

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
ARBITRATION PETITION NO. 332 OF 2018

1. Stemcor (S.E.A.) Pte Limited,)
a corporation duly organized and validly)
existing under the laws of Singapore)
(with Company Registration Number)
198801606R), having its registered office)
at 541 Orchard Road, # 17-02 Liat Towers)
Singapore 238881)

2. Moorgate Industries India Pvt.Ltd.)
(erstwhile Stemcor India Pvt.Ltd.),)
a company registered under the Companies)
Act, 1956, having its registered office at)
C21, C Wing, Mittal Towers, Nariman)
Point, Mumbai – 400021)

..... Petitioners

VERSUS

1. Mideast Integrated Steels Limited,)
a company incorporated and registered)
according to the provisions of the Companies)
Act, 1956 having its registered office at)
H-1, Zamrudpur Community Centre,)
Kailash Colony, New Delhi – 110048,)
CIN L74899DL1992PLC050216)

2. MESCO Hotels Limited,)
a company incorporated and registered)
according to the provisions of the Companies)
Act, 1956 having its registered office at)
D12, Neb Sarai, Freedom Fighters Enclave)
New Delhi – 110068,)
CIN U55101DL1986PLC025133)

3. MESCO Kalinga Steels Limited,)

**a company incorporated and registered)
 according to the provisions of the Companies)
 Act, 1956 having its registered office)
 3915, Lewis Road, Mesco Tower,)
 Kedar Gauri Square, Bhubaneswar)
 751002, Odisha,)
 CIN U36104OR1994PLC003616)**

**4. MESCO Logistics Limited,)
 a company incorporated and registered)
 according to the provisions of the Companies)
 Act, 1956 having its registered office at)
 3915, Lewis Road, Mesco Tower,)
 Kedar Gauri Square, Bhubaneswar)
 751002, Odisha,)
 CIN U60210OR1995PLC004126)**

..... Respondents

Mr.Rohit Kapadia, Senior Advocate, a/w. Mr.Chirag Kamdar, Mr.Mohit Advani, Ms.Pranjal Mehta, i/b. Cyril Amarchand Mangaldas for the Petitioners.

Mr.G.R.Joshi, Senior Advocate, a/w. Mr.Chirag Mody, Ms.Anusha Jacob, Mr.Yash Momaya, i/b. DSK Legal for the Respondents.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 2nd MAY, 2018

PRONOUNCED ON : 8th JUNE, 2018

JUDGMENT :

By this petition filed under section 27 of the Arbitration and Conciliation Act, 1996 (for short the Arbitration Act), the petitioners have prayed for issuance of a commission to Singapore to record the evidence of Mr.Gerard Craggs on dates that may be mutually convenient to all the parties and to direct that such recorded evidence be returned to the learned arbitral tribunal comprising Mr.Fredun E. De Vitre. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioners are the original respondents whereas the respondents are the original claimants in the arbitral proceedings. The petitioner no.1 is incorporated under the Laws of Singapore and is having its registered office at Singapore. The respondent no.1 is incorporated and registered under the Companies Act, 1956 and its registered office is at New Delhi.

3. Sometime in the year 2004, the petitioners and the respondents entered into a number of agreements and the arrangements on the terms and conditions recorded in those agreements. A dispute arose between the parties pursuant to which the respondents initiated the arbitration proceedings against the petitioners.

4. On 14th June, 2016, the parties filed consent minutes of the order in Commercial Arbitration Petition (L) No.7 of 2016 which was filed by the respondents herein against the petitioners *inter alia* praying for appointment of an arbitrator. Both the parties agreed that all disputes, differences and claims that may have arisen and that may arise between the parties arising out of various agreements entered into between the parties referred to in the said consent minutes of order will be referred to the sole arbitrator named therein in accordance with the provisions of the Arbitration and Conciliation Act, 1996 as amended from time to time. Those disputes between the parties are pending before the learned sole arbitrator Mr. Fredun E. De Vitre, a senior counsel of this court. Clause 3 of the said agreed consent terms provided as under :-

3. The said Agreements are/shall be governed by the laws of India. The seat and venue of the arbitration shall be Mumbai. The courts at Mumbai shall have exclusive

jurisdiction in relation to the arbitration.

5. It was further recorded in the said consent minutes of the order that the said clause 3 shall also be in supersession/amendment of Clause 23 of the Advance Payment and Supply Agreement dated 11th January,2007 and clause 17 of the Fee Letter dated 11th January,2007. Pursuant to the directions issued by the learned arbitrator, the respondents filed their statement of claim along with documents. The petitioners filed their written statement and counter claim along with documents.

6. The respondents examined four witnesses including Mr.Mathew Stock. The examination in chief of the said Mr. Mathew Stock was recorded orally whereas the other three witnesses examined by the respondents had filed their affidavit in lieu of examination in chief in the arbitral proceedings. The petitioners proposed to examine two witnesses i.e. (1) Mr.Aditeshwar Dayal Seth and (2) Mr.Gerard Craggs. The cross examination of Mr.Gerard Craggs however remained to be completed. Mr.Gerard Craggs was the managing director of the petitioner no.1 and is a resident of Singapore and carries on business at Singapore. It is the case of the petitioners that the said Mr.Gerard Craggs is the only witness leading evidence on behalf of the 1st petitioner.

7. On 20th March,2017, the respondents herein filed an application before the learned arbitrator seeking leave of the learned arbitrator to file an affidavit on behalf of an additional witness, Mr.Vineet Mehra in lieu of examination in chief. The respondents also made a separate application before the learned arbitrator seeking approval for making an application before this court for issuance of the witness summons under section 27 of the Arbitration Act to

summon Mr.Mathew Stock to depose as a witness on behalf of the respondents. The said application was opposed by the petitioners on various grounds.

8. On 4th April, 2017 the learned arbitrator passed an order holding that he did not at that point of time see any justification for granting an approval to make an application to court for issuance of a summons under section 27 to Mr.Mathew Stock. It was however clarified that in the event that the respondents herein were unable to obtain the affidavit, despite there being no objection, the learned arbitrator grants liberty to the respondents herein to make an appropriate fresh application before him including the approval under section 27 of the Arbitration Act and if any such application would be made by the respondents, the same would be decided on its own merits.

9. The respondents were unable to obtain an affidavit from Mr.Mathew Stock despite the order of the learned arbitrator passed on 4th April, 2017. The respondents therefore filed second application on 19th April, 2017 pursuant to the liberty granted by the learned arbitrator for seeking his approval for making an application before this court for an issuance of witness summons under section 27 of the Arbitration Act upon the said Mr.Mathew Stock. The said application was opposed by the petitioners on various grounds.

10. On 5th May,2017 the respondents made an application for seeking amendment to the application dated 19th April,2017 *inter alia* praying for the appointment of commission/issuance of a letter of request to examine Mr.Mathew Stock, the witness proposed to be examined by the respondents. The petitioners opposed the said application for amendment filed by the respondents. On 8th July,2017, the learned arbitrator provided the said Mr.Mathew Stock an

opportunity to depose before the learned arbitrator in Mumbai by dispensing with the agreed procedural requirement to file an affidavit of evidence. The learned arbitrator in the alternative also granted permission/approval to the respondents to approach this court for appointment of a commission to examine Mr.Mathew Stock under section 27 of the Arbitration Act.

11. On 21st December,2017, the petitioners sent an e-mail to the respondents seeking their assent for recording the evidence of Mr.Gerard Craggs by a video conferencing. The respondents vide their e-mail dated 22nd November,2017 refused to accept the request of the petitioners for recording of Mr.Gerard Craggs by video conference.

12. On 24th November,2017, the petitioners made an application before the learned arbitrator under section 19 of the Arbitration Act seeking recording of Mr.Gerard Craggs' evidence by way of video conferencing in Singapore. On 28th November,2017, the respondents opposed the said application filed by the petitioners under section 19 of the Arbitration Act.

13. On 24th December,2017, the learned arbitrator disposed of the application filed by the petitioners under section 19 of the Arbitration Act and directed that in the event of Mr.Gerard Craggs' unavailability to travel to Mumbai for recording his cross examination, it would be conducted in Singapore at petitioners' cost.

