

(2008) 07 DEL CK 0101
In the Delhi High Court
Case No : O.M.P. No. 364 of 2008

Reliance Polycrrete Ltd.

APPELLANT

Vs

National Agricultural Co-operative Marketing Federation of
India (Nafed)

RESPONDENT

Date of Decision : 23-07-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 27
Civil Procedure Code, 1908 (CPC) — Order 16 Rule 10, Order 16 Rule 12, Order 16
Rule 19, Order 26 Rule 4, 77

Citation : (2008) 8 ILR Delhi 132 : (2009) 154 PLR 28

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Guneeta Pahwa, for the Appellant; A.K. Thakur, R.K. Mishra and
Bharat Gupta, for the Respondent

Judgement

S. Ravindra Bhat, J.—The petitioner here claims an order u/s 27 of the Arbitration and Conciliation Act, 1996 (hereinafter called the "Act") for issuance of summons to named witnesses whose particulars are detailed in para 6. The witnesses mentioned in paras 6(a) to 6(j) are residents of Macau, Hongkong, Singapore and different cities in China. The other persons mentioned in para 6(k) to (q) are residents of India. Briefly, the facts are that the petitioner, a incorporated company sought adjudication of its disputes through arbitration, according to the agreed dispute resolving mechanism which forms part of the contract with the respondent. The petitioner engages itself in the export of Iron Ore Fines, the respondent, a Multi-State Cooperative Society agreed to finance the petitioner's operations asked for securities in that regard. It is claimed that the respondent assured to extend the financial facilities to the tune of Rs. 80 crores. The petitioner alleges that the respondent failed to release payments against Letters of Credit issued by six overseas financial institutions which led to the revocation of those credits. The petitioner alleges that it had entered into transactions with such institutions, leading to issuance of letter of Credit.

2. The arbitration held under the aegis of the Indian Council of Arbitrator, is under way. During the course of arbitral proceedings the petitioner applied to the Tribunal for summoning witnesses, many of whom are not residing in India. The Arbitral Tribunal, in its proceeding held on 12.5.2008 considered the request and ruled that the petitioner-claimant was able to establish relevance of such foreign witnesses, i.e. foreign buyers. Since it did not possess power to summon such witnesses, the petitioner was asked to seek recourse to Section 27 of the Act.

3. It is contended by Ms. Guneeta Pahwa, learned Counsel that this Court has the power and jurisdiction to issue summons to those cited as witnesses in para 6 including the foreign witnesses. Learned Counsel relied upon provisions of Order 16 Rule 19, CPC (CPC) in this regard and stated that since the Arbitral Tribunal had ruled on relevance of these witnesses the Court should summon them. She also relied upon Section 77 and Order 26 Rule 4 CPC to say that if for some reason the Court feels inhibited in issuing summons to such foreign witnesses, a letter of request can be issued. Reliance was also placed on provisions of Part (d) Chapter 10 of the Delhi High Court Rules.

4. Learned Counsel placed reliance on the judgments reported as *Ramasyee Agro Industries Limited v. The India Sugar Refineries Limited* AIR 1983 Mad. 194 *Indra Mehendirata Vs. Raj Mohini and others*, *Filmistan Private Ltd., Bombay Vs. Bhagwandas Santprakash and Another*, and the decision of the Bombay High Court in *Liverpool and London Steamship Protection and Indemnity Association Ltd. v. M.V. "Sea Success 1"* and *Anr. IV (2005) C.L.T. 471 : 2005 (3) Mah.L.J. 1050*.

5. Mr. Thakur, learned Counsel appearing for the respondents, opposed the request and submitted that this Court does not have jurisdiction to issue summons to foreign witnesses, in view of other provisions of Order 16 CPC, as it does not have the power to enforce their attendance. As far as the question of issuing summons is concerned. Counsel argued that such a request has not been made and that granting it would gravely prejudice the respondent, since it would be placed at a disadvantage being unable to subject such foreign witnesses to cross-examination, if a letter of request were to be issued. He relied on the decision of the Bombay High Court reported as *I.C. Corporation v. Daewoo Corporation and Ors.* AIR 1990 Bom. 152.

6. Before analyzing the rival contentions, it is necessary to notice the relevant provisions of law. Order 16 Rule 19 reads as follows:

NO WITNESS TO BE ORDERED TO ATTEND IN PERSON UNLESS RESIDENT WITHIN CERTAIN LIMITS.

No one shall be ordered to attend in person to give evidence unless he resides:

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than one hundred or (where there is railway or steamer communication or other established public conveyance for five

sixth of the distance between the place where he resides and the place where the court is situated less than [five hundred kilometer] distance.

