
(2006) 09 DEL CK 0054

In the Delhi High Court

Case No : CM (M) No. 733 of 2004 and CM No. 7154 of 2003

Hindustan Petroleum Corporation

APPELLANT

Vs

Ashok Kumar Garg

RESPONDENT

Date of Decision : 11-09-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 20, 21, 27, 27(27), 27(4)
Civil Procedure Code, 1908 (CPC) — Order 16 Rule 1, Order 16 Rule 1(1), Order 16 Rule 1(2)
Constitution of India, 1950 — Article 227, 27

Citation : AIR 2006 Delhi 366 : (2007) 1 ARBLR 368 : (2006) 91 DRJ 591

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Rajiv Shakdar and Rajiv Kapur, for the Appellant; J.V.C. Bharati, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—Admit.

2. At the request of learned Counsel for parties, the petition is taken up for final disposal.

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 u/s 27 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 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

u/s 27 of the said Act for summoning of witness. Since no such circumstance had been set out, it was held that the discretion u/s 27 of the said Act

cannot be exercised in a routine manner.

6. In order to appreciate the controversy, it is necessary to reproduce Section 27 of the said Act which 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.

7. Section 27 envisages an application to be made to the court for seeking

assistance to take evidence. Such an application can be made either by the arbitral tribunal or a party with the approval of the arbitral tribunal. Thus, in case of an application by a party, the legislature itself envisaged an approval of the arbitral tribunal. This in turn puts an obligation on the arbitral tribunal to apply its mind and not to mechanically direct an application to be filed before the court.

8. A reading of the provisions of Sub-section (3) and Sub-section (4) of Section 27 of the said Act would show that the court may according to its rules of taking evidence examine such an application and issue processes to the witnesses in the same manner as if the court was trying the suit.

This in turn would require the court to exercise powers in accordance with Order 16 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code"). The relevant provision is reproduced as under:

Order 16 Rule 1--List of witnesses and summons to witnesses--

(1) On or before such date as the court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in court.

(2) A party desirous of obtaining any summons for the attendance of any person shall file in court an application stating therein the purpose for which the witness is proposed to be summoned.

(3) The court may, for reasons to be recorded, permit a party to call, whether by summoning through court or otherwise, any witness, other than those whose names appear in the list referred to in Sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

(4) Subject to the provisions of Sub-rule (2), summonses referred to in this rule may be obtained by the parties on an application to the court or to such officer as may be appointed by the court in this behalf within five days of presenting the list of witnesses under Sub-rule (1).

9. Order 16 of the said Code, thus, envisages that in case a party seeks its assistance to summon a witness, the court may, for reasons to be recorded, permit summoning of such a witness.

10. In my considered view, a reading of the aforesaid provision does show that while considering an application u/s 27 of the said Act, the

procedure to be followed by a court would be as prescribed under Order 16 of the said Code. However, possibly, 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 u/s 27 of the said Act. Learned senior counsel for petitioner in fact points out that in the UNCITRAL Model Law on

International Commercial Arbitration, the relevant Article 27 only prescribes the court to execute the request. The said article reads as under:

Court assistance in taking evidence--The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of

this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

11. Learned Counsel also drew attention of this Court to the judgment of the Apex Court in Raipur Development Authority Vs. M/s. Chokhamal

Contractors etc. etc., where in para 19 it was observed as under:

It is now well settled that an award can neither be remitted nor set aside merely on the ground that it does not contain reasons in support of the

conclusion or decision reached in it except where the arbitration agreement or the deed of submission requires him to give reasons. The arbitrator

or umpire is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or in the deed of

submission he is required to give such reasons and if the arbitrator or umpire chooses to give reasons in support of his decision it is open to the

court to set aside the award if it finds that an error of law has been committed by the arbitrator or umpire on the face of the record on going

through such reasons. The arbitrator or umpire shall have to give reasons also where the court has directed in any order such as the one made u/s

20 or Section 21 or Section 34 of the Act that reasons should be given or where the statute which governs an arbitration requires him to do so.

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 u/s 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.

16. In view of the aforesaid, the request of the petitioner is allowed and the petitioner is permitted to summon the witnesses before the arbitration

tribunal.

17. The petition is accordingly disposed of leaving parties to bear their own costs.

18. The parties to appear before the trial court on 28.09.2006 for necessary directions.

CM No. 7154/2003

19. No further directions are called for in this application.

20. The application stands disposed of.

21. dusty.