

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

Date of decision: March 28, 2016

+ O.M.P. (E) (COMM.) 12/2016
THIESS IVIINECS INDIA

..... Petitioner

Through: Mr.Sandeep Sethi, Sr. Adv.
& Mr.Amit Sibal, Sr. Adv.
with Mr.Dhruv Deewan ,
Mr.Kostubh Devnani,
Mr.Namit Suri, Adv.

versus

NTPC LIMITED & ANR.

..... Respondents

Through: Mr.Vikas Singh, Sr. Adv.
with Mr. Nanju Ganpathy,
Mr.Anshika Misra,
Ms.Priyanka Shetty , Adv.

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.(Oral)

1. The present petition has been filed by the petitioner under Section 27 of the Arbitration & Conciliation Act, 1996 ('Act' in short) seeking a direction against the respondent to produce the following documents in accordance with the orders of the Arbitral Tribunal ('Tribunal' in short) dated September 21, 2015 ('order No.2' in short) and March 6, 2016 ('order No.3' in short).

A. Agenda Papers for Item No. 360.2.1 titled as "Development and Operation of the Pakri Barwadih Coal Mining Block" and Item No. 360.2.3 being "Investment Approval for Pakri Barwadih Coal Mining Project, Rated Production Capacity of 1 5MTPA" of the 360th Meeting of

the Board of Directors of the Respondent held on 12 November 2010;

B. NP 1 to 13 being supporting documents preceding NP-14 titled as "Approval for termination of Pakri Barwadih MDO reg."

Facts:-

2. The petitioner and the respondent entered into a project agreement for Development and operation of the western pit of the Pakri Barwadih Coal Block on July 14, 2011. The respondent terminated the said agreement on May 7, 2014, which is a subject matter of proceedings before the Tribunal consisting of three Hon'ble Members.

3. On April 1, 2015, in the Redfern Schedule, the petitioner had inter-alia requested for the production of the following documents:-

a. "Copy of NTPC's board resolution/ internal board notes/agenda papers/ approval pertaining to the award of the Project Agreement (Contract) vide Letter of Award dated 30.11.2010 (Item No. 2 of Petitioner's Redfern Schedule); and

b. "Copy of the decision taken by NTPC's "Competent Authority" including supporting documents, note sheets along with recommendation of sub-committee, if any, leading up to the non-extension of the Development Stage pursuant to the good faith discussions held on 24.01.2014 and issuing the termination letter dated 07.05.2014" (Item No. 3 to Petitioner's Redfern Schedule).

4. On May 27, 2015, the objection of the respondent with regard to these documents, that they are not relevant (item No.2) and confidential (item No.3) was rejected and the Tribunal allowing the petitioner's request partially directed the respondent to produce all documents except Internal Board Notes (with regard to item No.2) and Note Sheets (with regard to item No.3) respectively. Accordingly, on July 10, 2015, the production of documents was undertaken, when the respondent gave to the petitioner extracts from the minutes of 360th meeting of the Board of Directors held on November 12, 2010, relating to item No. 360.2.1 and 360.2.3 and NP-14, depicting the signatures of various officers, leading to the approval of termination. It is the case of the petitioner, as, the documents produced by the respondent in relation to item Nos.2 & 3 were incomplete, the petitioner sent an email dated July 15, 2015 requesting for production of the remaining documents. The response of the respondent on August 8, 2015 was, that the said documents were exempted from production by the Arbitral Tribunal. Accordingly, on August 21, 2015, the petitioner filed application seeking production of the remaining documents under item Nos. 2 & 3 in terms of the order of the Tribunal dated May 27, 2015. The respondent filed its reply. The Tribunal vide its order dated September 21, 2015 allowed the application and directed the respondent to produce the documents in question, that

is, agenda papers and approvals of minutes of 360th meeting as also of 380th meeting. The respondent was also directed to produce the decision of the Competent Authority with supporting documents. I may only note here, the respondent, in its reply to the application filed by the petitioner had taken a stand that, “Note Sheets” were exempted from production. The decision for termination of Contract was based on “Confidential note sheet”, which inter-alia contains attorney client privilege communication which was not required to be produced. Thereafter, the respondent on October 21, 2015, filed an application for clarification and recall of the order dated September 21, 2015. The application was premised on four counts:-

- (1) The 380th meeting has no relevance to the disputes nor any prayer was made in that respect;
- (2) None of the items for information (360.1.0 to 360.1.5) and item for approval (360.2.2.) are connected with the dispute before the Tribunal;
- (3) The production of agenda papers and approval of the 360th meeting, the respondent is seeking permission to redact certain portions which are not related to the dispute and/or contain commercially sensitive confidential information;
- (4) In relation to production of the documents marked as NP1 to

NP13, the respondent is seeking permission to redact certain portions which are confidential and privileged.

