
(2014) 07 DEL CK 0306
In the Delhi High Court
Case No : O.M.P. 1037/2013

Silor Associates SA

APPELLANT

Vs

Bharat Heavy Electrical Ltd.

RESPONDENT

Date of Decision : 01-07-2014

Acts Referred:

Arbitration Act, 1940 — Section 41
Arbitration and Conciliation Act, 1996 — Section 13, 16, 17, 18, 19
Civil Procedure Code, 1908 (CPC) — Order 11 Rule 11, Order 11 Rule 12, Order 11 Rule 14, Order 11 Rule 15, Order 11 Rule 21

Citation : (2015) 213 DLT 312

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : A.K. Sengupta, Suraj Prakash, Piyush Choudhary and Deblina Sengupta, Advocate for the Appellant; A.S. Chandhiok, Sr. Adv., Prashant Mehta, Priya Pathania and Harleen Singh, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Vipin Sanghi, J.—This petition has been preferred u/s 27 of the Arbitration & Conciliation Act, 1996 (the Act) to seek necessary orders and directions to direct the respondent to produce the two documents, the details whereof are as follows:

- i) Communication dated 22.06.2005 allegedly sent by the respondent to the petitioner containing summary of delays with the civil contractor along with its proof of delivery; and
- ii) Reply of the respondent submitted to its Vigilance Department to the queries issued by the respondent's Vigilance Department.

2. The parties to this petition are before an arbitral tribunal in respect of the disputes which have arisen between them in relation to the contract dated 14.02.2003 i.e. the Service Provider Agreement (SPA). The petitioner is the claimant in the arbitral proceedings, and is claiming its service charges from the respondent.

3. It appears that the petitioner moved an application to seek discovery and production of several documents from the respondent. By order dated 20.07.2013, the arbitral tribunal-consisting of three learned arbitrators, has held that the aforesaid two documents are relevant evidence in the matter. The tribunal has expressed the opinion that the disclosure of the said documents is necessary for giving the claimant full opportunity to present its case and that the said documents appear to be, *prima facie*, relevant.

4. The arbitral tribunal has observed that it is passing the order "by way of applying to the Hon'ble Delhi High Court for its assistance in the production of the said documents". Liberty was given to the petitioner to place the said order passed by the arbitral tribunal before the Registrar General of this court.

5. Upon issuance of notice, the respondents have filed their reply. At the outset, the Court put a question to learned counsel for the petitioner to satisfy the Court as to how the present petition is maintainable, since the arbitral tribunal has only found that the documents - of which the petitioner claimant has sought production, are relevant, and no witness is required to be summoned with, or without, any evidence. The tribunal has not passed an order directing production of the said documents by the respondent.

6. On this, learned counsel for the petitioner has drawn the attention of the court to the earlier part of the tribunal's order dated 20.07.2013.

7. From the tribunal's order, it appears that the respondents had argued before the arbitral tribunal that it is not a court; its orders are not judicial orders; its functions are not judicial functions; it cannot exercise its powers *ex debito justitiae*, and; that the jurisdiction of the arbitral tribunal being within the four corners of the agreement, it can only pass such an order which may be the subject matter of reference. An arbitral tribunal does not have inherent powers like a court. It is a tribunal with limited jurisdiction and its jurisdiction is circumscribed by the terms of reference.

8. The jurisdiction of the tribunal to itself pass an order directing discovery and production of documents was challenged by the respondent. In this regard, reliance was placed by the respondent on the judgment of the Supreme Court in *M.D., Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd.*, .

9. Before the arbitral tribunal, the submission of learned counsel for the petitioner was that the arbitral tribunal could direct production of documents by the respondent on its own. The submission of the petitioner was that:

even after enactment of Section 27, an Arbitral Tribunal under A&C Act 1996 can direct production of evidence which it considers relevant despite the objection raised by the other party, as otherwise, the Arbitral Tribunal will be denied of a very vital power of conducting the arbitration proceedings. If the argument advanced by the learned counsel for the respondent is accepted, the same will delay the conclusion of the arbitration proceeding which is meant to be disposed

of early and without being interfered by court in view of the provisions of Section 5 of A&C Act 1996.

10. Before the tribunal, the petitioner sought to place reliance on several decisions of the courts, including Supreme Court and several High Courts.

11. This submission of the petitioner was rejected by the arbitral tribunal by observing:

Therefore, in the facts of this case, we are unable to uphold the contention of the learned counsel for the claimant that without going through the procedure of Section 27, the tribunal can direct production of documents on its own.

12. In this background, the arbitral tribunal has by the said order applied to this court for assistance in the production of the documents.