14. On 3rd January,2018, the respondents filed an application seeking recall and/or revocation of the order dated 24th December,2017 passed by the learned arbitrator on the ground that the direction for a change of venue was

contrary to the consent terms agreed to between the parties on 14th June,2016 filed before this court while constituting the arbitral tribunal. The said application filed by the respondents was opposed by the petitioners by reply dated 5th January,2018. On 13th January,2018, the learned arbitrator allowed the application dated 3rd January,2018 filed by the respondents *inter alia* directing that Mr.Gerard Craggs to remain present in Mumbai from 29th January,2018 to 31st January,2018 for his cross examination.

15. On 22nd January,2018, the respondents filed an application before the learned arbitrator *inter alia* praying for closing of the evidence of the petitioner no.1 and disregarding of the affidavit of evidence filed by Mr.Gerard Craggs. On 23rd January,2018, the petitioners filed an application before the learned arbitrator *inter alia* praying for recalling of the order dated 13th January,2018 passed by the learned arbitrator and seeking permission to record the evidence of Mr.Gerard Craggs by way of video conferencing or in the alternative to grant leave to the petitioners to apply for assistance of this court under section 27 of the Arbitration Act by issuing commission to record the evidence of Mr.Gerard Craggs. The said application filed by the petitioners was opposed by the respondents. Both the parties also filed their written submissions before the arbitral tribunal and placed reliance on various judgments.

16. On 23rd February,2018, the learned arbitrator passed an order thereby rejecting the application dated 22nd January,2018 filed by the respondents *inter alia* praying for closure of evidence and granting leave to the petitioners to approach this court for assistance under section 27 of the Arbitration Act for the issuance of the commission to record the evidence of Mr.Gerard Craggs. The petitioners have thus filed this arbitration petition for seeking assistance of this

court under section 27 of the Arbitration Act.

17. Mr.Kapadia, learned senior counsel for the petitioners tendered compilation of documents and invited my attention to various exhibits to the arbitration petition as well as the pleadings and documents annexed to the original compilation of the documents filed by the petitioners. He also invited my attention to some portion of the pleadings annexed to the compilation of documents filed by the respondents.

18. Learned senior counsel for the petitioners made following submissions for consideration of this court :-

(a) The learned arbitrator had granted similar permission in favour of the respondents *inter alia* praying for permission to approach this court for taking assistance of this court and for the appointment of the commission to examine Mr.Mathew Stock who was a resident of another country and was unable to visit India for the purpose of recording evidence before the arbitral tribunal. The learned arbitrator had approved issuance of the commission in favour of the respondents herein to examine a witness outside India on the condition that the entire cost of the commission, if ordered, to be borne by the respondents herein alone.

(b) Even if the said Mr.Mathew Stock ultimately visited India for the purpose of recording his evidence, the fact remains that the respondents themselves had applied for permission of the learned arbitrator to grant permission to

approach this court to take assistance of this court for appointment of the commission to examine their witness outside India. The respondents thus cannot be allowed to oppose the similar application made by the petitioners for the issuance of the commission to record evidence of a witness in Singapore. The issuance of a commission to Singapore cannot amount to the change of the venue of the arbitration or cannot be contrary to the consent order dated 14th June, 2016 passed by this court wherein the venue was agreed at Mumbai. The respondents themselves had understood that the appointment of a commission for recording of evidence outside Mumbai or outside India would not change venue of the arbitration.

(c) Filing of such application by the respondents for seeking the permission of the arbitral tribunal to approach this court for assistance of this court under section 27 of the Arbitration Act for the purpose of appointment of commission outside India amounted to waiver on the part of the respondents with regard to the venue recorded in the order dated 14th June, 2016 passed by this court. The respondents thus cannot be allowed to oppose similar application filed by the petitioners on the ground that the order passed by the arbitral tribunal would amount to change of the agreed venue of the arbitration and would be contrary to the consent order dated 14th June, 2016.

(d) Reliance is placed on section 20(3) of the Arbitration

Act in support of the submission that the learned arbitrator is empowered to meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property, notwithstanding sub-section 1 of section 20 unless otherwise agreed by the parties. Section 20(3) is very wide and for the purpose described in the said provision if the learned arbitrator meets outside the agreed venue, it would not amount to change of venue. The recording of evidence of a witness outside the place of venue of the arbitration would not change the venue.

(e) Learned senior counsel placed reliance on the judgment of this court in case of ***Vithaldas Damodar vs. Lakhmidas Harjiwan and another, (1942) Indian Law Reports, 680*** and in particular pages 681 to 683 in support of the submission that even if the commission is appointed for the purpose of recording evidence of the witness proposed to be examined by the petitioners in Singapore, the court commissioner would have no authority to reject any evidence. Only after such evidence is recorded by the court commissioner, such evidence would be tendered before the arbitral tribunal and at that stage, the same would be tendered as evidence. The question of admissibility and relevancy can be considered at that stage.

(f) Learned senior counsel placed reliance on the judgment of this court in case of ***Montana Developers Private Limited***

vs. Aditya Developers and Ors., 2017(3) Bom.C.R.236 and in particular paragraphs 15 to 23 and also judgment of this court in case of ***M/s. National Insurance Company Limited vs. M/s.S.A.Enterprises, 2015 SCC OnLine Bom 5063*** and in particular paragraphs 33 to 44 and also on the judgment of Delhi High Court in case of ***International Planned Parenthood Federation (IPPF) vs. Madhu Bala Nath*** delivered on 7th January,2016 in FAO(OS)416/2015.

(g) Learned senior counsel for the petitioners placed reliance on Order XXVI Rules 7 and 8 of the Code of Civil Procedure, 1908 (CPC) and submits that the commissioner as may be appointed by this Court for the purpose of recording evidence of witness in Singapore would be an agent of the Court for recording evidence. As and when such evidence would be tendered in Mumbai, it would be before the learned arbitrator having venue at Mumbai. He invited my attention to the order passed by the learned arbitrator on 23rd February 2018 recalling the earlier order dated 24th December 2017 on the application made by the respondents. In international arbitration, parties may be in different countries of a video conference can be permitted, then appointment of commission for the purpose of recording evidence of witness outside India also can be permitted. Reliance is also placed on Sub Rule 4 of Rule 4 of Order XVIII of Code of Civil Procedure.

(h) It is the power of the Court or the arbitrator, as the case may be, to note the demeanour of any witness while under examination. Evidence recorded abroad is not a part of the evidence but is tendered before the learned arbitrator at the venue of arbitration. In the interest of justice, under proviso to Sub Rule 4 of Rule 4 of Order XVIII and under the provision of Sub Rules 4 and 4A of Rule 3 of Order XXVI of the Code of Civil Procedure, 1908 the commission shall be issued by this Court for the purpose of recording evidence of the witness of the petitioners at his place of residence in Singapore. It is submitted that since the witness is not a resident of this country, this Court may issue a Letter of Request. Reliance is also placed on Rule 8 of Order XXVI in support of his submission that oral evidence recorded on commission would be read in evidence only when the same is tendered before the learned arbitrator in Mumbai. Section 20(3) and 27 of the Arbitration and Conciliation Act, 1996 have to be read harmoniously.

(i) If this Court appoints commission, no prejudice would be caused to the respondents. The learned arbitrator has observed that the evidence of the said witness proposed to be examined by the petitioners would be relevant and his evidence cannot be eliminated. The said witness would be the main witness on behalf of the petitioners. The petitioners are agreeable to bear the costs of the commission for recording evidence of the said main witness of the petitioners

in Singapore including the expenses on accommodation, pay extra luggage charges, transportation etc. required to be paid for recording such commission, if any, incurred by the respondents.

19. Mr.Joshi, learned senior counsel for the respondents, on the other hand, submits as under :-

(a) Reliance is placed on the Consent Minutes of Order dated 14th June 2016 passed by this Court in Commercial Arbitration Petition (L) No.7 of 2016 in support of the submission that admittedly both the parties had agreed that seat and venue of arbitration would be at Mumbai. If this Court appoints commission for recording evidence outside the agreed venue, it would amount to change of venue which is not permissible without consent of both the parties is obtained. The respondents are not agreeable to give any consent for change of venue from Mumbai to Singapore. The said arbitration agreement is binding on the parties. This Court cannot overlook the said agreement.

