



2024:DHC:5136



\$~26

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **O.M.P. (E) (COMM.) 20/2024 & I.A. 32811/2024****BPT INFRA PROJECT PVT. LTD.Petitioner****Through: Mr. Akshu Jain, Ms. Stuti Jain
and Ms. Vishwa Bharti, Advs.****versus****INDRAPRASTHA ICE AND COLD STORAGE PVT. LTD.****.....Respondent****Through: Mr. Naman Joshi, Adv. with
Mr. Aryan Verma, Adv.****CORAM:****HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT (ORAL)**

%

10.07.2024

1. The present petition under Section 27¹ of the Arbitration and Conciliation Act, 1996 seeks the assistance of the Court to summon two official witnesses namely Mr. D.P. Singh, Flat no. 262, Plot no. 6,

¹ 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 any 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 by ordering that the evidence be provided directly to the arbitral tribunal.
- (4) The Court may, while making an 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 default, 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.



2024:DHC:5136



Samrat Ashoka Enclave, CGHS, Sector-18A, Dwarka, Delhi and Mr. S.C. Jain, or any other authorised person from M/s Architect Bureau, the respondent's Consultant, at 13A, Palam Marg, Vasant Vihar, New Delhi-110057.

2. Given the limited nature of the application, one need not delve deep into the controversy before the learned Arbitral Tribunal. Suffice it to state that the petitioner had been awarded the construction contract by the respondent for setting-up of a CA (Control Atmosphere Storage) Plant of the respondent at Kullu, Himachal Pradesh.

3. The cost of the contract was enhanced, while it was being performed, from ₹ 10 crores to ₹ 20 crores. The petitioner contended that this was done *mala fide* so as to ensure that the petitioner could not carry out the contract and that, for untenable reasons, the contract was terminated. The petitioner, therefore, claims, in the arbitral proceedings, expected loss of profits.

4. It is not for this Court, in these proceedings, to comment on the merit of the petitioner's claim which is subject matter of proceedings before the learned Arbitral Tribunal.

5. During the course of proceedings, the petitioner filed an application under Section 27 of the 1996 Act, from the order passed in which the present petition emanates. The application reads thus:

“1. That the Claimant had filed its list of witness on 06.09.2023 before the Ld. Arbitrator with copy to the Respondent.



2024:DHC:5136



2. That the Claimant needs assistance of the Hon'ble Court to summon the following witness (es) from the said list of witness:

(i) Sh. D.P. Singh, R/o Flat no.262, Plot no. 6, Samrat Ashoka Enclave, CGHS, Sector-18A, Dwarka, Delhi

(ii) Sh. S.C. Jain or any other authorised person from M/s Architect Bureau, Consultant of Respondent, 13A, Palam Marg, Vasant Vihar, New Delhi-110057

3. *That M/s Architect Bureau was the architect consultant engaged by the Respondent. The said witness is required to depose regarding the changes made/directed by the respondent from to time in the project in question including the change in the lay-out plan. Further, he is also required to prove the documents being Annexure C-19, Annexure C-20 and Annexure C-21 as he is the author of the said document.*

4. *That Sh. D.P. Singh was the Chief Consultant deployed by the Respondent. The said witness is required to depose regarding the direction issued by the Respondent and changes directed to be made from time to time. Further, he is also required to prove the documents being Annexure C-18 i.e. the e-mail dated 10.03.2022 written by him.*

Therefore, in light of the facts and circumstances explain above, the Hon'ble Tribunal is requested to allow the present application to seek assistance of the Hon'ble Court to summon the said witness(es).

New Delhi
Dated: 01.03.2024

Stuti Jain and Akshu Jain
Counsel for the claimant"

6. Clearly, therefore, the application sets out the reasons why the petitioner desired the summoning of Mr. D.P. Singh and Mr. S.C. Jain as witnesses.

7. The learned Arbitral Tribunal passed the following order, on the petitioner's application, on 15 May 2024:



2024:DHC:5136



“14TH ARBITRAL PROCEEDINGS DATED 15.05.2024

No arbitral proceedings could take place on 24.04.2024, since the Ld. Counsel for the Claimant had requested for adjournment on the ground that he was busy in the Hon'ble Supreme Court.

