

Before Sudip Ahluwalia, J.

M/S BJ-TECHNO-HAS (JV)—Petitioner

versus

NATIONAL HYDROELECTRIC POWER CORPORATION LIMITED—Respondent

CR No. 9540 of 2018

May 24, 2019

Arbitration and Conciliation Act, 1996—S.5, 19 and 27—Cross revisions filed—Claimant’s contention that learned Court below went beyond its mandate in terms of Section 27 and had no authority to adjudicate upon correctness of Tribunal’s order—Respondent’s contention that the learned Court below had fallen in error in allowing production of those documents which were not permitted even by the Arbitral Tribunal—Held, the Arbitral Tribunal is not bound by CPC, 1908 or Indian Evidence Act, 1872 and is possessed of the power to determine admissibility, relevancy, materiality and weight of any evidence produced before it—Learned Court below in terms of Section 27 can neither question legal correctness of the Tribunal’s decision regarding production of evidence nor adjudicate upon admissibility of documents sought—Claimant’s revision allowed—Respondent’s revision allowed in part setting aside impugned order to the extent that Respondent was directed to supply documents which were not permitted even by the Arbitral Tribunal.

Held that, Arbitral Tribunal is not to be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, and that its power under Sub-Section (3) includes the power to determine the admissibility, relevancy, materiality and weight of any evidence. However, there is nothing on record to indicate that the parties at any stage agreed to any procedure to be followed by the Tribunal in conducting its proceedings as required by Sub-Section (2), on account of which, automatically it is for the Tribunal now to conduct the proceedings in the manner it considers appropriate. Statutorily it is not bound by the strict rules either of the CPC or the Indian Evidence Act, and is, therefore, well possessed of the power to determine the admissibility, relevancy, materiality and weight of any evidence produced or sought to be produced before it. (Para 10)

Further held that, when thus read in conjunction with Section 5 as reproduced in Para 7 above, which precludes intervention by a Judicial Authority in Arbitral Proceedings, except when specifically permitted under Part I of the Act, it would logically follow that the Tribunal was well within its right to decide what evidence was material or relevant or admissible in the context of the application of the Claimant, on the basis of which, ultimately the assistance of the Court for causing production of such evidence was sought for. In such situation, the concerned Court whose assistance for that purpose was invoked by way of Section 27 of the Arbitration Act clearly could not have entered into the legal correctness of the Arbitral Tribunal's decision regarding production of the said evidence.

(Para 11)

Further held that, this Court has also no hesitation in holding that requisition of documents as sought for strictly in terms of the decision of the Arbitral Tribunal alone ought to have been secured by the Ld. Court below while dealing with the Application under Section 27 of the Arbitration Act, and that the Court had fallen in error by adjudicating upon the admissibility of the documents sought for.

(Para 20)

Yash Anand, Advocate
for the Petitioner in CR No.9540-2018 and
for the Respondent in CR No.1522 of 2919.

Lokesh Sinhal, Advocate
for the Respondent in CR No.9540-2018 and
for the Petitioner in CR No.1522 of 2919.

SUDIP AHLUWALIA, J.

(1) These are two cross Revisions filed by the contesting sides against the impugned order dated 18.8.2018 passed by the Ld. Addl.District Judge, Faridabad (Annexure P-13) on an Application moved before the said Court under Section 27 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to be as “the Arbitration Act”).

(2) Background of the matter is that the Arbitration was invoked at the instance of M/s B.J. Techno H.A.S. (JV) against National Hydroelectric Power Corporation Limited. During the Arbitral Proceedings, the Claimant filed an Application on 8.2.2016 requesting

the Arbitral Tribunal to direct the Respondent to produce certain documents. Vide its detailed order dated 1.8.2016 (Annexure P-4), the Arbitral Tribunal directed the Respondent to provide copies of documents sought against Sr. Nos.1 to 5 of Para 5 of the Claimant's Application, apart from providing copy of parts of Measurement Books required by the Claimant when sought. It appears that the Respondent's side in the Arbitration Proceedings did not comply with the aforesaid order for a considerable time, after which, the Claimant on 8.12.2016 filed an Application u/s 27 of the Act (Annexure P-8). The Arbitral Tribunal vide its order dated 15.12.2016 (Annexure P-9) allowed the aforesaid Application, after which, the requisite Application u/s 27 of the Act was filed before the Ld. Distt. Judge, Faridabad on 18.1.2017 (Annexure P-10), which was ultimately decided by the Ld. ADJ vide his impugned order.

