

(2007) 04 BOM CK 0073

In the Bombay High Court

Case No : Arbitration Petition No. 64 of 2007

Rasiklal Ratilal

APPELLANT

Vs

Fancy Corporation Ltd. and Another

RESPONDENT

Date of Decision : 02-04-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 27, 27(5), 27(6)
Civil Procedure Code, 1908 (CPC) — Order 13 Rule 1, Order 13 Rule 8, Order 13 Rule 9, Order 16 Rule 6, Order 7 Rule 17
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2007) 3 ALLMR 801 : (2007) 4 ARBLR 173 : (2007) 3 BomCR 603 : (2007) 109 BOMLR 880 : (2007) 4 MhLj 876

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Gaurav Joshi, instructed by D.P. Desai, for the Appellant; Ashish Kamath, instructed by V. Deshpande and Co., for the Respondent

Judgement

Anoop V. Mohta, J.—The petitioner has filed the present petition for issue of letter of request/witness summons to Janakalyan Sahakari Bank Ltd. (Respondent No. 2) as contemplated u/s 27 of the Arbitration and Conciliation Act, 1996 (for short, "Arbitration Act") for production of the original 8 Bills of Exchange, 8 cheques and dishonoured memos as per Exhibit "A" annexed to the petition.

2. The petitioner is a claimant before the Hon'ble Arbitral Tribunal. Respondent No. 1 against whom the claim is made in the sum of Rs. 2,69,31,779/-together with interest. The petitioners' basic claims are arising out of these documents. Therefore, an application u/s 27 of the Arbitration Act was filed by the petitioner being Arbitration Petition No. 379/2006 in this Court. After hearing the petitioner and respondent No. 1 by an order dated 29.08.2006 the said petition was allowed in terms of prayers (a), (b) and (c). The said order was communicated to respondent No. 2 vide letter dated 12.09.2006.

3. On 25.09.2006 representative of respondent No. 2-Bank was present through

their Advocates and informed to the Hon"ble Tribunal that they have certified copies of the original documents. They have not produced the original documents. However, they agreed to produce the original documents within a period of two weeks from 25.09.2006. As the original documents were not produced, the petitioner has filed the present petition seeking direction against respondent No. 2 to produce the original documents as referred above. Section 27 of the Arbitration Act as relevant is reproduced 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.

4. The scheme of Section 27 appears to be that the arbitral tribunal or a party with the approval of the arbitral tribunal may apply to the Court for assistance in taking evidence. For that the requirement is that the party should apply to the Court specifying the names and addresses of the parties and the Arbitrators; the general nature of the claim and the relief sought; the evidence to be obtained in particular, referring to the names and addresses of any person to be heard as witness or expert witness and a statement of the subject matter of the testimony required and secondly, by giving description of the documents to be produced or

property to be inspected. The Court within its competence and according to the Rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal. The Court may thereafter, while making an order under Sub-section (3), issue the same processes to witnesses as it may issue in Suits before it. Section 27(5) provides the consequence of non-compliance of the order of the Court. Section 27(6) further provides the meaning of expression "Processes" which includes summonses and commissions for the examination of witnesses and summons to produce documents.

5. Order 16, Rule 6 of the CPC (CPC) provides that a party desirous of obtaining summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness proposed is to be summoned. The court, if satisfied, is bound to issue summons as prayed. Order 13 of CPC deals with the procedure of production and return of documents. Rule 1 specifically for original documents to be produced at or before the settlement of issues. Order 13 Rule 9 deals with the return of admitted documents. The relevant Order 13, Rules 1 and 9 of CPC are reproduced as under:

1. Original documents to be produced at or before the settlement of issues.-

(1) The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed alongwith plaint or written statement.

(2) The Court shall receive the document so produced:

Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

(3) Nothing in Sub-rule (1) shall apply to documents

(a) produced for the cross-examination of the witnesses of the other party; or

(b) handed over to a witness merely to refresh his memory.

9. Return of admitted documents. -(1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under Rule 8 be entitled to receive back the same.

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of:

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefore

- (a) delivers to the proper officer for being substituted for the original
- (i) in the case of a party to the suit, a certified copy, and
- (ii) in the case of any other person, an ordinary copy which has been examined, compared and certified in the manner mentioned in Sub-rule (2) of Rule 17 of Order VII, and
- (b) undertakes to produce the original, if required to do so: Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.
- (2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it. Order 16, Rule 6 of CPC reads thus:

6. Summons to produce document. -Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons, if he causes such document to be produced instead of attending personally to produce the same.

Therefore, considering the scheme of the CPC in this regard, subject to hearing both the parties, the Court may pass appropriate order even to return the admitted documents, by substituting it with the certified copy. There is no provision pointed out by the parties that the Court should give hearing to the witness or a party against whom the Court wants to issue summons for production of documents or as witness.

6. The petitioners herein moved an application and sought leave from the Hon"ble Arbitral Tribunal for invoking the provisions of Section 27 of the Arbitration Act. The same was granted. It means that considering the controversy even as per the Hon"ble Arbitral Tribunal these documents are required for proper adjudication of the issues. As respondent No. 2, though ordered, failed to bring the original documents and as respondent No. 2 was not party to the earlier proceedings, the petitioner is seeking a direction specifically against respondent.