Today CW-3 Shri Sant Lal has been further cross examined by the Counsel for the Respondent and his cross examination has been concluded.

It is observed that an application was filed by the Claimant under Section 27 of the Arbitration & Conciliation Act, 1996 (As amended upto date) for seeking the assistance of the Hon'ble Court for summoning the witnesses namely Shri D.P. Singh and Shri S.C. Jain or any authorized person from M/s. Architect Bureau, Consultant of the Respondent.

I have considered the said application. *In my opinion, the evidence of the said witnesses was quite relevant for deciding the present arbitration case.* In the circumstances, the Claimant is hereby directed to approach the Hon'ble High Court for seeking the assistance of Hon'ble High Court for summoning the following witnesses for 20.07.2024 at 12.30 p.m. at Delhi High Court Bar Association Office, New Delhi:

- i) Shri D.P. Singh, resident of Flat No. 62, Plot No. 6, Samrat Ashoka Enclave, CGHS, Sector-18A, Dwarka, Delhi;
- ii) Shri S.C. Jain or any other authorized person from M/s. Architect Bureau, Consultant of Respondent, 13A, Palam Marg, Vasant Vihar, New Delhi - 110057

With the consent of the Ld. Counsel for both the parties the case is adjourned to 20.07.2024 at 12.30 P.M. for evidence of the Claimant, at the office of Delhi High Court Bar Association, New Delhi.”

8. Based on the said order, the petitioner has preferred the present application before this Court, seeking a direction to Mr. D.P. Singh and Mr. S.C. Jain (or any other authorised person from M/s Architect Bureau) to present themselves before the learned Arbitral Tribunal, for recording of their evidence.



2024:DHC:5136



9. Mr. Naman Joshi, learned Counsel for the respondent, submits that he has only one objection to make in this regard and submits that the court may dispose of the matter after taking a view on his objection.

10. Mr. Joshi's objection is that the order dated 15 May 2024 does not suffice to constitute an order granting approval within the meaning of Section 27(1) of the 1996 Act. He submits that the grant of approval cannot be a mechanical exercise and that the order must reflect conscious application of mind as to the relevancy of the evidences of witnesses whom the applicant seeks to summon. The order dated 15 May 2024, according to Mr. Joshi, is merely mechanical and non-speaking and proceeds on a premise that there is an absolute right to summon witnesses as and when either party chooses to do so. The requisite application of mind, which must necessarily precede the grant of an approval under Section 27(1), according to Mr. Joshi, is lacking.

11. Mr. Joshi has relied, for this purpose, on two judgments rendered by learned Single Judges of this Court in *Hindustan Petroleum Corporation Ltd v. Ashok Kumar Garg*² and *Steel Authority of India Ltd v. Uniper Global Commodities*³.

12. Section 27(1) does not expressly indicate that the arbitral tribunal is required to provide detailed reasons while agreeing to the request of a party to summon witnesses. Indeed, in case the tribunal

² 2006 (91) DRJ 591

³ 2023 SCC Online Del 7586



2024:DHC:5136



were, on a mere application for summoning of witnesses, to express a detailed opinion on the relevancy of their evidence, there is always a possibility of an objection being taken to the effect that the issue in controversy has been pre-determined.

13. The decisions on which Mr. Joshi relies do not really advance the contentions which he seeks to urge. In *Hindustan Petroleum*, the nature of the order passed by the learned Arbitral Tribunal under Section 27(1) is not clear from the judgment. All that is said, so far as the facts are concerned, is the following:

“3. An arbitration proceeding is pending between the parties. During the course of the arbitration proceedings, in order to prove its case, the petitioner moved an application seeking approval of the arbitrator in taking assistance of the court to summon four witnesses. The Arbitral Tribunal by its order dated 01.10.2003 allowed the same.

4. The petitioner thereafter filed the application under Section 27 of the Arbitration and Conciliation Act, 1996 (herein referred to as said Act) which was however rejected in terms of the impugned order dated 25.02.2004 which has given rise to the present proceedings under Article 227 of the Constitution of India.

