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

ARBITRATION PETITION (L) NO. 722 OF 2022

Dilip s/o. Bhavanji Shah … **Petitioner**

V/s.

Errol Moraes … **Respondent**

Mr. Ashok M. Saraogi for the petitioner.
Mr. Akash Rebello a/w. Mr. Anil D'souza for the respondent.

CORAM : G.S.KULKARNI, J.
DATE : 17 January, 2022

ORDER:

1. This proceeding is filed under 27 of the Arbitration and Conciliation Act, 1996 (for short "the Act"), which provides for the Court's assistance in taking evidence by enabling the arbitral tribunal or a party with the approval of the tribunal to apply to the Court for assistance in taking evidence.

2. In the present case, an application came to be made by the petitioner/original respondent before the arbitral tribunal, to examine one Mr. Anil Jaiswal as a witness in the arbitral proceeding. Such application of the petitioner was opposed by the respondent by filing a reply. On such backdrop, the arbitral tribunal heard the parties and by a detailed order dated 11 January, 2021 has come to a conclusion, that allowing the petitioner to lead evidence of such witness would certainly not cause any prejudice to the respondent. The arbitral tribunal also

observed that the evidence of such witness, as intended to be examined by the petitioner, would be material and not altogether a waste of time, as was urged on behalf of the respondent-claimant. A perusal of the said order passed by the tribunal clearly indicates that all objections of the respondent in that regard were considered by the arbitral tribunal and were rejected, as not relevant. Accordingly, on such approval being granted by the arbitral tribunal to examine such witness, the petitioner/original respondent has filed this petition under section 27 of the Act praying that this Court issues a witness summons to Mr. Anil Jaiswal.

3. Mr. Saraogi, learned counsel for the petitioner has reiterated the case of the petitioner as placed before the tribunal pointing out the necessity for the petitioner to examine such witness. He has drawn the Court's attention to the relevant paragraphs of the order dated 11 January, 2021 passed by the arbitral tribunal to submit that the arbitral tribunal in granting its seal of approval in permitting the petitioner to examine the said witness has considered the merits of the petitioner's contentions as also the opposition of the respondents. He submits that in the circumstances, the petition is required to be allowed by issuance of a witness summons to the said witness.

4. On the other hand, Mr. Rebello, learned counsel for the respondent would submit that the respondent has an objection to the order dated 11 January, 2021 passed by the tribunal permitting examination of such witness. He would submit that although the tribunal has approved that such witness needs to be examined, he, however, submits that this Court also needs to consider whether the tribunal was correct in coming to a conclusion that such a witness ought to be examined. In support of his contention, Mr. Rebello has placed reliance on the decision of Delhi High Court in **Hindustan Petroleum Corporation Ltd. vs. Ashok Kumar Garg**, **2006(91) DRJ 591** to submit that once a tribunal takes a prima facie view that a witness can be examined by a party, however even then, the final decision whether a witness summons ought to be issued to the concerned witness is required to be taken by the Court, applying the provisions of Order 16 Rule 1 of the Code of Civil Procedure. He submits that the respondent had put up a case that such witness cannot be examined by the petitioner, although it is not accepted by the tribunal. According to him, the correctness of the reasons as set out by the arbitral tribunal can certainly be scrutinized by the Court, akin to what the Civil Court would do in a trial of a civil suit, by applying the provisions of Rule (1) Order 16 of the CPC. It is, therefore, his submission that the petition ought to be dismissed.

5. Having heard learned counsel for the parties and having perused the detailed order dated 11 January 2021 passed by the arbitral tribunal, at the outset, it would be appropriate to note the provisions of Section 27 of the Act which reads thus:-

> "**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."

On a plain reading of Section 27 it is quite clear that it is a provision whereby the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence. Sub-section (2) provides for the necessary ingredients of an application which would be filed under such provision. Sub-section (3) provides 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. Sub-section (4) provides that 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. Sub-section (5) provides for the consequence on the persons failing to attend in accordance with the process issued by the Court under sub-section (4), to be at par to persons similarly placed in a suits to be tried by the Court. Sub-section (6) provides that the expression "Processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

The legislative scheme of the provisions of Section 27 is quite clear namely that the Court has not been attributed any adjudicatory function in providing assistance to the arbitral tribunal in taking evidence. In exercising jurisdiction under Section 27, the Court would be required to consider as to whether the requirements of sub-section (1) are satisfied namely that it is an arbitral tribunal or a party with the

approval of the arbitral tribunal, applying to the Court for assistance in taking evidence. Once such requirements are satisfied, it would be necessary for the Court to exercise its jurisdiction under Section 27 as sub-section (1) itself provides.

6. It would be required to be seen as to whether the application in question as moved by the petitioner complies with the requirements of sub-section (1) of Section 27. Having perused the detailed order dated 11 January, 2021, in my opinion, there is more than a prima facie application of mind by the arbitral tribunal on the need of such witness to be examined by the petitioner/original respondent. The arbitral tribunal has considered the rival contentions that the evidence of such witness would be material and it would certainly not be a waste of time. Even the contention of the respondent that there was a delay in summoning such witness, as his name was not set out in the list of witness is also not accepted and is held not relevant in the context such witness is intended to be examined by the petitioner. The arbitral tribunal has observed that no prejudice would be caused to the respondent-claimant if such a witness is examined. Thus, although as per the provisions of Section 19 of the Act, the strict procedure under the Code of Civil Procedure is not applicable to the arbitral proceedings, however, in the present case, it is clearly seen that *sub*

silentio the arbitral tribunal has in fact applied itself to the requirements of Order 16 Rule (2) and (3) in recognizing the need of such witness to be examined by the petitioner. The approach of the arbitral tribunal appears to be extremely fair in passing the said order dated 11 January, 2021.