(b) My attention is invited to various paragraphs of the order passed by the learned arbitrator granting permission to the petitioners to seek assistance of this Court under Section 27 of the Arbitration and Conciliation Act, 1996 and would submit that the learned arbitrator himself has rendered a finding that the reasons given by the petitioners for

appointment of commission for recording evidence of witness in Singapore were not convincing. The learned arbitrator having taken such view ought not to have granted liberty to the petitioners to seek assistance of this Court under Section 27 of the Arbitration and Conciliation Act, 1996.

(c) Powers of the Court under Section 27 are adjudicatory and are discretionary. The petitioners have not made out any case for exercising such discretion. The said witness proposed to be examined had at one point of time had agreed to visit Mumbai for the purpose of recording evidence and on that ground had obtained adjournment from the learned arbitrator. The petitioners thus cannot be allowed to seek assistance of this Court for appointment of commission for the purpose of recording evidence of such witness in Singapore. The learned arbitrator has already held that the alleged apprehension of the said witness that if he visits Mumbai for the purpose of recording evidence, he may be arrested, had no merit.

(d) My attention is invited to Section 20 (1) and 20(3) of the Arbitration and Conciliation Act, 1996 in support of the submission that in this case, admittedly the parties had agreed that seat and venue of arbitration would be Mumbai and the learned arbitrator can decide the seat and venue only if there is no agreement between the parties about such seat and venue of the arbitration. The learned arbitrator has no

discretion to change the seat or venue without consent of the parties. Powers under Section 20(3) are also subject to the agreement of the parties. The learned arbitrator is the creature of an agreement between the parties. Reliance is placed on Section 19 (2) of the Arbitration and Conciliation Act, 1996 in support of the submission that the learned arbitrator is bound to act in accordance with the agreed procedure between the parties.

(e) Reliance is placed on the judgment of the Supreme Court in the case of ***Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited and Ors. (2017) 7 SCC 678*** and in particular paragraphs 10 and 16 to 19 thereof.

(f) Since the seat and venue of the arbitration in this case is admittedly in India, Part-I of the Arbitration and Conciliation Act, 1996 would apply. Learned senior counsel did not dispute that Section 27 of the Arbitration Act is applicable for the purpose of seeking assistance of the Court for appointment of the commission for recording evidence of witness abroad. He however submits that instead of the petitioners compelling the respondents to visit Singapore for the purpose of recording evidence of a witness, it would be more convenient if such witness to be brought to the venue of arbitration in Mumbai for the purpose of recording evidence.

(g) Reliance is placed on Sections 75 to 78 of the Code of Civil Procedure, 1908 which provides for powers of the Court to issue commission. Even those powers of Court under Sub Rules 1, 4 and 4A of Order XXVI of the Code of Civil Procedure, 1908 are discretionary powers. This Court cannot issue a commission to the parties directly. Requisite procedure is required to be followed even by the Court under the provisions of the Code of Civil Procedure, 1908 read with Section 27 of the Arbitration and Conciliation Act, 1996. Reliance is also placed on Rules 6 to 8 of Order XXVI of the Code of Civil Procedure, 1908.

(h) In his alternative submission, it is submitted that under Rules 3 and 5 of Order XXVI of the Code of Civil Procedure, 1908, law of country in which commission has to be executed will apply to the parties. Reliance is placed on Order 66 of the Rules of Court, Supreme Court of Judicature Act, Singapore which provides the procedure for obtaining evidence for foreign Court etc. An application for appointment of commission has to be filed before the High Court at Singapore and must be made ex parte by a person duly authorised to make an application for appointment of commission or a request can be made by Attorney General of Singapore before the concerned Court for appointment of commission.

(i) My attention is invited to paragraph 8 of the order dated 24th December 2017 passed by the learned arbitrator recording reasons given by the petitioners that the said witness was too busy to attend the present proceedings in India. He submits that on such ground, the petitioners could not have applied for appointment of commission for recording evidence in Singapore. He strongly placed reliance on various observations made by the learned arbitrator about the conduct of the petitioners in delaying the arbitral proceedings in the earlier application made by the petitioners for recording evidence on video conferencing.

(j) The said witness had agreed to come to India in the month of September 2017. The petitioners had thereafter made an application for cancellation of meetings on the ground that the said witness was not available for next few months. If the said witness who is the Managing Director of the petitioners refuses to attend the proceedings in India on frivolous grounds, this Court cannot use its discretionary power to appoint commission for the purpose of recording such evidence in Singapore. The procedure suggested by the petitioners is cumbersome, expensive and not warranted for any reasonable ground. Since the appointment of commission is not permitted in law in these circumstances, this Court cannot exercise discretion under Section 27 of the Arbitration and Conciliation Act, 1996.

(k) It is submitted that what cannot be done directly, cannot be done indirectly. There is express bar recorded in the 'agreed consent terms' from meeting outside the venue and seat of arbitration. Even if the learned arbitrator appointed by the parties in this case is appointed as commissioner, it would be change of agreed venue and seat of arbitration.

(l) Learned senior counsel for the respondents distinguishes the judgment delivered by this Court in the case of ***National Insurance Company Ltd. Vs. M/s. S.A. Enterprises (supra) and Montana Developers Pvt. Ltd., Mumbai Vs. Aditya Developers, Mumbai and Ors. (supra)*** on the ground that in this case, the learned arbitrator has categorically rendered a finding that basis of application made by the petitioners for appointment of commission was baseless. This Court in the aforesaid two judgments was dealing with a plea for summoning of witness and not for appointment of commission. Section 5 of the Arbitration and Conciliation Act, 1996 would not be attracted in the facts of this case. The judgment of this Court in the aforesaid two judgments requires reconsideration.

(m) Reliance is placed on the judgment of the Supreme Court in the case of ***Bachahan Devi and Anr. Vs. Nagar Nigam, Gorakhpur and Anr., (2008) 12 SCC 372*** and in

particular paragraphs 8 and 13 to 21 in support of his submission that the word “may” shall be construed as “may” in this case and not “shall”. The exercise of discretionary power in this case for appointment of commission would amount to change of venue. Reliance is placed on the judgment of the Madras High Court in the case of ***M/s.Ennore Port Ltd. Vs. Hindustan Construction Co. Ltd., AIR 2007 Mad 73*** and in particular paragraphs 18 to 22, 27, 28 and 33 in support of the submission that since no case is made out by the petitioners for exercise of discretionary power of Court in this case, this Court shall not appoint commission.

(n) Learned senior counsel distinguishes the judgment of this Court in the case of ***Vithaldas Damodar Vs. Lakhmidas Harjiwan & Anr. (supra)*** in support of the submission that the said judgment was delivered by this Court considering the practice of this Court in recording evidence on commission and not the provisions of Rules 7 and 8 of Order XXVI of the Code of Civil Procedure, 1908. The facts in the said judgment are different than the facts of this case. Reliance is also placed on Section 24 of the Arbitration and Conciliation Act, 1996.

(o) Learned senior counsel distinguishes the judgment of the Supreme Court in the case of ***International Planned Parenthood Federation (IPPF) Vs. Madhu Bala Nath,***

delivered on 7th January 2016 in FAO (OS) No.416 of 2015 on the ground that the facts in the said judgment are totally different. Merely because the said witness claims to be a busy professional, the same cannot be a ground for appointment of commission. The learned arbitrator himself has rejected the prayer for recording of evidence by video conference on this ground earlier and thus the question of granting permission to the petitioners to seek assistance of this Court for appointment of commission was totally unwarranted. All contingencies provided in Section 27 of the Arbitration and Conciliation Act, 1996 have to be considered by this Court while exercising discretionary power under Section 27 of the Arbitration and Conciliation Act, 1996.

20. Mr. Kapadia, learned senior counsel for the petitioners in rejoinder submits as under :-

(a) The question as to whether the witness of the respondents whose application for appointment of commission for recording evidence abroad was allowed by the learned arbitrator, earlier had not taken any advantage of the said order but had made himself available for recording of evidence at the seat or venue of arbitration or not is not relevant to ascertain whether the respondents can be said to have waived their right to raise an objection of change of venue when the learned arbitrator granting similar permission to the petitioners to seek assistance of this Court

under Section 27 of the Arbitration and Conciliation Act, 1996 on the similar ground. The respondents cannot be allowed to blow hot and cold at the same time.

(b) The respondents have already waived their right to raise an objection about alleged change of venue by appointment of commission for recording evidence of witness of the petitioners in Singapore. Section 20(3) of the Arbitration Act requires a clear waiver. In this case, the respondents themselves have applied for appointment of commission of their witness outside India which amounted to clear waiver in so far the venue of arbitration is concerned. This agreement is without prejudice to the submission that recording of evidence on commission outside Mumbai would not amount to change of venue.