(3) Both sides are aggrieved with the aforesaid order. It may be mentioned that the Ld. Court below in its impugned order partially set aside the original order of the Arbitral Tribunal. The documents covered at Sr.Nos.1, 2 & 3 in the opinion of the Ld. Court below could not be directed to be produced, since the same were the only internal Note Sheet on the file of the Respondent's Establishment, and therefore, in view of the case law cited on behalf of the Respondent, such Note Sheet, which was meant only for internal Office file, could not be supplied to the Applicant. However, the documents at Sr. Nos.4 & 5 were permitted to be supplied alongwith documents at Sr. Nos.6 & 7 as well, for which even the Arbitral Tribunal had not allowed the Claimant's prayer.

(4) The Claimant's side is aggrieved at the decision of the Ld. Court below in disallowing the production of documents at Sr.Nos.1, 2 & 3, while the Respondent's side is aggrieved that those at Sr. Nos.6 and 7, which had not been allowed even by the Arbitral Tribunal, have been directed to be produced by the Ld. Court below.

(5) In challenging the impugned order, the contention raised on behalf of the Claimant's side are two fold. Firstly, that the Ld. Court below went beyond its mandate in terms of Section 27 of the Act, vide which, it was only required to provide its Statutory machinery for the purpose of securing the evidence sought for by the Ld. Arbitral Tribunal, and had no authority to adjudicate upon the correctness of the Tribunal's order. Second limb of the Claimant's contention is that the Ld. Court below was incorrect in holding that the documents permitted to be called for by the Arbitral Tribunal were inadmissible in evidence,

since the provisions of either the Code of Civil Procedure, 1908 or the Evidence Act, 1872 are not strictly applicable to the Arbitral Proceedings in view of Section 19 of the Act. On the other hand, contention of the Respondent's side is that the Ld. Court below had rightly determined that the documents at Sr. Nos.1, 2 & 3 could not be led into evidence before the Arbitral Tribunal, since the same are not admissible according to the settled law of evidence. However according to the Respondent, the Court at the same time had fallen in error in allowing production of the documents at Sr. Nos.6 & 7, which had not been permitted even by the Arbitral Tribunal itself

(6) In view of above submissions made on behalf of contesting sides, it is appropriate to first be acquainted with the basic provisions of the relevant Sections 5, 19 and 27 of the Arbitration Act, to appreciate the arguments advanced in their proper perspective.

(7) Section 5 of the Arbitration Act provides –

“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.”

(8) The provisions of Section 19 following in Chapter V of the Arbitration Act are now set out as below –

“19. Determination of rules of procedure.—

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

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

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

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

(9) Lastly, the relevant Section 27, under which, the Arbitral Tribunal seeks assistance of the Court for taking evidence, provides –

“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.”

(10) From Section 19 (1) and (4) reproduced above, it is seen that the Arbitral Tribunal is not to be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, and that its power under Sub-Section (3) includes the power to determine the admissibility, relevancy, materiality and weight of any evidence. However, there is nothing on record to indicate that the parties at any stage agreed to any procedure to be followed by the Tribunal in

conducting its proceedings as required by Sub-Section (2), on account of which, automatically it is for the Tribunal now to conduct the proceedings in the manner it considers appropriate. Statutorily it is not bound by the strict rules either of the CPC or the Indian Evidence Act, and is, therefore, well possessed of the power to determine the admissibility, relevancy, materiality and weight of any evidence produced or sought to be produced before it.