13. Upon perusal of the order dated 20.07.2013 passed by the Arbitral Tribunal, prima facie, I felt that the view of the Tribunal with regard to lack of power or jurisdiction in the Tribunal to direct production of documents of its own was erroneous, and the invocation of the process of the court u/s 27 of the Act for issuance of binding and effective directions for production of document - at this stage, was also erroneous, and accordingly, the matter was fixed for directions on 12.03.2014. On the said date I passed the following order:

The matter was part heard on 20.02.2014 and I had informed the counsels that the order shall be prepared during the course of the day. However, while preparing the order, it has been noticed that the tribunal may not have taken a correct view in law in holding that the assistance of the court (under Section 27 of the Act) is required for directing production of documents by a party to the proceedings.

Prima facie, it appears that the assistance of the court is required only for securing the presence of witnesses with or without documents.

The arbitral tribunal has dealt with the said issue on the basis of the submissions made by the parties before it by referring to several case laws. Since the issue is an important issue and, prima facie, this court is not obliged to accept the order passed by the arbitral tribunal invoking section 27 of the Act mechanically if it appears to the court that the said order may have been passed on a wrong premise in law.

I have informed the learned counsels of the said issue and asked them to assist the court to resolve the same.

List for hearing on the said issue on 22.04.2014.

14. I have heard learned counsels. Section 27 of the Act may be reproduced. It reads as follows:

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.

(emphasis supplied)

15. While hearing a petition u/s 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 u/s 27 of the Act.

16. Section 27(3) mandates that the Court "may" within its competence "and according to its rules on taking evidence", execute the request made by the tribunal by ordering that the evidence be provided directly to the tribunal. The use of the expression "may" shows that the court is not bound to act on the request in every case where a request for taking evidence is made by the tribunal. The Court "may" decline the request of the tribunal, if either it is not within the competence of the court to make an order on the request, or the request is not in accordance with the rules of the court on taking evidence.

17. Section 19(1) of the Act, inter alia, provides that "The Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872(1 of 1872)". This means that the Tribunal is not bound by the rigor and strict provisions of the Code of Civil Procedure, 1908 (CPC), or the Indian Evidence Act, 1872 (Evidence Act).

18. Section 19(2) states that subject to the provisions of Part I, the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings. In the present case, the parties have not agreed on any specific procedure to be followed by the Arbitral Tribunal in conduct of its proceedings. Section 19(3) states that "failing any agreement referred to in sub-section (2), the Arbitral Tribunal may, subject to this part, conduct the proceedings in the manner it considers appropriate" (emphasis supplied). Therefore, the Arbitral Tribunal is free to devise its own procedure, subject to the condition that such procedure should conform with the provisions of Part I of the Act. The procedure that the Tribunal may devise should meet the basic tenets of an adjudicatory process, namely, that the procedure should treat parties equally, and each party should be given a full opportunity to present its case (see Section 18). The procedure to be evolved by the Tribunal cannot be such that it curtails the rights of the parties under Sections 13, 16, 17, 22, 23, 24, 25 & 26 of the Act, or any of them.

19. There is nothing in the Act to contra indicate the existence of jurisdiction/power in the tribunal to require the parties to produce documents, exhibits or other evidence, as the arbitral tribunal may determine. The aforesaid provision has the effect of vesting the tribunal with much greater autonomy in the matter of regulating its procedure for conduct of the arbitration proceedings, than that exercised by a civil court-which is bound by the rigour of the CPC (CPC) and the Indian Evidence Act. The scheme contained in Section 19 of the Act is not to denude the arbitral tribunal of its power to regulate its procedure for effective and expeditious conduct of the arbitration proceedings in a transparent and fair

manner. On the contrary, the legislative intent appears to be vest the arbitral tribunal with autonomy and flexibility in the matter of conduct of its proceedings so as to expedite the proceedings and cut the procedural wrangles witnessed in courts - which are governed by the CPC and the Evidence Act.

20. The procedure that the Tribunal may adopt for conducting the proceedings need not be evolved by consensus of the parties. It is for the Tribunal to devise its own procedure, if the parties have themselves not evolved the procedure consensually u/s 19(2).

21. At this stage, I may take note of the procedure prescribed by the CPC, and the courts power to direct production of documents by a party to the proceedings. Section 30 CPC provides that, subject to such conditions and limitations as may be prescribed, the Court may, at any time, either on its own motion or on the application of any party make an order relating to, inter alia, production of documents. Order 11 deals with the aspect of service of interrogatories, discovery, inspection and production of documents. The aspect of production of documents is dealt with in Order 11 Rule 14, which states that it shall be lawful for the court, at any time during the pendency of the suit, to order the production by any party thereto, upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the court shall think right and the court may deal with such documents, when produced, in such manner as shall appear just.

22. Order 11 Rule 21 CPC deals with the consequences of non compliance of an order directing a party to answer interrogatories or to discover documents or grant inspection of documents. If the plaintiff fails to comply with any such direction, the suit is liable to be dismissed for want of prosecution. If the defendant is in breach of such an order, his defence is liable to be struck out. Pertinently, Order 11 Rule 21 does not take within its scope the aspect of non production of documents directed to be produced by a party under Order 11 Rule 14 CPC.