5. The application was decided by the Tribunal vide its order dated March 6, 2016, wherein the Tribunal regarding items No.360.2.1, 360.2.3 and NP1 to NP13, has observed that it had passed the order of production after hearing the parties which has not been challenged by any party and thus attained finality and rejected the prayer to reconsider or recall the directions issued by it on September 21, 2015.

6. It is the case of the petitioner that despite communication from its counsel, the respondent had not given the documents. It vide its letter dated March 11, 2016, made a request to the Tribunal, seeking its approval to apply to the court under Section 27 of the Act which request was, allowed by the Tribunal vide e-mail dated March 13, 2016. I may only note, Justice R.C. Lahoti, a Member of the Tribunal, in his communication, while agreeing with the order passed by the learned Presiding Arbitrator has stated as under:-

“While I am in respectful agreement with the Order passed by the Learned Presiding Arbitrator on the Claimant's Application u/s 27(1) of A&C Act, 1996, on my part, I would like to add and place on record my view that the Tribunals approval of allowing Claimant to move an application before the Court is not to be construed as an approval of, or, an expression of opinion on, the merits of the several averments made in the application as it would be for the Court to form its

own opinion thereon after hearing the parties.”

Submisisions:-

7. Mr. Sandeep Sethi, learned Senior Counsel for the petitioner, by drawing my attention to the facts as noted above, would submit, that the Tribunal having granted its approval, the Court only needs to execute the order and allow the application directing the respondent to produce the documents as asked for. He states, the order of the Tribunal is final, as no appeal is provided against the same, except, the same is challengeable in a petition under Section 34 of the Act. He would state, it is not only once, the Tribunal has called upon the respondent to produce the documents but twice and reiterated the same while rejecting the application for recall/clarification. According to him, the stand of the respondent with regard to documents at item Nos.2 & 3 was, that they are not relevant and confidential. He states, it was not the case of the respondent that the document at item No.3, consist of privilege communication between the attorney and client and cannot be disclosed. According to him, the aspect of relevancy and confidentiality was considered by the Tribunal in its initial order and the Tribunal after considering the judgments relied upon by the respondent on internal notings, internal communications and internal exchanges do not create any enforceable right in any one and would therefore, be of no relevance

for adjudicating upon dispute; has rightly allowed document at serial No.2 except internal Board notes and document at serial No.3 except note sheets. He would state, in view of the stand taken on the confidentiality of the note sheets, which have not directed to be given, the respondent could not have denied the rest to the petitioner. He submit, for the first time in reply to the application dated August 21, 2015 (second application) a stand of Internal Board notes which were exempted include, points of discussions held during previous meetings and confidential information/discussions with regard to commercially sensitive information was taken. Similarly, with regard to item No.3, the documents (NP1 to 14) contains attorney-client privileged communication: has been taken. According to him, the Tribunal, in its order dated September 21, 2015 has stated that only the notings of minutes of Board of Directors of subsidiary companies of NTPC Ltd. were exempted from production. The rest of the items were not exempted from production and hence they ought to have been produced.