(c) Learned senior counsel placed reliance on Section 20(3) of the Arbitration Act and would submit that if the argument of the respondents is accepted that mere appointment of commission for the purpose of recording evidence of witness outside Mumbai would amount to change of venue, it would be contrary to Section 20(3) of the Arbitration Act which provides that the learned arbitrator may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property notwithstanding sub-section (1) or sub-section (2) of

Section 20 of the Arbitration Act unless otherwise agreed by the parties. Blanket consent in such situation cannot be held good. In case of more than one arbitrator, the learned arbitrator can meet at the places of one or other members of the tribunal at the place of the respondents or office of such members for the purpose of consultation or for other purposes set out in the said sub-section (3) of Section 20 of the Arbitration Act.

(d) The learned arbitrator had issued both the directions i.e. either the witness proposed to be examined by the petitioners can come to the venue of arbitration or in the alternate for issuance of commission. Reliance is also placed on sub-rule 2 of Rule 4 of Order XVIII of the Code of Civil Procedure, 1908 and Rules 174 and 175 of the Bombay High Court (Original Side) Rules which permits the appointment of commissioner from the panel of this Court. The petitioners have no objection if the learned arbitrator himself is appointed as commissioner for the purpose of recording evidence of witness of the petitioners in Singapore.

(e) The respondents cannot be allowed to raise objection in respect of the validity of the order passed by the learned arbitrator permitting the petitioners to seek assistance of this Court under Section 27 of the Arbitration Act while opposing this petition filed by the petitioners for seeking such assistance. Learned senior counsel once again vehemently

placed reliance on the judgment of this Court in the case of ***National Insurance Company Ltd. Vs. M/s. S.A. Enterprises (supra) and Montana Developers Pvt. Ltd., Mumbai Vs. Aditya Developers, Mumbai and Ors. (supra).***

(f) It is lastly submitted that if this Court comes to the conclusion that this Court cannot appoint commission directly under Section 27 of the Arbitration Act, a Letter of Request can be issued to appropriate Court in Singapore to appoint commission for the purpose of recording evidence of witness of the petitioners. The petitioners are ready and willing to bear all necessary costs on transportation, accommodation etc. of the respondents and their advocates also.

21. Mr. Joshi, learned senior counsel placed reliance on the judgment of the Delhi High Court in the case of ***Susan Leigh Beer Vs. India Tourism Development Corporation Ltd., 1990 SCC OnLine Del 66*** and in particular paragraph 10 thereof and would submit without prejudice to his rights and contentions that commission cannot be appointed by this Court, a Letter of Request will have to be issued by this Court to the appropriate Court in Singapore in accordance with the Rules of Court, Supreme Court of Judicature Act, Singapore.

REASONS AND CONCLUSIONS :-

22. This Court shall first decide the issue as to whether the respondents themselves having made an application for appointment of Commission/issuance

of Letter of Request examined Mr.Mathew Stock as a witness and having obtained an order from the learned arbitrator to approach this Court for appointment of Commission to examine the said witness under Section 27 of the Arbitration and Conciliation Act, 1996 can be allowed to raise an objection about maintainability of similar application made by the petitioners for appointment of Commission to examine for recoding of evidence of Mr.Gerard Craggs or not and whether it would amount to waiver on the part of the respondents in raising any objection to the similar application made by the petitioners or not.

23. It is not in dispute that pursuant to the application made by the respondents before the learned arbitrator to summon Mr.Mathew Stock to depose as a witness on behalf of the respondents, the learned arbitrator passed an order dated 4th April 2017 holding that he did not at that point of time see any justification for granting an approval to make an application to Court for issuance of summons under Section 27 of the Arbitration Act to Mr.Mathew Stock. The learned arbitrator however clarified that in that event the respondents herein were unable to obtain the affidavit of the said Mr.Mathew Stock despite there being no objection, the respondents were at liberty to make an appropriate fresh application before the learned arbitrator including for permission to apply under Section 27 of the Arbitration Act.

24. It is not in dispute that the respondents were unable to obtain an affidavit from Mr.Mathew Stock despite the order of the learned arbitrator passed on 4th April 2017. The respondents therefore filed a second application on 19th April 2017, pursuant to the liberty granted by the learned arbitrator for seeking his approval for making an application before this Court for an issuance of

witness summons upon Mr.Mathew Stock under Section 27 of the Arbitration Act. The respondents made an application for seeking amendment to the application dated 19th April 2017 inter alia praying for appointment of Commission/issuance of Letter of Request to examine the said witness proposed to be examined by the respondents.

25. It is not in dispute that the learned arbitrator passed an order on the said application on 8th July 2017 granting an opportunity to the said Mr.Mathew Stock to depose before the learned arbitrator in Mumbai by dispensing with the agreed procedural requirement to file an affidavit of evidence. The learned arbitrator in the alternate also granted permission/approval to the respondents to approach this Court for appointment of Commission to examine the said witness under Section 27 of the Arbitration Act.

26. It is not in dispute that inspite of such liberty granted by the learned arbitrator to the respondents to apply for assistance of this Court under Section 27 of the Arbitration Act for issuance of witness summons upon the said Mr. Mathew Stock or for appointment of Commission to examine the said witness, the said Mr.Mathew Stock ultimately appeared before the learned arbitrator. The fact remains that the respondents themselves had applied for issuance of witness summons and/or appointment of Commission and/or issuance of Letter of Request to examine Mr.Mathew Stock, a witness proposed to be examined by the respondents abroad. Inspite of the objection raised by the petitioners, learned arbitrator granted such opportunity to the respondents on various grounds.

27. A perusal of the application dated 5th May 2017 filed by the respondents before the learned arbitrator for amendment to the application

seeking approval of the learned arbitrator for making an application before this Court under Section 27 of the Arbitration Act clearly indicates that the said application was made on the ground that this Court would have power and jurisdiction to issue witness summons to Mr. Mathew Stock who is not the resident of India. In the alternative and without prejudice, it was also contended by the respondents that as per Section 27 of the Arbitration Act, this Court would have power to appoint Commission or issue Letter of Request as provided in the Order XXVI Rule 5 read with Section 77 of the Code of Civil Procedure, 1908 to ensure the presence of Mr. Mathew Stock or to record his evidence which is utmost crucial in the matter for arriving at the truth and the real dispute between the parties. In paragraph 4 of the said application, it was averred that apart from the issuance of witness summons to Mr. Mathew Stock, the only other manner to ensure the presence of Mr. Mathew Stock was to appoint a commission for recording the evidence of Mr. Mathew Stock in the arbitral proceedings. The respondents have accordingly applied for amendment to the earlier application in order to include the prayer for appointment of Commission to record the evidence of Mr. Mathew Stock in the present arbitral proceedings under various provisions of law.

28. A perusal of the order dated 8th July 2017 passed by the said learned arbitrator on the application made by the respondents clearly indicates that the learned arbitrator had considered the email dated 15th April 2017 from Mr. Mathew Stock stating that he continued to be apprehensive regarding the filing of his affidavit in the light of the numerous letters and emails, he had received from the petitioners and various conversations, he had with the petitioners/Moorgate's senior management in that regard. The said Mr. Mathew Stock had also expressed his concern that the petitioner no.1 may take action

against him which although he felt would be incorrect and unjustified, would be a considerable inconvenience for him, both in terms of time and cost. The respondents herein had urged before the learned arbitrator that the witness summons can be issued by a Court in India to a foreigner resident abroad and had objected to the contentions of the petitioners herein that an Indian Court has no extra-territorial jurisdiction in that regard.

29. The respondents had urged in the alternative that even if the Court in India has no jurisdiction to issue summons to a foreigner resident outside India, nevertheless, the Court in India can order recording of evidence on Commission by issuing an appropriate process under Sections 75 and 77 of Order XXVI of the Civil Procedure Code, 1908. After considering the arguments of both the parties, the learned arbitrator held that the evidence of Mr. Mathew Stock would be relevant. Ordinarily, therefore the arbitrator would assist the party in obtaining such evidence through available legal means, unless there were compelling circumstances which negated such a course.