5. A perusal of the impugned order shows that the learned Additional District Judge has rejected the application on the ground that the Arbitral Tribunal had to pass a reasoned order setting out circumstances which necessitated it to recommend that the court ought to exercise its jurisdiction under Section 27 of the said Act for summoning of witness. Since no such circumstance has been set out, it was held that the discretion under Section 27 of the said Act cannot be exercised in a routine manner.”

14. No doubt, before this Court, a contention was advanced by the respondent that the learned Arbitral Tribunal had not passed the order under Section 27(1) with proper application of mind. This Court, speaking through Sanjay Kishan Kaul, J. (as he then was) set out the law in this regard, thus:



2024:DHC:5136



“12. It is in view of the aforesaid observations that the learned counsel contends that it is not mandatory for the arbitrator to give reasons while granting its approval for a party to move an application to the court under Section 27 of the said Act.

13. I am in agreement with the submission of the learned senior counsel for the petitioner to the extent that detailed reasons may not be specified by the tribunal but at least application of mind must be available from the order passed by the tribunal.

14. A perusal of the order passed by the tribunal for the present case shows that the tribunal appears to be under a misconception that it has no role to play in this application other than only giving a stamp of approval. *It is not as if an application filed before the tribunal should be approved in a mechanical manner since the object is that the Arbitral Tribunal must scrutinize at least prima facie that there is relevancy of the witness sought to be produced.* The pleadings are before the arbitrator and he is the master of the case. *Thus, it is the tribunal who would have to apply its mind to find out whether the evidence to be produced is relevant or irrelevant. This does not appear to have been done by the Arbitral Tribunal in the present case possibly under a misconception of law.*

15. In view of the aforesaid, an appropriate order to be passed would be for the Arbitral Tribunal to exercise its mind to decide whether such an application ought to be presented by the petitioner before the court. However, learned Counsel for the respondent states that he has no objection to the production of the witnesses sought to be summoned by the petitioner in court and the arbitration proceedings have now dragged on for almost three years only on this account.”

(Emphasis supplied)

15. All that has been held by this Court in paras 12 to 15 of ***Hindustan Petroleum*** is only that the arbitral tribunal cannot, while exercising jurisdiction under Section 27(1), operate mechanically or merely provide a stamp of approval to the request of the party before it to summon witnesses. This Court has held that “at least application of mind must be available from the order passed by the tribunal”. In the facts before it, this Court held (in para 14 of the report) the Arbitral Tribunal had not, apparently, “applied its mind to find out



2024:DHC:5136



whether the evidence to be produced is relevant or irrelevant”.

16. As already noted, the exact order passed by the Arbitral Tribunal in *Hindustan Petroleum* is not reflected in the judgment. On a holistic reading of the judgment, however, it would appear that the order passed by the learned Arbitral Tribunal under Section 27(1), in that case, did not reflect any application of mind as to whether the evidence of witnesses, whose attendance had been sought by the party, was, or was not, relevant.

17. *SAIL* is clearly distinguishable on facts and, in fact, would militate against the contentions advanced by Mr. Joshi. In that case, the learned Arbitral Tribunal, in the order passed under Section 27(1), observed thus:

“Having deliberated upon and considered the Application and the Reply thereto, the Tribunal is of the considered view that the role of the Tribunal under Section 27 of the Arbitration & Conciliation Act, 1996 is limited and at this stage, Tribunal is not required to go into relevance or materiality of the evidence sought to be produced. Both the parties in arbitration proceedings are to be given full opportunity to present their case. In the last hearing held on 27.03.2023 and 28.03.2023, it was agreed by the parties that the Respondent in the meantime will produce its other witness(es) for which, dates are already fixed on 26th and 27th April, 2023.”

(Emphasis supplied)

18. It is clear that the learned Arbitral Tribunal, in *SAIL*, effectively abdicated the responsibility legislatively invested in it by Section 27(1) of the 1996 Act. This aspect has been noticed by the Coordinate Bench in para 13 of the judgment, which reads thus:

“13. Ordinarily an order passed by the Arbitral Tribunal, granting permission to the applicant to apply to the Court for seeking assistance in taking evidence, is not liable to be disturbed



2024:DHC:5136



since this Court while exercising powers under Section 27 of the A&C Act is not hearing an appeal over the decision of the Arbitral Tribunal. However, the order dated 13.04.2023 passed by the Arbitral Tribunal, in this case, granting permission to the petitioner to apply to this court for seeking its assistance in taking evidence, is a non-speaking order, based on a misconception of law that the Arbitral Tribunal is not required to examine, even prima-facie, into the relevancy or materiality of the evidence sought to be produced, before allowing the application under Section 27 of A&C Act filed by the petitioner.”

