
(2014) 09 DEL CK 0258
In the Delhi High Court
Case No : FAO(OS) 370/2014

Bharat Heavy Electricals Ltd.

APPELLANT

Vs

Silor Associates S.A.

RESPONDENT

Date of Decision : 01-09-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 18, 27, 34
Civil Procedure Code, 1908 (CPC) — Order 11 Rule 11, Order 11 Rule 12, Order 11 Rule 13, Order 11 Rule 14, Order 11 Rule 21

Citation : (2014) 3 ARBLR 522 : (2014) 145 DRJ 142 : (2014) 176 PLR 1

Hon'ble Judges : Pradeep Nandrajog, J; Mukta Gupta, J

Bench : Division Bench

Advocate : A.S. Chandhiok, Sr. Advocate instructed by Prashant Mehta, Priya Pathania, Hasleen Singh and Abhimanyu, Advocate for the Appellant; A.K. Sengupta, Suraj Prakash, Ashish Dixit and Deblina Sengupta, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Section 27 of the Arbitration and Conciliation Act, 1996 reads as under:-

"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 ".

2. The language of the section is plain and clear and admits of no two meanings. No part of the section needs to be interpreted. Sub-Section (1) empowers the Arbitral Tribunal or a party in lis before the Arbitral Tribunal, but with the approval of the Tribunal, to apply to the Court for assistance in taking evidence. Thus, as per sub-Section (1) of Section 27 either the Arbitral Tribunal or a party with the approval of the Tribunal can apply to a Court for assistance in taking evidence. As per sub-Section (2) the application which is made to the Court for its assistance in taking evidence must specify the details as per clauses (a) to (c) including sub- paras (i) and (ii) of clause (c). As per sub-Section (3), on receipt of the application either from the Arbitral Tribunal or from a party before the Tribunal but with the approval of the Tribunal, the Court may, within its competence and according to its rules on taking evidence, execute the order ordering that the evidence be provided directly to the Arbitral Tribunal. In other words, a Court is not mandated to comply with a request made by the Tribunal or by a party with the approval of the Tribunal. As sub-Section (4), while making an order under sub-Section (3) the Court is competent to issue the same processes to the witnesses as it would issue in a suit being tried before it. Sub-Section (5) provides for the consequence if a person fails to attempt in accordance with the process issued or makes a default or refusing to give evidence. Sub-Section (6) clarifies that the expression "processes" include summons and commissions for the examination of witnesses and summons to produce documents.

3. Now, as per sub-Section (3), if a Court accepts the request received from the Arbitral Tribunal or from a party with the approval of the Arbitral Tribunal, for assistance to be provided in taking evidence, the Court is empowered to order the evidence to be provided directly to the Tribunal but according to its (the Courts) rules. The process would then be issued by the Court to witnesses in the same manner as the Court issues in suits tried before it.

4. The CPC has elaborate provisions contained in Order XVI of the Code to summon and require the attendance of witnesses. Failure of a witness to comply with the summons is as per Rule 10 of Order XVI of the Code as also Rule 12 thereof. It is trite that the power of the Court to compel witnesses to appear to give evidence or produce documents envisaged by Order XVI are persons other than the litigating parties or a person under the direct control of a litigating party. To wit : the plaintiff is a company registered under the Companies Act, 1956 and wants to examine its accountant with additional requirement for the accountant to produce the cash book maintained by the company for a certain duration. The company has to produce its accountant who is working in the company requiring the accountant to take along with him in Court on the date notified for his evidence the cash book in question. It would be absurd for the company to proceed under Order XVI of the Code by moving an application in the Court requiring its accountant to be compelled to appear as a witness and additionally being compelled to take along with him the cash book in question. If the accountant for the period in question who wrote the cash book is not in the service of the company, the company can require the process of the Court to be initiated by applying for summons to be issued to the accountant requiring him to appear in the Court as a witness. Since the cash book in question is in the custody of the company, on the date fixed for the evidence of the accountant the company would have to send some person with the cash book in question.

5. The provisions of Order XVI of the Code have not to be confused with the provisions of Order XI of the Code concerning discovery and inspection.

6. As per Rule 12 of Order XI a party to a suit may apply to the Court for an order directing the other party to the suit to make discovery on oath of documents which are or have been in its power of possession relating to any matter in question therein and if the Court opines that for a fair disposal of the suit or for saving costs discovery should be ordered, an order would be passed to said effect requiring the party directed to file an affidavit of discovery as contemplated by Rule 13 of Order XI. Rule 14 empowers the Court to direct production of any document by a party which is in the power and possession of the party.

7. Reading the provisions of Order XI and Order XVI it becomes clear that the subject matter of Section 27 of the Arbitration and Conciliation Act, 1996 are third parties who could be witnesses required to be examined in relation to a fact in issue between the litigating party before an Arbitral Tribunal or persons who are in possession of documents production whereof would be necessary in the lis between the parties because the document is relevant to determine a fact in issue. Thus, if an application is filed before a Tribunal requiring a party before the Tribunal to produce a document in its power and possession, the Tribunal would be competent to deal with the same without any reference being made to a Court. Non- compliance with an order of discovery followed by production by a party to a litigation would be as per Rule 21 of Order XI.

8. With the aforesaid legal position we note the relevant facts which have given birth to the instant appeal.

9. Bharat Heavy Electricals Limited (BHEL) and M/s Silor Associates S.A. (a company registered under the laws of Panama) are bound by a contract dated February 14, 2003 which the two call "SERVICE PROVIDER AGREEMENT". The agreement notes that BHEL's offer to execute, on a turnkey basis, the erection and commissioning of 600 MW gas turbine power project has been accepted by a company M/s General Electrical Company of Libya in Libya. The agreement records that Silor has the necessary market know-how and experience and would be assisting BHEL in obtaining goods and services for the project. The role of Silor is advisory as also to assist BHEL by providing services for staff of BHEL visiting Libya. A service fee has to be paid by BHEL to Silor for the services rendered.