30. It is held that the witness was a foreigner not resident in India. A Court in India has no power to issue a witness summons to a person not resident in India. The Court in India has no extra-territorial jurisdiction and would not be in a position to enforce its order or punish the addressee of the summons, if it were disobeyed. Learned arbitrator held that proviso to Section 2(2) of the Arbitration Act empowers a Court in India to act under Section 27 of the Arbitration Act in respect of a person resident within its jurisdiction, in an international commercial arbitration sited abroad.

31. In so far as the request for issuance of Commission by Letter of Request made by the respondents is concerned, the learned arbitrator held that the learned arbitrator has a discretion to issue Commission to record the evidence of persons who are resident abroad but unable to be personally present in India to record their evidence. In paragraph 38 of the said order, the learned arbitrator has rendered a finding that Mr.Mathew Stock was willing to give evidence before the learned arbitrator but had declined to make an affidavit of evidence, voicing his apprehensions and concerns regarding likely actions by the respondents against him if he was to file his affidavit of evidence. The learned arbitrator has considered the case of the said witness i.e. Mr.Mathew Stock that he continued to remain apprehensive regarding the filing of his affidavit of evidence on behalf of the claimants. The learned arbitrator has accordingly held that the overriding consideration must be that a party should not be denied an opportunity to lead relevant evidence.

32. It is held that if a proposed witness is recalcitrant or not reasonable, the party proposing to lead his evidence should ordinarily be granted Court assistance in obtaining such relevant evidence. The learned arbitrator accordingly permitted the respondents herein to lead evidence of Mr.Mathew Stock as a witness deposing on their behalf, attending before the learned arbitrator and to record his examination-in-chief without filing his affidavit in lieu of examination-in-chief. In the said order, it was made clear that if Mr.Mathew Stock should refuse in writing to appear before the learned arbitrator to record his evidence on behalf of the respondents herein inspite of the directions issued by the learned arbitrator, the learned arbitrator grants approval to the respondents herein to make an application to this Court under Section 27 of

the Arbitration Act to record his evidence on Commission. The learned arbitrator made it clear that the entire costs of the Commission, if ordered, to be borne by the respondents alone.

33. It is not the case of the respondents that the said application made by the respondents for issuance of witness summons or for issuance of a Commission or Letter of Request was without jurisdiction or that the order dated 8th July 2017 passed by the learned arbitrator granting such liberty to the respondents to take assistance of this Court under Section 27 of the Arbitration Act for recording evidence of witness proposed to be examined by the respondents was also without jurisdiction.

34. In so far as the evidence of Mr. Gerard Craggs, witness proposed to be examined by the petitioners herein is concerned, it is not in dispute that the said proposed witness has already filed an affidavit in lieu of examination-in-chief dated 25th February 2017 before the learned arbitrator. On 23rd January 2018, the petitioners herein had filed an application before the learned arbitrator inter alia praying for recall/revocation of the earlier order passed by the learned arbitrator permitting recording of Mr. Gerard Craggs' cross examination by video conferencing or in the alternative to permit the said witness to present his evidence and be available for cross examination in Singapore, or in the alternative in London, for which purpose, the respondents were willing to bear the costs for up to 6 representatives of the petitioners being present with the witness in person at the time of his cross examination. The petitioners herein in the alternative prayed to permit to apply to this Court under Section 27 of the Arbitration Act for recording the cross examination of Mr. Gerard Craggs as and by way of a Commission.

35. A perusal of the order dated 23rd February 2018 passed by the learned arbitrator on the application filed by the petitioners dated 23rd January 2018 seeking a partial recall/revocation of the orders dated 24th December 2017 and 13th January 2018 indicates that it was the case of the petitioners that Mr.Gerard Craggs as the Managing Director of the petitioner no.1 reasonably apprehends that should he travel to Mumbai, he may be questioned as part of the investigation,, and detained and his passport impounded, which would cause him grave prejudice, personal and business wise. The petitioners had also referred to and relied upon the directives/notices/summons from Enforcement Directorate to the Managing Director/Chief Financial Officer and other officers of the petitioner no.1 during the period between May 2016 and April 2017.

36. The learned arbitrator observed that the petitioners initially attempted to avoid the evidence of Mr.Gerard Craggs being recorded in Mumbai by urging that he was unavailable on the specific December 2017 hearing dates. Subsequently, the petitioners urged that Mr.Craggs would not be in a position to be present in Mumbai for the next few months. On account of busy schedule and engagements/appointments required him to travel to various places all over the world. Learned arbitrator noticed that it is the case of the petitioners now that the said Craggs will not travel to Mumbai at any time for recording his evidence - at least, not until the Enforcement Directorate investigations are on-going. The learned arbitrator observed that the apprehensions of Craggs did not appear to be real or reasonable. The learned arbitrator rejected the application of the petitioners to recall the order of rejection of the application for recording the cross examination of Mr.Craggs by video conference.

37. In so far as the alternate prayer for recording evidence of Mr.Craggs on Commission is concerned, the learned arbitrator accepted the submissions made by the learned counsel for the respondents that even under the Code of Civil Procedure, 1908, there is discretion in regard to permitting recording of evidence on Commission of a witness resident out of India. It is observed in the said order that although the learned arbitrator had found that reasons of Mr.Craggs for not attending in person in Mumbai are not acceptable, he could not ignore that fact that the evidence of Mr.Craggs is material and relevant in the present proceedings.

38. It was further observed that if Mr.Craggs persists in his refusal to attend for his cross-examination in Mumbai, based on his perception of the likelihood of his detention/impounding of his passport, the petitioners herein would be denied the benefit of their evidence to their prejudice. It is further observed that if despite what is stated in the said order, Mr.Craggs persists in his refusal to attend for his cross-examination, the petitioners ought not to be thereby denied the opportunity to lead relevant evidence. In that event, the learned arbitrator could grant approval to the petitioners to apply to record the cross-examination of Mr.Craggs on Commission in Singapore. At the first instance, the learned arbitrator directed that if the petitioners were desirous of relying upon the evidence of Mr.Craggs in these proceedings, they shall arrange for Mr.Craggs to be present in person in Mumbai for his cross-examination. The learned arbitrator accordingly granted approval to the petitioners to apply to this Court under Section 27 of the Arbitration Act to record the cross-examination of Mr.Craggs on Commission in Singapore and directed that the entire costs of the Commission, if ordered, to be borne by the petitioners alone.

39. It is thus clear beyond reasonable doubt that the learned arbitrator has rendered a finding that the evidence of Mr.Craggs is material and relevant in the present proceedings and the petitioners would be denied the benefit of their evidence to their prejudice. If the said witness persists in his refusal to attend for his cross-examination, the petitioners ought not to be thereby denied the opportunity to lead relevant evidence.

40. In my view, since the respondents themselves have applied for recording of evidence of their witness Mr.Mathew Stock on almost similar ground or in the alternative for permission to apply for recording the evidence on Commission in other country, the respondents having obtained such order from such arbitrator for granting such assistance of this Court under Section 27 of the Arbitration Act, have waived their alleged rights, if any, in opposing the application made by the petitioners on the ground that if the evidence of the witness proposed to be examined by the petitioners was recorded by issuing commission in Singapore, it would amount to change of agreed venue agreed by the parties in the order dated 14th June 2016 passed by this Court. In my view, Mr.Kapadia, learned senior counsel for the petitioners is right in his submission that it would amount to waiver on the part of the respondents in opposing the application of the petitioners for issuance of Commission for recording evidence of witness proposed to be examined by the petitioners in Singapore.

41. Be that as it may, a question that also arises for consideration of this Court is whether recording of evidence of any witness at the place or venue outside the agreed venue would amount to change of venue under any part of Section 20 of the Arbitration Act or not. It is not in dispute that on 14th June

2016, this Court passed order in Arbitration Petition (L) No.7 of 2016 based on the consent minutes of order tendered by the parties. In paragraph 3 of the consent minutes of order, it was provided that the said agreements shall be governed by the laws of India. The seat and venue of the arbitration shall be Mumbai. The Courts at Mumbai shall have exclusive jurisdiction in relation to the arbitration. Based on Clause 3 of the consent minutes of the order dated 14th June 2016, it is strongly contended by the respondents that the recording of evidence in Singapore on Commission even if appointed by this Court would amount to change of venue of the arbitral proceedings which would be contrary to the venue agreed by both the parties in the consent minutes of order dated 14th June 2016.