19. Thus, this Court, in *SAIL*, correctly held that the learned Arbitral Tribunal had completely erred in law in proceeding on the premise that it was not required to go into the issue of whether the evidence, which was sought to be requisitioned by summoning witnesses, was or was not relevant or material.

20. There can be no manner of doubt that the arbitral tribunal cannot mechanically pass orders under Section 27(1) of the 1996 Act and that the order passed under the said provision must reflect a conscious view that the evidence of the persons whose presence the applicant seeks, is relevant or material to the case.

21. Neither of these decisions, however, go a step further and require detailed reasoning, regarding the relevancy of the evidence of the witnesses for whom the application under Section 27 is filed, to be provided by the learned Arbitral Tribunal. Indeed, if the court were to so hold, it might amount to re-writing Section 27 which merely uses the word “approval”. So long as the learned Arbitral Tribunal approves the prayer of the party before it, for summoning the cited witnesses, the requirement of Section 27 (1) is fulfilled. No doubt, as held in *Hindustan Petroleum* and *SAIL*, the approval cannot be



2024:DHC:5136



mechanical but must reflect a view that the evidence of the said witnesses is relevant or material.

22. Beyond that, nothing more is required from the learned Arbitral Tribunal either under Section 27 (1) or in the decisions in *Hindustan Petroleum* and *SAIL*.

23. Besides, in the present case, the application filed by the petitioner sets out clear and cogent reasons as to why the petitioner was seeking summoning of Mr. D.P. Singh and Mr. S.C. Jain or any other authorised person from M/s Architect Bureau. The order passed by the learned Arbitral Tribunal must, therefore, be regarded as having impliedly accepted the contentions of the petitioner in that regard and having found the reasons adduced by the petitioner in its application to be justified.

24. As has been held by the coordinate bench in *SAIL*, this Court cannot deal with an application under Section 27(1) of the 1996 Act as though it were an appeal against an order of Arbitral Tribunal. The discretion as to whether to summon, or not to summon, a witness as cited by a party, vests in the learned Arbitral Tribunal.

25. Section 5⁴ of the 1996 Act very clearly proscribes interference by courts with the arbitral process save and except to the extent specified in the Act. The provisions of the Act must be strictly read,

⁴ 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.



2024:DHC:5136



keeping in mind the avowed objective of the 1996 Act, which is to promote the arbitral process and insulate it, as far as possible, from interference by the judiciary.

26. The learned Arbitral Tribunal having, while passing the order dated 15 May 2024, recorded a finding that the evidence of Mr. D.P. Singh and Mr. S.C. Jain is relevant in the present case and the reasons for summoning the said witnesses having been clearly set out in the application filed by the petitioner under Section 27(1), any interference by this Court, at this juncture, would fly in the teeth of Section 5 of the 1996 Act and would also be an affront to the principle of arbitral autonomy, which permeates the 1996 Act throughout.

27. In view of the aforesaid, the present petition is liable to be allowed.

28. Accordingly, Mr. D.P. Singh and Mr. S.C. Jain are directed to present themselves before the learned Arbitral Tribunal on 20 July 2024. In case, the witnesses are under the control or employment of the respondent, the respondent shall take steps to ensure their appearance before the learned Arbitral Tribunal on the said date. In case the witnesses are not under the control of the respondent, the witnesses would themselves take steps to ensure their presence before the learned Arbitral Tribunal on the said date.

29. Needless to say, the petitioner would have to deal with the said witnesses on the same day, and no adjournment shall be sought in this regard.



2024:DHC:5136



30. The learned Arbitral Tribunal would make effect to ensure that evidence of the said witnesses, to the extent desired by the petitioner, is concluded on that date itself.

31. The present petition stands allowed in the aforesaid terms, with no order as to costs.

C. HARI SHANKAR, J.

JULY 10, 2024

dsn

Click here to check corrigendum, if any