8. On item No.3, also, according to him, the Tribunal, observed, that it had directed the respondent to produce documents of the Competent Authority including supporting documents as also recommendations of the sub committee, if any leading to non extension of development stage and issuing of termination order. So, the order dated September 21,

2015 directing to produce Agenda papers and approvals of minutes of 360th meeting and the decision of the Competent Authority with supporting documents is justified. It was his endeavour to argue that, the plea of relevance, confidentiality having been considered by the Tribunal, and thereafter, direction given to produce the documents, neither the respondent can take as a defence such pleas of confidentiality, attorney-client privileged communication in these proceedings nor this Court being an executing Court would entertain such pleas. He has sought to draw support to his arguments by relying on section 5 of the Act and drawing a distinction between Section 19 and Section 27 of the Act to contend that Section 19 of the Act contemplates, that the Tribunal is within its competence to decide its Rules of procedure, which according to him, includes to determine the admissibility, relevance, materiality and weight of any evidence, whereas, under Section 27 the assistance of the Court is only for taking evidence. He would state, that Section 27 of the Act does not contemplate while exercising power, the Court has power to determine admissibility, relevancy, materiality and weight of any evidence. He states, this primarily because the intent of the Act was not to denude the Tribunal of its power to regulate its own procedure for effective and expeditious conduct of the arbitration proceedings and to lessen the interference by Court in the arbitral

proceedings. According to him, while executing a request, the Court follow its Rules on taking evidence, which are Rules framed by the Court on its administrative side or the provisions of the CPC like Order 16 for issuance of summons etc. Mr. Amit Sibal, learned Senior Counsel also appearing for the petitioner adopt the arguments of Mr. Sethi. That apart, he would rely upon the judgment of this Court in ***AIDS Healthcare Foundation India Cares vs. National AIDS Control Organization and Anr.***, to contend that this court has held that an application under Section 27(3) of the Act is only to seek the Court's assistance in executing the request of the Tribunal for recording of the evidence. It is his submission, that the attempt of the respondent is to achieve indirectly what it could not have achieved directly, inasmuch as any challenge to the order of the Tribunal for production of documents would be maintainable only after the final Award is made i.e in a petition under Section 34(2) of the Act.

9. Together Mr. Sethi and Mr. Sibal rely upon the following judgments:-

(i) Harinarayan G. Bajaj vs. Shareddeal Financial Consultants Pvt. Ltd. and Anr. Arbitration Petition No.433/2002 decided by Bombay High Court on December 13, 2002;

(ii) AIR 2006 Delhi 365 Hindustan Petroleum Corporation vs. Ashok Kumar Garg;

(iii) AIR 2013 67 Full Bench National Highway Authority of India vs. Oriental Structure Engineers Ltd.-Gammon India Ltd.(JV);

(iv) Silor Associates SA vs. Bharat Heavy Electrical Ltd decided on July 1, 2014;

(v) (2014) DRJ 142 (DB) Bharat Heavy Electricals Ltd. vs. Silor Associates S.A;

(vi) M/s National Insurance Company Limited vs. M/s S.A. Enterprises decided on October 16, 2015.

10. On the other hand, Mr. Vikas Singh, learned Senior Counsel for the respondent would oppose the prayer in the petition. He by conceding to the fact, that there is no remedy challenging the order of the Tribunal directing the production of documents by referring to the judgment of the Supreme Court in ***SBP & Co. vs. Patel Engineering Ltd. and anr (2005) 8 SCC 618***, wherein in para 45, the Supreme Court has inter-alia held unless a right to appeal is provided under Section 37 of the Act, a party has to wait until the Award is passed, would submit, that the Tribunal, in the present case, has not considered the plea of the respondent on confidentiality including attorney-client privileged communication before directing production of the documents. He states, that there is a statutory protection available to the respondent from disclosing the documents in terms of Section 126 and 129 of the Indian Evidence Act. According to him, the words “according to its Rules on taking evidence”

in Section 27(3) of the Act would mean, this Court considering the request must consider the admissibility, relevance, materiality of the documents keeping in view, the aforesaid provisions of the Indian Evidence Act. He has taken me through various paragraphs of the orders passed by the Tribunal in support of his submission. He would also submit, that in any case, the request of the petitioner for production of documents is untenable as the termination letter dated May 7, 2014, which runs into several pages is a speaking one from which the reasons for termination can be deduced. In other words, it is not a case where the reasons are not forthcoming which resulted in the application for production of the documents. He would rely upon the following judgments in support of his submissions:-

(i) (2005) 8 SCC 618 SBP & Co. vs. Patel Engineering Ltd. and Anr.;

(ii) AIR 2007 Mad 73 M/s Ennore Port Ltd. vs. Hindustan Construction Co. Ltd.;

