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

Judgment pronounced on: 01.12.2023

+ O.M.P. (E) (COMM.) 22/2023

STEEL AUTHORITY OF INDIA LTD

..... Petitioner

Through: Mr. Saurabh Seth, Ms. Sonia Dube,
Ms. Kanchan Yadav and Ms. Saumya
Sharma, Advs.

versus

UNIPER GLOBAL COMMODITIES

..... Respondent

Through: Mr. Amit Agarwal, Mr. Shwetabh
Sinha, Mr. Sidhant Pandita & Ms.
Vatsala Pandey, Advs.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 27 of the Arbitration and Conciliation Act, 1996 (the 'A&C Act') has been filed on behalf of the petitioner seeking the following reliefs:

"a) The person described in paragraph 14 above be directed to appear before the Arbitral Tribunal and adduce evidence directly before the Hon'ble Arbitral Tribunal of the Indian Council of Arbitration;

(b) The Department of this Hon'ble Court be directed to issue appropriate notice and summons to the person named and described in paragraph 14 hereinabove to adduce evidence as witness before the Hon'ble Arbitral Tribunal of the Indian Council of Arbitration on the issues framed by the Arbitral Tribunal;"

2. Briefly stated, the facts are that the petitioner had chartered a vessel by the name 'MV PEACE GEM' for the carriage of the petitioner's cargo from the port of DTA Terminal New Port News, on the East Coast of the



United States of America to the destination ports of Vizag (Visakhapatnam) and Haldia in India. The respondent is purportedly the owner of the said Vessel. Disputes having arisen between the parties, the respondent (claimant in the arbitration) has made a reference to Arbitration under the Rules of the Indian Council of Arbitration, New Delhi, in accordance with the relevant terms of the subject Charter Party Agreement.

3. The respondent has a monetary claim against the petitioner on account of alleged demurrage for the said Vessel while the Vessel was at Haldia Port, India, between 07.05.2019 and 20.05.2019. The petitioner in the arbitration has denied this claim on the ground, *inter-alia*, that the said Vessel was suffering from infrastructural damages and was unfit to be called to berth, inasmuch as the River Pilots of the Haldia Dock Complex had refused to board the said Vessel until 20.05.2019 on account of the pilot ladder on the starboard side of the Vessel having been damaged and rendered non-functional and unserviceable.

4. On the said aspect, one of the issues framed by the Arbitral Tribunal is as under:

“5. Whether the vessel can berth and also discharge goods with a damaged starboard combined pilot ladder?”

5. It is averred in the petition that the concerned officer of the Kolkata Port Trust had issued an e-mail to the petitioner on 19.05.2022, confirming that the River Pilots had refused to board the said Vessel when the Vessel was called to berth, on the ground that the combined pilot ladder on the starboard-side of the Vessel was not functional and therefore the Vessel was not capable of being boarded.

6. An application was filed by the petitioner before the Arbitral



Tribunal, seeking its approval for moving the court for seeking the court's assistance for taking evidence of the concerned officer of the Kolkata Port Trust. Vide order dated 13.04.2023, the Arbitral Tribunal allowed the said application, as under:

“ORDER

The Respondent had filed an Application dated 27.03.2023 (“the Application”) in the hearing held on 27.03.2023 seeking approval/permission of the Tribunal under Section 27 of the Arbitration and Conciliation Act, 1996 for producing a witness from S P Mookerjee Port, Kolkata for deposing in the present proceedings in respect of vessel MV Peace Gem more particularly, in respect of the damaged pilot combination ladder on her starboard site at that time of her call for berthing at Haldia Dock Complex in May, 2019.

The Claimant has filed a Reply dated 03.04.2023 praying for rejection of this application on the grounds stated therein.

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.

In view of the foregoing, the Application filed by the Respondent is allowed and permission is given to the Respondent to file the necessary application expeditiously in the appropriate court for its assistance in taking evidence from S P Mookerjee Port, Kolkata. Meanwhile the Respondent will produce its other witness(es) on April 26-27 dates already fixed.

*Ashok Sharma
Presiding Arbitrator on behalf of the Tribunal”*

7. The details of the person to be summoned as witness and description of documents to be produced, are described in paragraph 15 of the petition;



the same is reproduced hereunder:

Name of person to be heard as witness	Address of person to be heard as witness	Description of documents proposed to be produced
Prosenjit Gupta (Senior Deputy Manager (Sh&CH), Syama Prasad Mookerjee Port	Traffic Operations (Sh&CH) Division, Operational Building, Chiranjibpur, Haldia. Purba Medinipur, West Bengal. Pin- 721604	E-mail dated May 19, 2022 issued by the said Prosenjit Gupta at 10:44:49 AM.