10. BHEL and Silor went into litigation. The agreement between the two has an arbitration clause. An Arbitral Tribunal of three persons was constituted. Silor filed its claim. BHEL oppose the same.

11. Pleadings were completed. Parties filed their respective documents and started examining the witnesses. Being the claimant, Silor examined its witness(s). BHEL commenced examination of its witness(s). Three applications came to be filed by Silor invoking Section 18 of the Arbitration and Conciliation Act, 1996 which enjoins that parties shall be treated with equality and each party shall be given a full opportunity to present its case by the Tribunal. In the first application prayer made was to direct BHEL to produce a communication dated June 22, 2005 which BHEL claim to have been sent to Silor and in respect of which stand of BHEL there are specific pleadings to said effect. Silor has denied receiving said letter. The relevance of the letter is that BHEL claims that it contains a summary of the delays by the civil contractor at Libya, obviously as per BHEL being the person introduced to BHEL by Silor as a part of Silor's obligations under the contract. In the second application prayer made was that BHEL be directed to produce the information sent by one of its department to a query by its vigilance department. The relevance pleaded was the replies were from responses received from Silor and were by way of justification of action of Silor being accepted by the concerned department. In the third application the prayer made was to the production of a letter of authority (LOA) claimed to have been issued by BHEL in the name of Silor. The relevance was Silor claiming not having received the said letter of authority and for said reason the nomenclature of the proposed agreement between the parties not being termed as a "Representation Agreement" but as a "Service Provider Agreement".

12. BHEL opposed the three applications, as regards the first picking on an expression "Non-est" used in the application filed by Silor seeking production of the communication dated June 22, 2005. Opposing the third application BHEL pleaded that the said letter of authorization dated June 15, 2002 had already been filed by Silor along with statement of claim and was at page No.102.

Opposing the second application, privilege was claimed. Power of the Tribunal to direct production of the documents was questioned. Prejudice likely to be caused to BHEL if it was directed to produce the three documents was also pleaded as a ground to reject the application.

13. By a 2:1, the majority view being in favour of Silor, vide order dated July 20, 2013 the Tribunal held that Silor was entitled to maintain the three applications u/s 18 of the Arbitration and Conciliation Act, 1996. Holding that the three documents were relevant, not giving any opinion on the claim of privilege with respect to the inter-departmental communication concerning a vigilance inquiry, the Tribunal passed a declaratory order that the documents were relevant. The Tribunal held that in its opinion the disclosure of the documents were necessary to give the claimant full opportunity to present its case. The Tribunal held that it was passing the order by way of applying to the Delhi High Court for its assistance in the production of the documents.

14. Enclosing therewith a copy of the order passed by the Arbitral Tribunal OMP No.1037/2003 was filed by Silor u/s 27 of the Arbitration and Conciliation Act, 1996.

15. The learned Single Judge has opined that the application was misconceived. The view taken is that the Tribunal was competent within its power to direct production of the documents. The learned Single Judge has refused to go into the legality of the order passed holding that if the award was against it, while challenging the award u/s 34 of the Arbitration and Conciliation Act, 1996 the BHEL could challenge the legality of the order.

16. The grievance in the appeal is that the learned Single Judge could not set aside the direction issued by the Tribunal and the learned Single Judge was bound to decide on the relevancy and confidentiality of the documents because of the mandate of sub-Section (3) of Section 27 of the Arbitration and Conciliation Act, 1996 as per which the request had to be treated by the Court for purposes of it being executed by applying the rules applicable to the Court in ordering evidence to be provided, and for which the learned Single Judge ought to have taken note of Order XVI of the Code of Civil Procedure.

17. We have in the opening of our opinion discussed the difference between the powers under Order XI and Order XVI of the Code of Civil Procedure. It is apparent that the argument of the appellant is misconceived and is on the belief that the Tribunal had wanted a third party to produce the documents. To some extent the belief of the appellant is induced by a wrong belief in the correct legal position by the Tribunal. The Tribunal overlooked that the request made to it was for a party before it to produce before the Tribunal a document referred to by the party i.e. BHEL in its pleadings. The request was not that the document (3) were in possession of a third party outside the control of either party to the litigation and thus assistance by way of a compulsive process was necessary.

18. The view taken by the learned Single Judge in clarifying on the law and

refusing assistance is correct.

19. We concur with the view taken by the learned Single Judge that the legality of the order passed by the Tribunal in so far it held on the relevancy of the documents and the effect of the Tribunal not deciding on the claim of privilege for one document as also its power u/s 18 had to await an award being passed for the reason the Arbitration and Conciliation Act, 1996 does not contemplate any challenge to such an order save and except when the award is pronounced. The criticism of the impugned order that the learned Single Judge could not have set aside the order passed by the Tribunal in so far the Tribunal opined that assistance from the Court was necessary overlooks the fact that the learned single Judge has not over-ruled any part of the order passed by the Tribunal. What has been held by the learned Single Judge is that the Tribunal has sought assistance from the Court on an erroneous belief of the law. Throwing light on the law, being the power of the Tribunal vested in it to direct production of a document by a party in lis before it, the request made by the Tribunal has been politely turned down.

20. We dismiss the appeal clarifying as the learned Single Judge has done that the legality of the order passed by the Tribunal concerning relevance and the omission not to decide on the claim of privilege of one document could be challenged by BHEL should it be aggrieved, when the award is published.

21. No costs.