(11) When thus read in conjunction with Section 5 as reproduced in Para 7 above, which precludes intervention by a Judicial Authority in Arbitral Proceedings, except when specifically permitted under Part I of the Act, it would logically follow that the Tribunal was well within its right to decide what evidence was material or relevant or admissible in the context of the application of the Claimant, on the basis of which, ultimately the assistance of the Court for causing production of such evidence was sought for. In such situation, the concerned Court whose assistance for that purpose was invoked by way of Section 27 of the Arbitration Act clearly could not have entered into the legal correctness of the Arbitral Tribunal's decision regarding production of the said evidence.

(12) It has, however, been contended on behalf of the Respondent that some of the documents sought to be got placed on record at the instance of the Claimant, could not have been admissible in evidence, since the same mostly happen to be internal Notes on the files of the Respondent, which have been held in various Judicial pronouncements to be inadmissible in evidence, and a number of decisions in support of this contention have been cited on behalf of the Respondent. These happen to be –

- i) *Sethi Auto Services Station and another* versus *Delhi Development Authority and others*¹;
- ii) *Shanti Sports Club and another* versus *Union of India and others*²;
- iii) *Jasbir Singh Chhabra and others* versus *State of Punjab and others*³;
- iv) *Union of India and another* versus *Ashok Kumar Aggarwal*⁴.

¹ 2009(1) SCC 180

² (2009) 15 S.C.C. 705

³ (2014)4 S.C.C.192

(13) In all the above mentioned decisions, it was held that the internal Notes on the Departmental Files not being the actual decision of the concerned Authority could not be led into evidence. This part of legal position is indisputable, but at the same time, we cannot lose sight of the fact that none of the above decisions were passed in the context of the power of an Arbitral Tribunal to decide on the relevancy or admissibility of any evidence, which as already seen, is independent of the rigors and trappings of the strict provisions of the Indian Evidence Act, 1872, and therefore, the Ld. Court below was not competent to interfere with the decision of the Arbitral Tribunal while dealing with the Application u/s 27 of the Arbitration Act. The Respondent's side has been unable to show any precedent, in which, adjudication upon the admissibility of evidence sought to be procured by the Arbitral Tribunal through assistance of the Court u/s 27 of the Arbitration Act was ever upheld by the Superior Court. On the contrary, the Claimant's side has placed a number of Judgments in support of its contention that role of the Court in dealing with a matter referred to it u/s 27 of the Arbitration Act is limited to providing its machinery for getting such evidence to be collected and supplied to the Arbitral Tribunal, and not to adjudicate upon the admissibility of the evidence called for by the tribunal.

(14) In dealing with a similar matter, the Delhi High Court in *“Thiess Iviinecs India versus NTPC Limited & Anr.”, O.M.P. (E) (COMM.) 12/2016 decided on 28.3.2016*, had similarly adverted to Sections 5, 19 and 27 of the Arbitration Act, which have also been reproduced in this Judgment, and observed -

“25. Section 5 specifically prohibits any judicial authority to intervene in the arbitration proceedings notwithstanding anything contained in any other law, for the time being in force in matters governed by part I of the Act, except to the extent, provided for in the Act. On perusal of Section 19(1), it is noted that the Tribunal shall not be bound by the Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. Section 19(2) contemplates, the parties are free to agree on the procedure to be followed by the Tribunal. Section 19(3) stipulates, failing any agreement, the Tribunal may conduct the proceedings, in the manner it considers appropriate. Section 19(4) contemplates, the Tribunal to govern the admissibility, relevancy, materiality and weight

of any evidence. Unlike 19(4), a perusal of Section 27 would reveal, it is enacted for the Court's assistance in taking evidence. There is nothing in Section 27, where the Court can determine the admissibility, relevancy, materiality and weight of any evidence. The only requirement for the Court is to ensure that it is within its competence and according to its Rules on taking evidence. The nature of power exercised is to execute the request as the Tribunal on its own cannot do it, in view of the inapplicability of the provisions of the Code of Civil Procedure, 1908. Such a request presupposes a direction of the Tribunal to produce the documents, which has not been complied with.