42. This Court in the case of ***Vithaldas Damodar Vs. Lakhmidas Harjiwan & Anr. (supra)*** while dealing with provisions of Order XXVI Rules 7 and 8 of the Code of Civil Procedure has held that the evidence which is recorded on commission has got to be read as evidence before it becomes evidence. It is held that evidence taken under a commission shall not be read as evidence in the suit without consent of the party against whom the same is offered until the conditions laid down in clause (a) of that rule are satisfied. Under Rule 7 of Order XXVI, the evidence taken on commission forms part of the record in the same way as pleadings, affidavits and other documents of a suit form part of the record of that suit. It is held that the Commissioner who takes evidence on commission has no authority to reject any evidence. All that he can do is to note the objections taken by counsel appearing on behalf of the party while commission evidence is being taken, and after having noted the objections he has got to record the evidence given by the witnesses. It is only when the evidence is read before the Court and tendered as evidence that the questions of

admissibility and relevancy are considered. In my view, the principles of law laid down by this Court in the case of **Vithaldas Damodar Vs. Lakhmidas Harjiwan & Anr. (supra)** construing the provisions under Order XXVI Rules 7 and 8 of the Code of Civil Procedure are applicable to the facts of this case. I am respectfully bound by the said judgment.

43. Delhi High Court in the case of **International Planned Parenthood Federation (IPPF) Vs. Madhu Bala Nath (supra)** has considered an appeal arising out of the order passed on the application under Order XVIII Rules 3 and 4 of the Code of Civil Procedure for seeking permission to record the statement of a witness through video conferencing. Delhi High Court had adverted to the judgment of the Supreme Court in the case of **State of Maharashtra Vs. Dr. Praful B. Desai -AIR 2003 (4) SCC 601** and several other judgments. Supreme Court in the said judgment in the case of **State of Maharashtra Vs. Dr. Praful B. Desai (supra)** held that video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence on a screen. Recording of evidence by video-conferencing also satisfies the object provided in Section 273 of the Code of Criminal Procedure, 1973. It is held that the accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in court. All these objects would be fully met when evidence is recorded by video-conferencing. No prejudice whatsoever nature would be caused to the accused.

44. In so far as the recording of evidence on Commission is concerned, Supreme Court has held that an officer would have to be deputed, either from India or from the Consulate/Embassy in the country where the evidence is being recorded who would remain present when the evidence is being recorded and who will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded. That officer will ensure that the witness is not coached/tutored/prompted. As the evidence is being recorded on commission that evidence will subsequently be read in court, if on reading the evidence the court finds that the witness has perjured himself, just like in any other evidence on commission, the court will ignore or disbelieve the evidence.

45. Delhi High Court after adverting to the said judgment of the Supreme Court has held that procedures have been laid down to facilitate dispensation of justice. Dispensation of justice entails speedy justice and justice rendered with least inconvenience to the parties as well as to the witnesses. If a facility is available for recording evidence through video conferencing, which avoids any delay or inconvenience to the parties as well as to the witnesses, such facilities should be resorted to. Merely because a witness is traveling and is in a position to travel does not necessary imply that the witness must be required to come to Court and depose in the physical presence of the court. The Court should take a pragmatic view. In that matter, the application was made for recording evidence through video-conferencing on the ground that the witness holds an important position in her organization and has to travel world over. Delhi High Court held that such a request was not unreasonable. The principles of law laid down by the Delhi High Court after adverting to the judgment of the Supreme Court in the case of *State of Maharashtra Vs. Dr.Praful B. Desai (supra)* would apply to the facts

of this case. I am in agreement with the views expressed by the Delhi High Court.

46. In this case, the learned arbitrator at the first instance, had directed the witness proposed to be examined by the petitioners to remain present before the learned arbitrator for the purpose of cross-examination if the same was not possible, in the alternative, permitted the petitioners to seek assistance of this Court for issuance of commission in recording evidence in Singapore. In my view, recording of evidence by commission would be more authentic and better than even video-conferencing which is recognised by the Supreme Court in the case of ***State of Maharashtra Vs. Dr.Praful B. Desai (supra)*** and by various other judgments rendered by various Courts in India.

47. Under Order XXVI Rule 5 of the Code of Civil Procedure, the Court is empowered to issue a commission for the examination of a person residing at any place not within India upon satisfying that the evidence of such person is necessary, the Court may issue such commission or a letter of request. Under Order XXVI Rule 7 of the Code of Civil Procedure, 1908, a commission has to be returned together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order and the commission and the return thereto and the evidence taken under it shall subject to the provisions of Rule 8 forming part of the record of the suit.

48. Under Order XXVI Rule 8 of the Code of Civil Procedure, 1908, the evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered unless the

person who gave the evidence is beyond the jurisdiction of the Court or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court or is a person in the service of the Government to attend without detriment to the public service. The Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a) of Rule 8 of Order XXVI of the Code of Civil Procedure, 1908 and authorises the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

49. In my view, Mr.Kapadia, learned senior counsel for the petitioners is right in his submission that as and when such evidence would be tendered by the petitioners of their witness whose evidence is recorded on commission, if allowed by this Court, before the learned arbitrator in Mumbai, at that stage, the evidence would be tendered in Mumbai and may be considered by the learned arbitrator. In my view, there would be thus no change of agreed venue even if evidence of witness is recorded on commission not in Mumbai but in Singapore. A commission if appointed, for recording evidence of witness of the petitioners would be an agent of the Court for the purpose of recording of evidence in Singapore which process would not change the agreed venue. If the argument of the learned senior counsel for the respondents that recording of evidence on commission in Singapore would amount to change the venue without consent of the parties is accepted, the arbitral tribunal will not be able to meet at any place though considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property. Acceptance of such argument would be in clear violation of Section 20 (3) of the Arbitration and Conciliation Act, 1996.

50. Under Sub Rule 4 of Rule 4 of Order XVIII of the Code of Civil Procedure, 1908, the commissioner appointed by a Court for the purpose of recording of evidence is empowered to record such remarks as it thinks material respecting the demeanour of any witness while under examination, provided that any objection raised during the recording of evidence before the commissioner shall be recorded by him and decided by the Court at the stage of arguments. In my view, no prejudice of any nature thus would be caused to the respondents if the commission is issued for the purpose of recording of cross-examination of witness proposed to be examined by the petitioners. As and when such evidence is tendered before the learned arbitrator by the petitioners for the purpose of taking the same on record and to be read in evidence, all permissible objections available in law to the respondents can be raised by the respondents at that stage including the objection about demeanour of the said witness while under examination.

51. This Court in the case of *M/s.National Insurance Company Limited Vs. M/s.S.A. Enterprises (supra)* has considered the judgment of this Court in the case of *M/s.Rasiklal Ratilal Vs. Fancy Corporation Limited & Anr., 2007 (4) Mh.L.J. 876* in which it was held by this Court that the Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal and while making an order under Sub-section (3) of Section 27 of the Act, issue the same processes to witnesses as it may issue in suits tried before it. This Court also considered the powers of the Court under Order XXVI Rule 6 and also Order XIII Rules 1 and 9 of the Civil Procedure Code, 1908 while passing such order by the Court under Section 27 of the Arbitration Act. This Court 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.

52. This Court also considered the judgment of the Division Bench of this Court in the case of ***Janakalyan Sahakari Bank Ltd. Vs. M/s. Rasiklal Ratilal & Anr.*** decided on 12th July 2007 in Appeal (L) No.557 of 2007 arising out of the judgment in the case of ***M/s.Rasiklal Ratilal Vs. Fancy Corporation Limited & Anr. (supra)*** partly modifying the judgment to the limited extent that the bank shall produce the original documents before the learned arbitrator along with the certified true copies thereof. This Court has also considered the judgment of this Court in the case of ***United Spirits Limited, Bangalore Vs. Delta Distilleries Limited, Mumbai & Anr. (supra)***. This Court held that a party which has been directed by the learned arbitrator to do something, cannot be permitted to run away from the direction issued by the learned arbitrator, if the Court finds that for effective and complete adjudication in the arbitral proceedings, it is necessary to do so. Since the arbitral tribunal is not in a position to compel a party or a witness to give evidence before it or to produce a document before it, Section 27 of the Act has been brought on the Statute, so that it provides aid to the arbitral tribunal in producing evidence if it finds necessary. The judgment of this Court in the case of ***United Spirits Limited, Bangalore Vs. Delta Distilleries Limited, Mumbai & Anr. (supra)*** has been upheld by the Supreme Court in the case of ***Delta Distilleries Ltd. Vs. United Spirits Ltd. & Anr., 2014 (1) SCC 113.***

53. This Court held that at the stage of hearing the application under Section 27 of the Arbitration Act, 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. 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. The legislature has inserted the Section 27 of the Arbitration Act to obviate the 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. In my view, the principles of law laid down by this Court in the case of ***M/s.National Insurance Company Limited Vs. M/s.S.A. Enterprises (supra)*** would squarely apply to the facts of this case. I do not propose to take a different view in the matter.