7. Heard the learned Counsel for the parties. There is no dispute about the jurisdiction and power of the Court to pass an appropriate order on an application; u/s 27 of the Arbitration Act if a case is made out by the petitioner. In the present case, in view of the earlier order there remained no doubt that these documents are necessary to be produced before the Hon"ble Tribunal for adjudication of the disputes. Section 31 of CPC and Orders 13 and 16 are the available procedure for issuance of summons to a witness to give evidence or to produce documents and/or for other relevant material.

8. The petitioner has made a third party to the dispute as Respondent No.2 in this arbitration Petition. Respondent No. 2 through their Advocates though appeared before the Hon"ble Tribunal on earlier occasion failed to produce the

original documents. In their affidavit dated 16.03.2007 filed in opposition to this petition basically objected to the production of original documents. Their case is that they required these original documents to support their case initiated u/s 138 of Negotiable Instruments Act in respect of the aforesaid dishonoured cheques. Respondent No. 2 is therefore required to file the originals of the said dishonoured cheques along with the Bank Return memo and other incidental correspondence in the said Magistrate Court along with the Affidavit of Evidence in Chief Examination so that those documents can be marked as Exhibit and the learned Magistrate will proceed to dispose of the said complaint as early as possible. Further delay in filing those original documents before the learned Magistrate, it is respondent No. 2 who will suffer and not the petitioner and/or respondent No. 1. Therefore, the learned Counsel for respondent No. 2 submitted that an appropriate direction be issued against the Hon''ble Tribunal to return those original documents within specific period or time. Respondent No. 2 further stated that they are ready to produce the original documents on a given date and/or fixed date, but they want those documents to be returned back by Hon''ble Tribunal immediately. They are ready to submit certified copy of those documents.

9. Considering the scheme of the Arbitration Act it is not possible for the Court to interfere with the proceedings which are pending before the Hon''ble Tribunal. An Arbitrator is a master of his own proceeding. The Court normally should not direct or re-schedule the proceeding of the Hon''ble Tribunal. Such submission therefore is absolutely untenable. The Hon''ble Tribunal is free to proceed in the matter as scheduled.

10. As respondent 2 is a party to this petition, I have taken note of his submission, otherwise, considering the scheme of Section 27 of the Arbitration Act, there is no procedure available whereby the Court should give hearing to the witness or a party against whom the Court wants to issue directions to produce record or to issue summons for witness. Such hearing is not at all contemplated under this provision and/or even in any other provision of CPC. Once the Court comes to a conclusion that these documents are required for adjudication of the issues, in the peculiar facts and circumstances of the case, issue direction or pass such an order to produce the original documents before the Hon''ble arbitral Tribunal directly. It is the Hon''ble Tribunal who will thereafter proceed as agreed and scheduled. The court's assistance in taking evidence as contemplated is restricted only to this extent of giving direction to the parties to produce the documents or issue summons to witnesses. In the present case, the Court is concerned only with the production of original documents, therefore, as case is made out and as respondent No. 2 is also not disputing to produce original documents, but only on certain conditions as referred above, I am inclined to grant relief, as referred above, as prayed in terms of prayer Clauses (a) and (b).

11. Respondent No. 2 has no objection of any kind in granting prayer (b).

12. So far as prayer (a) is concerned, I am not inclined to direct the Hon''ble

Tribunal to release and/or hand over and/or return of those original documents on or before particular date. However, in view of the submission made by respondent No. 2, as noted above and also in view of the fact that respondent No. 2 will require those documents to pursue their remedy against these parties which are pending. Respondent No. 2 is at liberty to move an application for return of those original documents before the learned Arbitral Tribunal.

13. The petition is accordingly allowed in terms of prayers (a) and (b). Respondent No. 2 should produce documents as ordered, before the tribunal directly. There will be no order as to costs. Prayers (a) and (b) reads thus:

a) that Honourable Court be pleased to issue letter of request/witness summons to the Janakalyan Sahakari Bank Ltd. for production and deposit with the Honourable Arbitral Tribunal on or before 02/04/2007 (2nd April of 2007) the original 8 Bills of Exchange, 8 cheques and 8 dishonour memos (As per Exhibits "A" herein) and

b) for issuance of witness/production summons to Janakalyan Sahakari Bank Limited for production and deposit with the Honourable Arbitral Tribunal on or before 02/04/2007, the other documents, for which already earlier orders dtd. 29th August 2006 are passed by the Honourable Bombay High Court, for the following documents:

i) Original of the fixed deposits, referred to in Exhibit "B" hereto.

ii) Letter dated 15th September 2003 addressed by Stock of India Limited to of the Janakalyan (copy whereof is in Exhibit "C" hereto); Holding the Sahakari Manager Bank Corporation(Credit) Ltd.

iii) Statement prepared Sahakari Bank Ltd. of the Shares deposited with the Corporation of India Limited (copy whereof is in Exhibit "D" hereto)." of by containing the Stock Janakaly an details petitioner Holding