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

(15) In ***“M/s National Insurance Company Limited. versus M/s S.A. Enterprises” Review Petition (L) No.51 of 2015 in Arbitration Petition No.1544 of 2015 decided on 16.10.2015***, similarly the Bombay High Court had held -

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

production of such documents or presence of such witness was warranted or not.”

(16) Again the High Court after referring to the above decision in “*M/s National Insurance Company Limited's*” case (supra) in “*Stemcor (S.E.A.) Pte. Limited* versus *Mideast Integrated Steels Limited*”⁵ had observed –

“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 *National Insurance Company Limited Vs. 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.”

(17) Similarly, in “*Montana Developers Pvt. Ltd. Mumbai* versus *Aditya Developers, Mumbai and others*”, *Arbitration Petition (Lodging) No.680 of 2016 decided on 22.6.2016*, the Bombay High Court had held –

“16. I am thus inclined to accept the submission of Mr.Tulzapurkar, the learned senior counsel for the petitioner that the powers under section 27 of the Arbitration Act are not adjudicatory powers. In my view, the said provision

⁵ 2018 SCC OnLine Bom 1179

provides a procedure for providing assistance to a party in whose favour the learned arbitrator has opined that the production of documents or witness was warranted in the facts of his case. Under section 19 of the Arbitration Act, it is clearly provided that the learned arbitrator shall not be bound by the Code of Civil Procedure, 1908 or Evidence Act, 1872. In my view, the arbitral tribunal is thus not empowered to issue any witness summons itself or to compel a party to produce any documents under the provisions of the Arbitration Act. If the learned arbitrator is satisfied on the application made by any of the party that production of witness or documents which is not being produced inspite of the attempts made by a party, the arbitral tribunal can grant permission to such a party to take the assistance of this Court under section 27 of the Arbitration Act. In my view, merely because a party has filed the arbitration proceedings in view of the agreement between the parties, he cannot be put to dis-advantage in view of the powers of summoning a witness not having been provided to the arbitrator under the provisions of the Arbitration Act.

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

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

cannot hear the respondents on the merits of the order passed by the learned arbitrator at this stage.”

(18) In “*United Spirits Ltd., Bangalore versus Delta Distilleries Ltd., Mumbai and another*”, *Arbitration Petition No.838 of 2011 decided on 20.7.2012*, it was again observed –

“15. At the cost of repetition I reiterate that the powers vested with the Court under the provisions of section 27 of the Act, are required to be exercised by this Court so as to enable the Arbitral Tribunal to effectively and completely decide the matters before it. Any other interpretation, in my considered view, would rather make the provisions of section 27 redundant and would frustrate the very purpose of the Arbitration. In that view of the matter, in ordinary course this Court would have passed the order directing the respondent No.2 to produce the Assessment Orders on the failure of the respondent No.1 to produce the same. However, since the learned AGP categorically stated that the record is not available with the respondent No.2, as such a direction cannot be issued as against the respondent No.2.”

(19) In “*Delta Distilleries Limited versus United Spirits Limited and another*”⁶, the Supreme Court had explicitly endorsed the Application of the Arbitral Tribunal u/s 27 regarding production of certain documents, which were ostensibly 'confidential' documents, and directed the Appellant to produce the same as had been sought by the Respondents. The relevant extracts from the Judgment of the Apex Court are as follows –

“25.2. If we look at the words used in these two sections, they very clearly state that particulars contained in any return or statement made by a party, or document produced along therewith are confidential, and no court shall pass any order requiring the Government or a Government servant to produce any such statement, document or return. It is a settled principle of law that the words used in a statute are to be read as they are used, to the extent possible, to ascertain the meaning thereof. Both these provisions contained a bar only against the Government officers from producing the documents mentioned therein. There is no bar therein against a party to produce any such document.