54. In so far as the submission of Mr.Joshi, learned senior counsel for the respondents that since the learned arbitrator himself has rendered a finding that the reasons given by the petitioners for appointment of Commission for recording of evidence of witness were not convincing, the learned arbitrator could not have permitted the respondents to seek assistance of this Court under Section 27 of the Arbitration and Conciliation Act, 1996 is concerned, in my view, this argument of the learned senior counsel cannot be accepted.

55. This Court in the case of ***Montana Developers Private Limited Vs. Aditya Developers & Ors. (supra)*** after adverting to the judgment of this Court in the case of ***United Spirits Limited, Bangalore Vs. Delta Distilleries Limited, Mumbai & Anr., 2012 (6) Mh.L.J. 522***, an unreported judgment of this Court in the case of ***M/s. Rasiklal Ratilal Vs. Fancy Corporation Limited & Anr. (supra)*** and the judgment of the Delhi High Court in the case of ***Thiess Iviinecs India Vs. NTPC Limited & Anr.- 2016 SCC OnLine Del 1819*** has held that powers of the Court under Section 27 of the Arbitration and Conciliation Act, 1996 are not adjudicatory powers. 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. 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.

56. It is held that 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. This Court has held that 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.

57. This Court has held that 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, the respondent could not have raised any objection on merits of the order passed by the learned arbitrator while opposing the application made by the opponent under Section 27 of the Arbitration Act for seeking assistance of the Court in furtherance of the order passed by the arbitral tribunal. This Court has also considered the effect of Section 5 of the Arbitration Act and held that since the respondents could not have challenged the order passed by the arbitral tribunal granting permission to the petitioners to apply to the Court for assistance so as to comply with the order passed by the learned arbitrator, the respondents cannot be indirectly allowed to challenge the validity of that order while opposing this application under section 27 of the Arbitration Act. This Court held that what cannot be done directly, cannot be allowed to be done indirectly.

58. 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. This Court clarified 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. In my view, there is no substance in the submission made by the learned senior counsel for the respondents that Section 5 of the Arbitration Act has no relevance to the consideration of the objection about validity of the order passed by the learned arbitrator while opposing the application filed by the petitioners under Section 27 of the Arbitration Act for seeking assistance of the Court or that the judgment of this Court in the case of

M/s.National Insurance Company Limited Vs. M/s.S.A. Enterprises (supra) and in the case of ***Montana Developers Pvt. Ltd., Mumbai Vs. Aditya Developers, Mumbai and Ors. (supra)*** require reconsideration.

59. In my view, the respondents thus cannot oppose the application filed by the petitioners under Section 27 of the Arbitration Act at this stage. If the respondents are aggrieved by the award as may be rendered by the learned arbitrator, the respondents would be at liberty to challenge the order passed by the learned arbitrator granting such permission to seek assistance of this Court under Section 27 of the Arbitration Act along with such award under Section 34 of the Arbitration and Conciliation Act, 1996. This Court having taken the aforesaid view, this Court is not required to go into the issue as to whether the learned arbitrator could not have exercised a discretion in the favour of the petitioners or not.

60. In so far as the reliance placed on the judgment of the Supreme Court in the case of ***Indus Mobile Distribution Private Limited Vs. Datawind Innovations Private Limited and Ors. (supra)*** by the learned senior counsel for the respondents is concerned, the parties before the Hon'ble Supreme Court had agreed that the arbitration shall be conducted at Mumbai and all disputes & differences of any kind whatever arising out of or in connection with this Agreement shall be subject to the exclusive jurisdiction of courts of Mumbai only.

61. In this context, the Supreme Court has held that the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties. It is held that Mumbai courts alone have

jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai as per the arbitration agreement. In this case, the respondents have not disputed that this Court has no jurisdiction to entertain this petition under Section 27 of the Arbitration and Conciliation Act, 1996. This judgment of the Hon'ble Supreme Court relied upon by the learned senior counsel for the respondents would thus be of no assistance to the respondents. Section 27 (6) of the Arbitration Act clarifies that the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents. In my view, under Section 27(6) of the Arbitration Act, this Court has powers to consider and allow the application for seeking assistance to record evidence for the examination of witnesses and summonses to produce documents.

62. In so far as the submission of the learned senior counsel for the respondents that instead of the petitioners compelling the respondents to visit Singapore for recording evidence of the witness, it would be more convenient to such witness to be brought to the venue of arbitration in Mumbai is concerned, a perusal of the order passed by the learned arbitrator clearly indicates that the learned arbitrator has categorically held that the evidence of Mr.Craggs is material and relevant in the present proceedings and if the said witness persists in its refusal to attend for his cross-examination in Mumbai, based on his perception of the likelihood of his detention/impounding of his passport, the petitioners herein would be denied the benefit of their evidence to their prejudice. It is held by the learned arbitrator that he was conscious that Mr.Craggs is an officer/director of the petitioner no.1. The learned arbitrator adverted to the judgment of the Supreme Court in the case of *M/s.Ram Chand Vs. Kanhayalal* AIR 1966 SC 1899 in which it was held by the Supreme Court that it would not be legally right

to strike off the defence of the company where one of its directors refused to respond to a Court notice to personally attend Court to answer material questions. The learned arbitrator has already held that the petitioners ought not to be denied the opportunity to lead relevant evidence.

63. A perusal of the order indicates that the learned arbitrator at the first instance directed the petitioners to arrange for Mr.Craggs to be present in person in Mumbai for his cross-examination and if the said witness refused to attend in Mumbai for his cross-examination by communicating the same within the time prescribed, an approval is granted to the petitioners to apply to this Court for seeking assistance of this Court under Section 27 of the Arbitration and Conciliation Act, 1996. The learned arbitrator has already clarified that the entire costs of the Commission, if ordered, to be borne by the respondents alone. Mr.Kapadia, learned senior counsel for the petitioners also has made a statement before this Court that if number of persons mentioned in the application before the learned arbitrator representing the respondents attend commission for the purpose of recording cross-examination of Mr.Craggs in Singapore, all expenses will be incurred by the petitioners alone. Statement made by the learned senior counsel is accepted.

64. I am inclined to accept the request of the learned senior counsel for the petitioners that it would be more appropriate however subject to the consent of the learned arbitrator to appoint the learned arbitrator as a Commissioner for recording evidence of Mr.Craggs in Singapore to obviate any arguments about demeanour of the witness examined to be examined by the petitioners. In my view, in view of the safeguard provided by the learned arbitrator and in the interest of justice, with a view not to deprive the petitioners of an opportunity to lead

evidence of the main witness, I am not inclined to accept the submission of the learned senior counsel for the respondents that this Court shall not exercise its discretion in favour of the petitioners.

65. In so far as the reliance placed on the judgment of the Supreme Court in the case of ***Bachahan Devi & Anr. Vs. Nagar Nigam, Gorakhpur and Anr. (supra)*** by the learned senior counsel for the respondents in support of the submission that the word “may” shall be construed as “may” in this case and not “shall” is concerned, this Court in the above referred judgment relied upon by Mr.Kapadia, learned senior counsel for the petitioners while construing Section 27 of the Arbitration Act has already rejected such argument made by the respondents. The judgment of the Supreme Court in the case of ***Bachahan Devi & Anr. Vs. Nagar Nigam, Gorakhpur and Anr. (supra)*** construing Order XLI Rule 25 of the Code of Civil Procedure would not even remotely assist the case of the respondents.