Order 16 Rule 10 deals with situation where a witness fails to comply with the summons issued by Court; it provides for the mode of enforcement of attendance and reads as follows:

10. PROCEDURE WHERE WITNESS FAILS TO COMPLY WITH SUMMONS:

(1) Where a person whom a summons has been issued either to attend to give or to produce a document, failed to attend or to produce the document in compliance with such summons, the court:

(a) shall, if the certificate of the serving officer has not been verified by affidavit, or if service of the summons has been effected by a party or his agent, or

(b) may, if the certificate of the serving officer has been so verified examine on oath the serving officer or the party or his agent, as the case may be, who has effected service, or cause him to be so examined by any Court, touching the service or non-service of the summons.

(2) Where the Court sees reasons to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein, and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the court may in its discretion, issue a warrant, either with or without bail, for the arrest of such person and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which maybe imposed under Rule 12;

Provided that no court of Small Causes shall make an order for the attachment of immovable property.

7. Section 77, the substantive provision relating to issuance of commission for examination of foreign witnesses, reads as follows:

77. Letter of Request.

In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within India.

8. Order 26 Rule 4, which deals with requests to foreign courts, for examination of witnesses by commission, reads as follows:

COMMISSION OR REQUEST TO EXAMINE WITNESS NOT WITHIN INDIA -Where any Court to which application is made for the issue of a commission for the

examination of a person residing at any place not within India is satisfied that the evidence of such person is necessary the court may issue such commission or a letter of request.

9. The judgment of the Supreme Court in *Filmistan* no doubt indicates that a letter of request can be issued to any person; not even a Court, for the purpose of examination of witnesses. The Court declared that the amplitude of that power is not constrained by the existence of any reciprocal treaty or arrangement with the host country, *Ramasre Agro Industries Limited*, undoubtedly supports the point of view canvassed by the petitioner in this case, as far as issuance of summons is concerned; the Court need not feel inhibited that the witness resides more than 500 kilometers away from Delhi. The question, however, is whether such jurisdiction is available here. The decision in *Indra Mehendirata* in the opinion of the Court, is not an authority on the issue; the court indeed implicitly accepted the position that if the witness resides beyond the territorial limit mentioned in Order 16 Rule 19, there would be no power to issue summons. There, an important factual difference existed, the party to the litigation had to be examined. In such a case, recourse to the power to issue letter of request or for commission, may be warranted.

10. *I.C. Corporation's* case in the opinion of this Court, is apt for a decision on the issue at hand. The Bombay High Court examined the relative position, as well, as advantages and disadvantages of issuing commission under Order 26 Rule 4. It ruled, and in the view of this Court, correctly, that Order 16 Rule 19 has no application to witnesses residing outside India. If one may add to that reasoning, the power of a Court is fortified by its jurisdiction to enforce its orders, through suitable action, spelt out in Rule 10, for enforcement by way of attachment of the witnesses' properties. If a foreign witness defies the summons of Court, obviously the provision of Rule 10 Order 16 cannot have any application. The Bombay High Court went on to outline the relative factors which the Court should consider while exercising discretion, in granting or refusing the request for an order to examine foreign witnesses on commission. One dominant factor is that the opponent, in the main litigation before the Court, would be deprived of the benefit of cross-examination of the witness.

11. In this case, the arbitrators no doubt ruled that the witnesses, including the foreign witnesses are relevant to the petitioner's case. However, as the preceding discussion would reveal, the court is bereft of any power to issue process to such foreign witnesses. As far as issuance of commission to examine witnesses is concerned, aside from any logistical difficulties which may arise, since, all these witnesses are living in different locales, it is also unclear as to how the attendance of such witnesses to answer summons of the Commissioner or depose before him, can be obtained. The petitioner has not indicated any Court, or authority, who is empowered to answer to the requests made till now. Most importantly, the grant of the petitioner's request would mean that the respondent is completely shut out from the opportunity of cross-examining such

witnesses, and would be confronted with evidence on behalf of the petitioner, of two classes-one set, who are available for cross-examination, and Anr. who are not. That is hardly conducive to equal justice and fair play.

12. In view of the above discussion, the petition has to fail so far as it concerns, the request for issuing summons to foreign witnesses is concerned. However, as far as it relates to witnesses living within jurisdiction of the Court, indicated in paras 6(k) to 6(q) the petition has to be allowed. The addresses of all these witnesses has not been indicated. Therefore, parties are directed to appear before the Joint Registrar and disclose the addresses of those witnesses whose particulars are not furnished. In case any of them resides outside Delhi, the petitioner shall ensure that air fare and incidental expenses to ensure their attendance is borne in that regard. The petitioner shall also ascertain the convenient dates for summoning of such witnesses from the Arbitrators, to avoid unnecessary costs. After these particulars are furnished, the Registry shall, upon deposit of process fee, issue summons, returnable on a fixed date and specified (as indicated in terms of these directions) before the Arbitrators. The parties shall appear before the Joint Registrar, on 1st August, 2008 to give effect to these directions.

13. The petition is partly allowed, but in the above terms. In the circumstances of the case, the parties shall bear their own costs.