⁶ (2014) 1 S.C.C. 113

25.3 In *Tulsiram Sanganaria v. Anni Rai and Ors.* reported in 1971 (1) SCC 284, a Bench of three Judges of this Court interpreted an identical provision in Section 54(1) of the Income Tax Act, 1922, and held that the said provision created a bar on the production of the documents mentioned therein by the officials and other servants of the Income Tax Department, and made it obligatory on them to treat as confidential the records and documents mentioned therein, but the assessee or his representative-in-interest could produce assessment orders as evidence, and such evidence was admissible. Thus, if a claim is to be decided on the basis of an order of assessment, the claimant as well cannot be denied the right to seek a direction to the party concerned to produce the assessment order.

25.4. It is this very prayer which has been allowed by the earlier order dated 27-3-2007 passed by the then Arbitrator, and also by the subsequent order dated 16-9-2011 passed by the Arbitral Tribunal, and in our view rightly so. There is no substance in the second objection as well.

26 There is one more aspect which we must note, i.e., when the first respondent made an application for production of the assessment orders, the defence taken by the appellant in their affidavit dated 16-9-2011 was that those documents were confidential documents, and could not be directed to be produced. It was not stated at that time that the said documents were not available. It is ten months thereafter, that when the second affidavit was filed in the High Court, that the respondent for the first time contended that the said documents were not available. This was clearly an after thought, and this attitude of the respondent in a way justified the earlier order permitting an application under Section 27 passed by the Arbitral Tribunal. The Assistant Commissioner of Sales Tax of the concerned area was also joined as respondent so that he could be directed to produce the required documents. However, he reported that those documents were old records, and were destroyed. The learned Single Judge did not pass any order against Respondent 2 to produce the documents, as sought. However, the learned Single Judge rightly allowed the petition as against the appellant in terms of Prayer clause

(a), directing the appellant to produce the documents which were sought by the Respondent 1.

27. In the circumstances, there is no merit in the appeal. The appeal is, therefore, dismissed.”

(20) In the light of the aforesaid decisions cited on behalf of the Claimant i.e. the Petitioner in CR No.9540 of 2018, this Court has also no hesitation in holding that requisition of documents as sought for strictly in terms of the decision of the Arbitral Tribunal alone ought to have been secured by the Ld. Court below while dealing with the Application under Section 27 of the Arbitration Act, and that the Court had fallen in error by adjudicating upon the admissibility of the documents sought for. Consequently, CR No.9540 of 2018 is allowed in totality after setting aside that portion of the impugned order, according to which, the Ld. Court below had determined that the documents covered at Sr. Nos.1 to 3 could not be directed to be produced. The counter Civil Revision No.1522 of 2019 filed at the instance of the Respondent in the Arbitral Proceedings is allowed in part after setting aside the impugned order to the extent that the Respondent was directed to supply the documents at Sr. Nos.6 & 7 as well, which had not been called for even by the Arbitral Tribunal.

(21) The Ld. Court below is, therefore, directed to see that the documents against Sr.Nos.1 to 5 of the Claimant's original Application, the production of which was sought for under Section 27 of the Arbitration Act, be got placed before the Arbitral Tribunal. At the same time, it may be recalled that on 6.5.2019, Ld. Counsel for the Respondent (NHPC) had, however, submitted that it was not in a position to comply with the direction in respect of document at Sr.No.5, since its description was lacking in vital material particulars. At that stage, Ld. Counsel for the Petitioner/Claimant had submitted that the concerned document is already available on the file of the Arbitral Tribunal, and that if so warranted, it would identify the same before the Arbitral Tribunal with liberty to the Respondent to admit or deny its authenticity.

(22) Such liberty is also granted to the Petitioner/Claimant in respect of the disputed document at Sr.No.5 of the original Application (Annexure P-1) and these two Revisions are thus disposed off with the observations recorded above.