66. In so far as the judgment of the Madras High Court in the case of ***M/s.Ennore Port Ltd. Vs. Hindustan Construction Co. Ltd. (supra)*** relied upon by the learned senior counsel for the respondents in support of the submission that no case is made out by the petitioners for exercising discretionary powers of this Court is concerned, the facts before the Madras High Court are totally different and the said judgment is clearly distinguishable in the facts of this case and would not assist the case of the respondents.

67. In so far as the submission of Mr.Joshi, learned senior counsel for the respondents that since the learned arbitrator has already rejected the prayer for recording of cross-examination of Mr.Craggs by video-conferencing and thus the

learned arbitrator could not have granted permission to the petitioners to seek assistance of this Court under Section 27 of the Arbitration and Conciliation Act, 1996 is concerned, in my view, there is no merit in this submission of the learned senior counsel for the respondents for the reason that this Court cannot go into the correctness of the order passed by the learned arbitrator granting permission to the petitioners to seek assistance of this Court under Section 27 of the Arbitration Act.

68. Section 77 of the Code of Civil Procedure, 1908 provides that in lieu of issuing a Commission, the Court may issue a Letter of Request to examine a witness residing at any place not within India. In my view, this power prescribed under Section 77 of the Code of Civil Procedure granted to the Courts in India will have to be however read with the powers of appropriate Courts under the provisions applicable to such Courts within whose jurisdiction the witness proposed to be examined on commission resides or carries on business. It is not in dispute that the provision of Supreme Court of Judicature Act applies to various provisions in the Supreme Court and the State Courts in so far as the matters to which those Rules relate. The said Rules consist of a similar provision and more particularly Order 66 for the purpose of “Obtaining Evidence For Foreign Courts etc.” Order 66 provides for an application for order and Rule 1 of Order 66 provides for modes and manner of making such application. Rule 3 of Order 66 provides for an application to be made by Attorney General in certain cases. Rule 4 of Order 66 provides for modes and manner of taking examination of witness.

69. The question now arises for consideration of this Court in the facts and circumstances of this case is whether the Letter of Request shall be issued by

this Court upon the concerned Court in Singapore for issuance of a commission for the purpose of recording cross-examination of Mr. Craggs in Singapore or not. Mr. Craggs in accordance with the provisions of the Supreme Court of Judicature Act, Rules of Court and more particularly Order 66 for the purpose of "Obtaining Evidence For Foreign Courts etc." or not. The provision of Supreme Court of Judicature Act applies in relation to all proceedings in the Supreme Court and the State Courts, in so far as the matters to which these Rules relate are within the jurisdiction of those Courts and unless the Court otherwise orders, apply to any pending proceedings therein.

70. Mr. Kapadia, learned senior counsel for the petitioners does not dispute these Rules may be made applicable for the purpose of issuance of Letter of Request for the purpose of issuance of Commission for recording cross-examination of Mr. Craggs in Singapore. Without prejudice to the other submissions of the learned senior counsel for the respondents which are already dealt with by this Court in the earlier part of this judgment, learned senior counsel for the respondents urged before this Court and if this Court comes to a conclusion that an order for issuance of Commission has to be issued by this Court for the purpose of recording cross-examination of Mr. Craggs in Singapore, a requisite procedure under the provisions of the Supreme Court of Judicature Act will have to be followed by this Court and the parties to these proceedings. I am inclined to accept this submission made by the learned senior counsel for the respondents and to issue a Letter of Request upon the appropriate Court in accordance with the provisions of Order 66 of Supreme Court of Judicature Act.

71. Supreme Court in the case of *M/s. Filmistan Private Ltd., Bombay Vs. M/s. Bhagwandas Santprakash and Anr.* -AIR 1971 SC 61 has construed

Sections 75 and 77 of the Code of Civil Procedure and has held that powers of Court to issue commission is discretionary. The fact that witnesses examined on commission cannot be effectively cross-examined on their examination will entail heavy costs are not sufficient circumstances to interfere with discretion of the Court in appeal. Section 77 of the Code of Civil Procedure read with Section 75 empowers the Court to issue a Letter of Request to any person other than the Court to examine witnesses residing at any place not within India. This power of the Court is not subject to any reciprocal agreement between the Governments. In my view the principles of law laid down by the Supreme Court in the case of *M/s.Filmistan Private Ltd., Bombay Vs.M/s.Bhagwandas Santprakash and Anr.(supra)* would apply to the facts of this case. This Court has ample power to issue a Letter of Request by exercising such powers under Sections 77 and 75 along with Order XXVI Rules 7 and 8 of the Code of Civil Procedure, 1908 and also read with Section 27(6) of the Arbitration and Conciliation Act, 1996.

72. For the reasons recorded aforesaid, in my view, the petitioners have made out a case for exercising a discretion in their favour under Section 27 of the Arbitration and Conciliation Act, 1996 and for issuance of such Letter of Request to the appropriate Court in Singapore for the purpose of recording cross-examination of Mr.Craggs.

73. I, therefore, pass the following order :-

- (i) Mr.Fredun E. De Vitre, learned arbitrator is proposed to be appointed as a Court Commissioner for recording the cross-examination and re-examination of Mr.Gerard Craggs in Singapore. If the learned arbitrator is not agreeable to act

as a Court Commissioner for the purpose of recording evidence of Mr.Gerard Craggs in Singapore, he should communicate his decision to the parties within two weeks from the date of communication of this order.

(ii) In that event, the petitioners would be at liberty to apply before the concerned Court at Singapore under Order 66, Rules 1 and 2 of 'Supreme Court of Judicature Act' for appointment of a Court Commissioner as an officer to be appointed as a Commissioner for the purpose of recording cross-examination and re-examination of Mr.Gerard Craggs in Singapore and for appropriate directions under the said provisions.

(iii) The learned Prothonotary and Senior Master of this Court is directed to issue a Letter of Request to the High Court of Singapore to issue appropriate directions for the examination of Mr.Gerard Craggs in the manner provided under Order 39, Rules 5 to 10, 11(1) and 11(2) of the Supreme Court of Judicature Act and under Order 39 Rule 14 for fees and expenses, if any, due to the examiner in respect of the examination or under any other applicable provisions of law for the purpose of such commission. The High Court of Singapore shall be requested to transmit the testimony of the witness along with report, if any, to this Court.

(iv) In the event of the learned arbitrator accepting the appointment as a Court Commissioner, the Letter of Request

that is directed to be issued by the learned Prothonotary and Senior Master shall indicate his name as the Court Commissioner. The Prothonotary and Senior Master shall furnish a copy of such Letter of Request to the parties for their record and to enable the petitioners to make appropriate application under Order 66 Rule 2 of the Supreme Court of Judicature Act.

(v) If the learned arbitrator declines to accept to act as the Court Commissioner, Letter of Request shall indicate a request to the concerned High Court for appointing a fit and proper person as the commission as the High Court of Singapore may deem fit for the aforesaid commission.

(vi) If the learned arbitrator accepts his appointment as a Court Commissioner, the petitioners shall make appropriate arrangements for the learned arbitrator to record the evidence of Mr. Gerard Craggs in Singapore at their own costs. The additional fees of the learned arbitrator, if any, shall be borne by the petitioners alone.

(vii) The petitioners shall make an appropriate application before the High Court of Singapore for complying with the aforesaid directions within two weeks from the date of the learned Prothonotary and Senior Master furnishing a copy of Letter of Request to the petitioners as directed in this order and shall serve a copy of such application upon the

respondents' advocate in Mumbai for their record and perusal.

(viii) The petitioners are duly authorised to make an application on behalf of this Court by following the procedure prescribed under Supreme Court of Judicature Act. The petitioners have agreed to incur all the expenses in respect of four advocates and two representatives of the respondents whose names would be informed to the petitioners by the learned advocate on record for the respondents who would attend the proceedings before the learned Court Commissioner at the time of recording evidence of the witness proposed to be examined by the petitioners in Singapore. Such names should be conveyed to the advocates of the petitioners within two weeks from today. Statement is accepted.

(ix) The petitioners have to make appropriate arrangement for securing presence of Mr.Gerard Craggs on the date appointed by the Court Commissioner for the purpose of recording cross-examination and re-examination, if any. If the said witness chooses to remain absent on the appointed date, the learned Court Commissioner shall record his absence in the report to be submitted before the learned arbitrator.

(x) The commercial arbitration petition is disposed of in aforesaid terms. There shall be no order as to costs.

(xi) Parties to act on the authenticated copy of this order.

(R.D.DHANUKA, J.)