Submissions of the Parties

8. Learned counsel for the petitioner has submitted that during the stage of Admission/Denial of documents in the subject arbitral proceedings, the respondent has denied the aforesaid e-mail dated 19.05.2022. It is submitted that the petitioner is not the author or issuer of the said email, and therefore cannot prove its contents or veracity. It is submitted that unless the witness of the Kolkata Port, who is an independent third party to the arbitration proceedings, is permitted to depose and get his testimony recorded and considered by the Arbitral Tribunal, the petitioner shall be gravely deprived of valuable legal rights, and its *bona fide* defence in the subject arbitral proceedings. It is submitted that perusal of the order dated 13.04.2023 clearly shows application of mind and *prima facie* examination of the matter by the Arbitral Tribunal from the following words in the said order – “Both the parties in arbitration proceedings are to be given full opportunity to present their case”. It is submitted that the Arbitral Tribunal was not required to give elaborate reasons before allowing the application filed



under Section 27 of the A&C Act. It is also submitted that the Arbitral Tribunal by virtue of Section 19 of the A&C Act was entitled to conduct the proceedings in a manner it considered appropriate, and thus deferring of the decision on relevance or materiality of the evidence sought to be produced by the petitioner was within the domain of the Arbitral Tribunal.

9. *Per contra*, learned counsel for the respondent has submitted that the Court is not to issue orders under Section 27 of the A&C Act where the Arbitral Tribunal has proceeded on a misconception of law, or where the Arbitral Tribunal's order exhibits a complete non-application of mind. It is submitted that the Arbitral Tribunal is required to pass a reasoned order (even if brief and *prima facie*) and cannot act mechanically. It is further submitted that, in any case, there is no material before the Court to determine the relevancy of the evidence requested by the petitioner. To determine whether a particular witness or material is relevant or simply an abuse of process, it is necessary to examine the pleadings of the parties and the material/evidence already available. None of this has been placed on record. It is also submitted that the email dated 19.05.2022 is completely irrelevant to the issue of whether the vessel can berth and discharge goods with a damaged starboard combined pilot ladder.

10. Learned counsel for the respondent has also submitted that the Court's power under Section 27 is discretionary, as evidenced by the use of the word "may" in the said provision. It is submitted that the Court should not exercise its discretion in favour of the petitioner in this case, given the petitioner's conduct in not even paying the arbitral fees and costs.

11. On the issue of payment of the arbitral fees and costs, learned counsel for the petitioner has submitted that Rule 21(3) of the Maritime Arbitration



Rules of the Indian Council of Arbitration permits the petitioner to withhold said payments since the respondent has not filed any counterclaim in the arbitration proceedings. He has further submitted that the Arbitral Tribunal has taken note of this issue in its Minutes of Proceedings dated 27.10.2022, and has conclusively put this issue to rest. Additionally, learned counsel for the petitioner submitted that the payment of arbitration fees to the Arbitral Tribunal is outside the scope and domain of the present application under Section 27 of the A&C Act.

Analysis and Findings

12. I have perused the record and heard learned counsel for the parties.

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 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.

14. The Arbitral Tribunal although not bound by the rules of procedure envisioned under Code of Civil Procedure, Evidence Act, and entitled to conduct the proceedings in the manner it considers appropriate, was still required to form an opinion/exercise discretion in permitting the witness to



be examined by the petitioner. An application filed before the Arbitral Tribunal under Section 27 of the A&C Act cannot be allowed mechanically by the Arbitral Tribunal, it must scrutinize, at least on a *prima facie* basis, that there is relevancy of the witness sought to be produced. This Court in ***Hindustan Petroleum Corpn. Ltd. v. Ashok Kumar Garg***, 2006 SCC OnLine Del 1056, has held as under:

“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. The Court in ***Hindustan Petroleum*** (supra) further held as under:

“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....”