7. Considering such seal of approval granted by the tribunal to permit the petitioner to examine such witness, in my opinion, it would be certainly not the jurisdiction of this Court under Section 27 to sit in appeal over such findings as rendered by the tribunal which is a procedural decision taken during the course of the arbitral proceedings. The arbitral tribunal, being the master of the proceedings before it, has the ultimate jurisdiction to come to a conclusion, in the course of the adjudication, to form an opinion as to who are the appropriate and relevant witness to be examined by the parties. Also the respondent would have all the opportunity to cross-examine such witness. In the present case, the tribunal has rightly exercised its discretion in permitting the witness in question to be examined by the petitioner. It would not be the jurisdiction of this Court, in proceedings under Section 27 of the Act, to consider the legality of the reasons which are set out by the tribunal in its order dated 11 January, 2021 in permitting the witness to be examined by the petitioner.

8. It may also to be useful to note the provisions of Section 5 of the Act which provides for “Extent of judicial intervention” in arbitral proceedings which provide that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part-I of the Act, no judicial authority shall intervene except where so provided in this Part I of the Act. Section 19 provides for “Determination of rules of procedure”, and ordains that 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).

9. In my opinion, Section 27 needs to be read on the touchstone of Section 5 read with Section 19 of the Act, which clearly brings about a legal consequence that under section 27 of the Act, the Court has not been conferred with any adjudicatory powers, being a provision merely intended to enable the parties to seek assistance of the Court in taking evidence, which is particularly clear from the provisions of sub-section (1) of Section 27. Thus, Mr. Rebello’s contention that Section 27 should be read so as to contain an element of adjudication, even in providing assistance in taking evidence would amount to reading something into Section 27 which has been not provided by the legislature. Such interpretation as suggested by Mr. Rebello, in fact,

would lead to an absolute absurdity, counter productive to the efficacy as also the efficiency of the arbitral proceedings resulting into a delay in expeditious determination of the disputes.

10. It would be useful to refer to the decision of the learned Single Judge of this Court in "**M/s.Tata Industries Ltd. Vs. M/s.Grasim Industries Ltd.**"**2011(1) Mh.L.J. 436** in the context of the observations the decision makes on judicial interference in arbitral proceedings, as also on the policy of the provisions as reflected from the scheme of the different provisions of the Act. The Court has also considered the effect of the provisions of Section 5 of the Act and has observed that the policy of the legislature is to minimize judicial intervention in arbitral proceedings and to confine intervention into an exceptional category of cases stipulated in the legislation. It was held that the discipline of the Act must be observed by Courts and excessive intervention in arbitral proceedings is liable to render nugatory the object and purpose of facilitating arbitration as an effective form of alternate dispute resolution in commercial disputes. It was also observed that the role of the Court when it enters into the arena of commercial disputes must be to facilitate an efficacious and expeditious determination of disputes and that both the sense of expedition and efficacy ought not to be lost in entertaining unwarranted pleas. In my opinion, such principles are

aptly applicable to the plea being urged on behalf of the respondents for the Court to reject the respondents' contentions.

11. Insofar as Mr. Rebello's reliance on the decision of the learned Single Judge of the Delhi High Court in **Hindustan Petroleum Corporation Ltd.** (supra), in my opinion, in the facts of the present case, this decision does not at all support the case of the respondent. No doubt that when the Civil Court is called upon to to pass an order to summon a witness to be examined in a civil trial, the provisions of Order 16 Rule 1 would become relevant. However, I do not agree with Mr. Rebello's contention that once the tribunal has formed a prima facie opinion, that a particular witness is required to be examined, by a party to the arbitral proceedings, such reason ought to be revisited and/or scrutinized by the Court, as if the proceeding under section 27, is in the nature of an appeal over such decision of the arbitral tribunal, as noted above. This is certainly not the jurisdiction of the Court under section 27 as clear from its plain language.

12. Moreover, as to what Mr. Rebello has contended is also not the view taken by the Delhi High Court in the said decision as relied on by Mr. Rebello. In paragraph 10 of the said decision, the Court has observed that although on a reading of provisions of Order 16 Rule 1

would show that when considering an application under section 27 of the Act, the procedure to be followed by the Court would be as prescribed by Order 16 of the said Code, however, in order to facilitate the exercise of power by the court and also so that the Court is not inundated with unnecessary requests, a condition of prior approval of the arbitral tribunal is envisaged under Section 27 of the Act. Notably paragraph 14 of the said decision reflects the context in which the Court was called upon to consider Section 27 of the Act. The Court observed thus:

> "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."

As seen from the observations as made in paragraph 14 of the said decision, certainly such are not the facts in the present case. Moreover, in the present case, there is certainly a prima facie consideration of the rival contentions and application of mind by the arbitral tribunal in permitting examination of the said witness, which satisfies the requirements of sub-section (1) of Section 27 of the Act for the Court to issue a witness summons as prayed for.

13. In view of the above discussion, the petition is required to be allowed. It is allowed in terms of prayer clause (a). Office is directed to issue witness summons to Mr.Anil Jaiswal to remain present before the Tribunal on 21 March, 2022 at 5.00 p..m at Orritel Business and Arbitration Centre, 89, Ararat Building, 3rd floor, N.M. Road, Kalaghoda, Fort, Mumbai – 400 023.

14. Disposed of in the above terms. No costs.

(G.S.KULKARNI, J.)