(iii) (1981) 2 SCC 121 Controller of Estate Duty, Lucknow vs. Alope Mitra;

(iv) (2014) 1 SCC 113 Delta Distilleries Limited vs. United Spirits Limited and Anr.;

(v) 2006 (91) DRJ 591 Hindustan Petroleum Corporation Ltd. vs. Ashok Kumar Garg;

(vi) (1981) 2 SCC 109 Superintendent And Remembrancer of Legal Affairs, West Bengal vs. Satyen Bhowmick and others;

(vii) 2012 SCC OnLine Del 1235 Council of the Institute of Chartered Accountants of India vs. Ajay Kumar Gupta;

(viii) (1981) 2 SCC 493 Khatri and others (IV) vs. State of Bihar and others;

(ix) Larsen & Toubro Limited vs. Prime Displays (P) Ltd, Abiz Business (P) Ltd. and Everest Media Ltd;

(x) (1978) 1 SCC 405 Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others;

11. Having heard the learned counsel for the parties, two questions arises for consideration, in this petition; (i) Whether the respondent can urge the plea of confidentiality/attorney-client privileged communication as a defence in these proceedings when there is an order of Tribunal, to give the documents, and such direction of Tribunal can be challenged only in a proceeding under Section 34 of the Act; (ii) Whether this Court, while executing the request of the Tribunal under Section 27 of the Act, can go into the question of admissibility, relevancy, materiality, confidentiality of the documents of whose production is sought for.

12. Before I answer the questions, I would deal with the judgments relied upon by the learned counsel for the parties. In ***Hindustan Petroleum Corporation (supra)***, this Court while considering the scope of Section 27 of the Act, has in para 10, held as under:-

“10. In my considered view, a reading of the aforesaid provision does show that while considering an

application under Section 27 of the said Act, the procedure to be followed by a court would be as prescribed under Order 16 of the said Code. However, possibly, in order to facilitate the exercise of power by the court and also so that the court is not inundated with unnecessary requests, a condition of prior approval of the arbitral tribunal is envisaged under Section 27 of the said Act. Learned senior counsel for petitioner in fact points out that in the UNCITRAL Model Law on International Commercial Arbitration, the relevant Article 27 only prescribes the court to execute the request. The said article reads as under: Court assistance in taking evidence--The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”

13. In ***AIDS Health Care Foundation India Cares (supra)***, this Court has in clear terms held that under Section 27(3) of the Act the Court’s assistance is for executing the request for recording of the evidence.

14. Similarly, in ***National Highway Authority of India (supra)***, this Court speaking through Full Bench, has held that the Act itself contemplates the recourse to be taken to the provisions of CPC in certain circumstances. In paras 10.2 and 10.3, the Full Bench held as under:-

“10.2 Likewise, under Section 27 where either the arbitral tribunal or the party, before the arbitral tribunal with its approval applies to the court for assistance in taking evidence, recourse can be taken to the provisions of the CPC, as would be evidence from the following.

10.3 Under sub-section (4), the court while making an order for provision of evidence under sub-section (3) is

empowered to issue the same processes as it may to witnesses before it in a suit being tried before the court. Upon failure of persons to attend in accordance with such processes being issued to them or committing a default or refusing to give evidence or even being guilty of contempt of the arbitral tribunal, they would be subject to such like disadvantages, penalties and punishments, which the court may impose by its order on a representation of the Arbitral Tribunal as it can do in suits being tried before it.”

15. In *Silor Associates SA (supra)*, this Court while considering a petition under Section 27 of the Act, wherein the Arbitral Tribunal had while observing that “*by way for applying to the Hon’ble Delhi High Court for its assistance in the production of the documents*”, granted liberty to the petitioner to place the said order, passed by it, before the Registrar General. I may state here, this Court in the said case, was primarily concerned with the procedure adopted by the Arbitral Tribunal as if the Arbitral Tribunal was not empowered on its own to direct a party to produce the documents. This Court held otherwise i.e that such a view is erroneous. For the purpose of this case, the following conclusion of the Court in paras 41 and 43 are relevant, which I reproduce as under:-

“41. Mr. Chandhiok, learned senior counsel appearing for the respondents has sought to assail the order passed by the arbitral tribunal insofar as the arbitral tribunal has sought the assistance of the court for production of the reply of the respondent, submitted to the Vigilance Department, about the queries raised by

the department in respect of payment. As noticed herein above, I am not hearing an appeal against the order passed by the arbitral tribunal on 20.07.2013, as the said order is not appealable. Insofar as the order passed by the arbitral tribunal on the aspect of relevance of the documents is concerned, a perusal of the same - on the face of it, does not call for interference in these proceedings under Section 27 of the Act. I, therefore, do not consider it necessary to deal with the submission of Mr. Chandhiok in this regard.