16. This Court in ***Silor Associates v. Bharat Heavy Electrical Ltd.***, 2014 SCC OnLine Del 3407, approved by Division Bench in ***Bharat Heavy Electricals Ltd. v. Silor Associates***, 2014 SCC OnLine Del 4442, has held as under:

“15. While hearing a petition under Section 27 of the Act, no doubt, I am not hearing an appeal from the order passed by the Tribunal. An appeal from an order passed by the Tribunal is maintainable only in terms of Section 37(2) of the Act, and not otherwise. But that does not mean that when an order passed by the Tribunal invoking Section 27 of the Act - to



*seek the assistance of the Court in taking evidence, is placed before the Court, the Court would simply act on the request of the Tribunal, even if it appears to the Court that the order of the Tribunal has been passed on an erroneous premise in law. **The Court is not bound to act on the request of the arbitral tribunal mechanically - even when the order appears to have been passed by the arbitral tribunal on a misconception of law. In such a situation, the Court would not only be entitled to, but would be duty bound to correct the error, if any, found in the order passed by the Tribunal.** In *Managing Director, Army Welfare Organisation (supra)*, the Supreme Court observed:*

“72. This Court cannot sit in appeal over the award of the arbitrator but can certainly interfere when the award suffers from non-application of mind or when a relevant fact is ignored or an irrelevant fact not germane for deciding the dispute is taken into consideration”.

In my view, the same principle applies to orders placed before this court under Section 27 of the Act.”

17. Further, it is not for this Court for the first time to determine the relevancy or materiality of evidence sought to be produced by the petitioner. The powers of this Court under Section 27 are not adjudicatory powers when r/w Section 5 & Section 19 of the A&C Act. The adjudication has to be done by the Arbitral Tribunal, which is the chosen forum by the parties. This court in *Thiess Iviinecs India v. NTPC Limited*, 2016 SCC OnLine Del 1819, has held as under:

“25. Section 5 specifically prohibits any judicial authority to intervene in the arbitration proceedings notwithstanding anything contained in any other law, for the time being in force in matters governed by part I of the Act, except to the extent, provided for in the Act. On perusal of Section 19(1), it is noted that the Tribunal shall not be bound by the Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. Section 19(2) contemplates, the parties are free to agree on the procedure to be followed by the Tribunal. Section 19(3) stipulates, failing any agreement, the Tribunal may conduct the proceedings, in the manner it considers appropriate. Section 19(4) contemplates, the Tribunal to govern the admissibility, relevancy, materiality and weight of any evidence. Unlike 19(4), a perusal of Section 27 would reveal, it is enacted for the Court's assistance in taking evidence. There is nothing in Section 27, where the Court can determine the admissibility, relevancy, materiality and weight



of any evidence. The only requirement for the Court is to ensure that it is within its competence and according to its Rules on taking evidence. The nature of power exercised is to execute the request as the Tribunal on its own cannot do it, in view of the inapplicability of the provisions of the Code of Civil Procedure, 1908. Such a request presupposes a direction of the Tribunal to produce the documents, which has not been complied with.

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

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

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

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



41. *The purpose of Section 27 of the Arbitration Act, in my view, is to provide assistance to the arbitral tribunal or to a party in taking evidence with a view to expedite the arbitral proceedings. Merely because the arbitral tribunal has no power to issue a witness summons or to compel the attendance of the witnesses, the parties should not suffer. The legislature has inserted the Section 27 of the Arbitration Act to avoid this inconvenience to the parties to the arbitral proceedings and has thus empowered the arbitral tribunal as well as the parties to take assistance of the Court. The Court is empowered to issue direction to a party or even third party to produce documents or witnesses by summoning the party or even third party if the arbitral tribunal has granted permission and is of the opinion that production of such documents or evidence of such party including third party would be necessary for proper and effective adjudication of the dispute before it.”*

18. The Bombay High Court in ***Dilip v. Errol Moraes***, 2022 SCC OnLine Bom 129, has held as under:

“9. 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.

10. It may also 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 Civil Procedure Code, 1908 (5 of 1908) or the Evidence Act, 1872 (1 of 1872).



11. 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.”

19. In view of the aforesaid, and particularly in view of the decision of this Court in ***Hindustan Petroleum*** (supra), the present petition is dismissed with a direction to the Arbitral Tribunal to consider, even if only on a prima facie conspectus, the relevancy or materiality of the evidence sought to be produced by the petitioner, before allowing the petitioner to approach this Court for seeking assistance in taking evidence.

20. The rival contentions of the parties with respect to non-payment of arbitral fees and costs by the petitioner cannot be made the subject matter of these proceeding under Section 27 of the A&C Act, at this stage.

SACHIN DATTA, J

DECEMBER 01, 2023/hg