel a party to produce any documents under the provisions of the Arbitration Act. If the learned arbitrator is satisfied on the application made by any of the party that production of witness or documents which is not being produced inspite of the attempts made by a party, the arbitral tribunal can grant permission to such a party to take the assistance of this Court under section 27 of the Arbitration Act. In my view, merely because a party has filed the arbitration proceedings in view of the agreement between the parties, he cannot be put to dis-advantage in view of the powers of summoning a witness not having been provided to the arbitrator under the provisions of the Arbitration Act.

17. If the petitioner before this Court was required to file a suit and if he was required to examine any witness or to produce a document, which was not produced by such a party or such witness or a party would have refused to give evidence, the petitioner in that event could have applied for issuance of witness summons or for production of document under the provisions of the Code of Civil Procedure, 1908. At that stage, the respondent was not required to be heard by this Court. In my view, once the arbitral tribunal was of the opinion that production of such document or witness was

warranted in the facts and circumstances of the case, at this stage, the respondent could not have raised any objection on merits of the order passed by the learned arbitrator. If the learned arbitrator decides on merits against the respondents herein, the respondents would be entitled to challenge the said award along with the order passed by the learned arbitrator granting such permission to the petitioner to apply to this Court for the assistance under section 27 of the Arbitration Act.

18. In view of section 5 of the Arbitration Act, since the respondents could not have challenged the order passed by the learned arbitrator granting such permission to the petitioner to apply to this Court for the assistance or the order of the learned arbitrator holding that examination of additional witnesses or production of documents was warranted, the respondents cannot be indirectly allowed to challenge the validity of that order while opposing this application under section 27 of the Arbitration Act. In my view, what cannot be done directly, cannot be allowed to be done indirectly. Under section 5 of the Arbitration Act, there is a clear bar for a Court to intervene in any proceedings except the proceedings specifically provided under the provisions of the Arbitration Act. There is no proceeding provided under the Arbitration Act for challenging an order passed by the arbitral tribunal granting permission to a party to

seek assistance of a Court under section 27 of the Arbitration Act during the pendency of the arbitral proceedings.

19. I am not inclined to accept the submission of Mr.Sancheti, the learned senior counsel for the respondents that in the proceedings under section 27 of the Arbitration Act, the Court can decide the merits of the order passed by the learned arbitrator. In my view, Mr.Tulzapurkar, the learned senior counsel for the petitioner is right that under section 27 of the Arbitration Act, a procedure is prescribed for taking assistance of this Court for issuance of witness summons in terms of the order passed by the learned arbitrator and the proceedings are not adjudicatory proceedings.

20. Though the learned senior counsel for the respondents wanted to address this Court on merits of the order passed by the learned arbitrator as to why production of additional witnesses or production of documents was not at all warranted in the facts and circumstances of this case, since the respondents cannot challenge the order passed by the learned arbitrator granting permission to the petitioner for taking assistance of this Court at this stage, this Court cannot hear the respondents on the merits of the order passed by the learned arbitrator at this stage.

21. Insofar as judgment of Delhi High Court in case of **Reliance Polycrete Limited** (supra), **Bharat Heavy Electricals**

Limited (supra) and **Silor Associates SA** (supra) relied upon by Mr.Sancheti, learned senior counsel for the respondents are concerned, a perusal of these judgments clearly indicates that effect of section 5 of the Arbitration Act was not considered in those judgments. Delhi High Court in its later judgment delivered on 28th March, 2016 in case of **Thiess Iviinecs India** (supra) after adverting to the aforesaid judgments of Delhi High Court and the judgment of this Court in case of **National Insurance Company Limited** (supra) and after considering the bar under section 5 of the Arbitration Act has taken a similar view that was taken by this Court in case of **National Insurance Company Limited** (supra). In my view judgment of this Court in case of **National Insurance Company Limited** (supra) applies to the facts of this case. I am in agreement with the views expressed by the Delhi High Court in its later judgment in case of **Thiess Iviinecs India** (supra).

22. It is made clear that this Court has not expressed any views on the merits as to whether the learned arbitrator was justified in holding that production of additional witnesses or documents was warranted in the facts and circumstances of this case or not and the same is kept open.

23. I therefore, pass the following order :-

a). Arbitration Petition (Lodging) No.680 of 2016 is made

absolute in terms of prayer clause (a). No order as to costs.

b). At this stage, the learned senior counsel for the petitioner invited my attention to the directions issued by the learned arbitrator in paragraph 17(a) of the order and would submit that the respondents be directed to disclose mobile numbers of Mr.Jignesh Hirani and Mr.Ashokbhai which they were using at the time of the meeting alleged to have been held on 2nd October, 2012 at MCA Club, Bandra Kurla Complex, Mumbai. Mr.Sancheti, learned senior counsel on instructions states that without prejudice to the rights and contentions of the respondents, the respondents would furnish the mobile numbers of those two persons which are to their knowledge as on today. The statement is accepted. The said mobile numbers shall be provided to the petitioner within one week from today.

c). Learned senior counsel for the respondents seeks stay of this order for a period of six weeks from today, which is vehemently opposed by the learned senior counsel for the petitioner.

d). Since the learned arbitrator has already fixed the tentative date as 11th July, 2016, I am not inclined to grant stay of this order or of the order of the learned arbitrator. It is for the parties to apply for adjournment before the learned arbitrator. If any such application is made by the parties for adjournment, the learned arbitrator may decide the said application on its own merits. The parties are directed

to disclose the date of the next meeting and also the venue of evidence to the office of the Prothonotary & Senior Master at the earliest to enable the office to issue witness summons in compliance with this order passed by this Court.

(R.D. DHANUKA, J.)