43. It shall be open to the respondents to raise the aspect of relevance of the documents, or the legality of the direction of the tribunal to produce the same, if eventually, an arbitral award is rendered against it and such an award is challenged by the respondent under Section 34 of the Act.”

16. In an appeal by BHEL, in para 3, Court had held as under:-

“3. Now, as per sub-Section (3), if a Court accepts the request received from the Arbitral Tribunal or from a party with the approval of the Arbitral Tribunal, for assistance to be provided in taking evidence, the Court is empowered to order the evidence to be provided directly to the Tribunal but according to its (the Courts) rules. The process would then be issued by the Court to witnesses in the same manner as the Court issues in suits tried before it.”

17. In paras 19 and 20, the Division Bench agreeing with the view of the learned Single Judge, has held as under:-

“19. We concur with the view taken by the learned Single Judge that the legality of the order passed by the Tribunal in so far it held on the relevancy of the documents and the effect of the Tribunal not deciding on the claim of privilege for one document as also its

power under Section 18 had to await an award being passed for the reason the Arbitration and Conciliation Act, 1996 does not contemplate any challenge to such an order save and except when the award is pronounced. The criticism of the impugned order that the learned Single Judge could not have set aside the order passed by the Tribunal in so far the Tribunal opined that assistance from the Court was necessary overlooks the fact that the learned Single Judge has not over-ruled any part of the order passed by the Tribunal. What has been held by the learned Single Judge is that the Tribunal has sought assistance from the Court on an erroneous belief of the law. Throwing light on the law, being the power of the Tribunal vested in it; to direct production of a document by a party in lis before it, the request made by the Tribunal has been politely turned down.

20. We dismiss the appeal clarifying as the learned Single Judge has done that the legality of the order passed by the Tribunal concerning relevance and the omission not to decide on the claim of privilege of one document could be challenged by BHEL should it be aggrieved, when the award is published.”

18. The Bombay High Court in *National Insurance Co. Ltd. (supra)*, has inter-alia held that the Court cannot go into the validity of the order of the Tribunal granting permission to a party seeking assistance of the Court. The aggrieved party can challenge the Award along with the order passed by the Tribunal granting permission.

19. On similar lines, is the judgment of the Bombay High Court in an earlier judgment in the case of *Harinarayan G. Bajaj (supra)*.

20. In *SBP and Co. (supra)*, the Supreme Court has in para 45 held as

under:-

“45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, is a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.”

21. Insofar as the judgment of this Court *in Hindustan Petroleum Corporation Ltd. (supra)*, Mr. Vikas Singh, had primarily relied upon to contend that the order of the Arbitrator should give reasons in support of its decision reached by the Arbitrator. There is no dispute on that proposition. Suffice to state, the Tribunal had considered the points raised by the respondent herein. It is not a case that where the Tribunal

did not dwell into the issue of confidentiality. The other judgments referred by my Mr. Singh relates to confidential, privilege documents and the documents, which are statutorily barred from being disclosed.

22. Insofar as the first question as framed above, it is clear from para 45 of *SBP Co. (supra)* as reiterated by the Division Bench of this Court in *BHEL (supra)* and the Bombay High Court in National *Insurance Corporation (supra)*, in the absence of a remedy, the respondent could only challenge the order of the Tribunal to give documents to the petitioner only at the stage of challenging the Award, if the same is against the respondent. The respondent, cannot indirectly challenge the direction of the Tribunal, which it could not have challenged directly in the absence of any remedy, that too, in a proceeding initiated by the petitioner under Section 27 of the Act. From the submissions made by Mr. Singh, as noted above, it is clear that they relate to the conclusion arrived at by the Tribunal, in its various orders.

23. No doubt, the Tribunal, in its order, has taken against respondent the aspect of the orders having attained finality. In the absence of a remedy, if there is no challenge, the same cannot be the fault of the respondent. Be that as it may, as noted above, the remedy to challenge the order of the Tribunal directing production of the documents would be, after the Award is passed and pleas with regard to validity of the

order of the Tribunal, are unsustainable in these proceedings.

24. For answering the second question, which is in the alternative, three Sections of the Act need to be noted, which are reproduced as under:-

5. *Extent of judicial intervention.*- *Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*

19. *Determination of rules of procedure.*- *(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.*

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

27. *Court assistance in taking evidence.*- *(1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.*

(2) The application shall specify----

(a) the names and addresses of the parties and the arbitrators.

(b) the general nature of the claim and the relief sought;

(c) the evidence to be obtained, in particular,----

(i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;
(ii) the description of an document to be produced or property to be inspected.

(3) The Court may, within its competence and according to its rules on taking evidence, execute the request or ordering that the evidence be provided directly to the arbitral tribunal.

(4) The Court may, while making or order under sub-section (3), issue the same processes to witnesses as it may issue in suits tried before it.

(5) Persons failing to attend in accordance with such process, or making any other fault, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.

(6) In this section the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

25. Section 5 specifically prohibits any judicial authority to intervene in the arbitration proceedings notwithstanding anything contained in any other law, for the time being in force in matters governed by part I of the Act, except to the extent, provided for in the Act. On perusal of Section 19(1), it is noted that the Tribunal shall not be bound by the Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. Section 19(2)

contemplates, the parties are free to agree on the procedure to be followed by the Tribunal. Section 19(3) stipulates, failing any agreement, the Tribunal may conduct the proceedings, in the manner it considers appropriate. Section 19(4) contemplates, the Tribunal to govern the admissibility, relevancy, materiality and weight of any evidence. Unlike 19(4), a perusal of Section 27 would reveal, it is enacted for the Court's assistance in taking evidence. There is nothing in Section 27, where the Court can determine the admissibility, relevancy, materiality and weight of any evidence. The only requirement for the Court is to ensure that it is within its competence and according to its Rules on taking evidence. The nature of power exercised is to execute the request as the Tribunal on its own cannot do it, in view of the inapplicability of the provisions of the Code of Civil Procedure, 1908. Such a request presupposes a direction of the Tribunal to produce the documents, which has not been complied with.

26. Further, the competence of a Court is not the same as determining the admissibility, relevancy, materiality and weight of any evidence, otherwise Section 27 would have said so. The words 'according to its Rules' have been held to mean issuance of process to witness in the same manner as the Court issues in suits, tried before it.

27. The submission of Mr. Singh that the judgment of this Court in

Silor (supra), *BHEL (supra)* and *National Insurance Corporation (supra)*, would not be applicable as they do not relate to documents having statutory protection is not appealing. The judgments primarily relate to the scope of Section 27 of the Act, with which, we are concerned here. I have already held, in exercise of power under Section 27, this Court cannot determine the admissibility, relevancy, materiality and weight of any evidence. There is another reasoning to it, that if the argument of Mr. Singh is to be accepted the Court is primarily interfering with the proceedings of the Tribunal, which is impermissible, except in certain circumstances laid down in the Act.

28. I reproduce hereunder, the following paragraphs of the judgment of the Bombay High Court in *National Insurance Company Limited (supra)*, for benefit.

“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.”

29. Insofar as the judgment of the Supreme Court in ***Delta Distilleries Limited (supra)*** is concerned, in the said case, the Supreme Court has held that ‘any person’ appearing under Section 27(2)(c) is wide enough to cover not merely the witnesses, but also the parties to the proceeding.

30. The other judgments relied upon by Mr. Vikas Singh, relate to confidentiality/privileged documents, which in view of my aforesaid conclusion may not be necessary to be gone into.

31. Accordingly, the petition is allowed. The respondent is directed to produce the documents as allowed by the Tribunal vide its order dated September 21, 2015 and March 6, 2016 before the Tribunal as detailed in para 34 of the petition. No costs.

(V.KAMESWAR RAO)
JUDGE

MARCH 28, 2016
ak