23. Order 16 CPC deals with the aspect of summoning and attendance of witnesses. Order 16 Rule 6 states that 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. The expression "any person" used in Order 16 Rule 6 CPC would include a party to the proceedings. This is evident from Order 16 Rule 20 CPC and is well accepted in judicial pronouncements referred to a little later. Order 16 Rule 10 CPC deals with the procedure to be adopted qua the person to whom summons have been issued, inter alia, for production of documents, and who fails to produce the documents in compliance with such summons. If the person-without lawful excuse, fails to produce the document in compliance with the summons, the court may issue a proclamation requiring him to attend and to produce the document at a time and place to be

named. If, inspite of this procedure being adopted, the person fails to produce the document, the court may issue a warrant for his arrest - with or without bail, and may make an order for attachment of his property for an amount not exceeding the amount of the costs of attachment and of fine which may be imposed under Order 16 Rule 12.

24. Order 16 Rule 15 imposes a duty upon the person summoned to give evidence or produce documents before the court. Order 16 Rule 20 provides that where any party to a suit present in court refuses, without lawful excuse when required by the court, to give evidence or to produce any document, then and there in his possession or power, the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

25. From the above provisions, it appears that the reason why Order 11 Rule 21 does not deal with the aspect of non compliance of an order directing production of documents by a party, is that such a default is covered and dealt with by Order 16 CPC.

26. Consequently, it is evident that the discovery, inspection and production of documents by a party, at the request of the opposite party, is a matter of procedure. It is for this reason that the same has been dealt with in Order XI Rules 12 to 15 and 21, and Order 16 of the CPC. Thus, the arbitral tribunal is not powerless to direct production of a document - considered to be relevant evidence by it, by one or the other party to the proceedings. This power is statutorily conferred upon the tribunal Section 19 of the Act. Exercise of this statutory power by the arbitral tribunal does not tantamount to assumption of "inherent power" by the arbitral tribunal - which power does not vest in an arbitral tribunal.

27. It is one thing to say that the arbitral tribunal does not have the power or the jurisdiction to direct production of documents by one of the parties, and it is another thing to say that the arbitral tribunal does not have the power to enforce compliance of such a direction. If a direction issued by the arbitral tribunal directing production of documents by a party is not complied with, it appears that the arbitral tribunal would be in a position to invoke Section 27 of the Act, since Section 27 of the Act deals with the aspect of taking the courts assistance for taking evidence. The aspect of production of documents is specifically dealt with in Section 27(2)(c)(ii). However, the arbitral tribunal in the present case has proceeded on an erroneous premise that it does not have the jurisdiction to direct production of documents by the respondent, even though the arbitral tribunal has found the aforesaid two documents to constitute relevant evidence, and the arbitral tribunal has straightaway invoked the provisions contained in Section 27 of the Act to seek the courts assistance for a direction to the respondent to produce the said documents.

28. The Supreme Court, in Delta Distilleries Limited Vs. United Spirits Limited and Another, , has held that the expression "any person" used in Section 27 of

the Act is wide enough to cover not merely the witnesses, but also the parties to the proceedings and that, in the event of the document not being produced as directed by the arbitral tribunal, the arbitral tribunal would be entitled to draw an adverse inference against such a party. The Supreme Court has held:

21. As seen from these two sections, Section 25(c) provides that in the event a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings, and make the arbitral award on the evidence before it. This evidence can be sought either from any third person or from a party to the proceeding itself. The substitution of the phrase "parties and witnesses" u/s 43 of the earlier act by the phrase "any person" cannot make any difference, or cannot be read to whittle down the powers of the Arbitral Tribunal to seek assistance from the court where any person who is not cooperating with the Arbitral Tribunal or where any evidence is required from any person, be it a party to the proceedings or others. It is an enabling provision, and it has to be read as such. The term "any person" appearing u/s 27(2)(c) is wide enough to cover not merely the witnesses, but also the parties to the proceeding. It is undoubtedly clear that if a party fails to appear before the Arbitral Tribunal, the Tribunal can proceed ex-parte, as provided u/s 25(c). At the same time, it cannot be ignored that the Tribunal is required to make an award on the merits of the claim placed before it. For that purpose, if any evidence becomes necessary, the Tribunal ought to have the power to get the evidence, and it is for this purpose only that this enabling section has been provided.

The Supreme Court has further observed

23. It was contended that if the necessary documents are not produced, at the highest an adverse inference may be drawn against the Appellant. That is a power, of course available with the Arbitral Tribunal, and if necessary the same can be used. However, as observed by the learned Arbitrator in her order dated 27.3.2007, the documents sought in the present matter were required to arrive at the decision on the claim of the Respondent No. 1, since, the quantification in support of the claim had been done by the Respondent No. 1 on a theoretical basis. A hypothetical calculation should not be resorted to when actual Sales Tax Assessments are available, which would show as to whether the quantum of set-off allowed and claimed was in fact justified.

29. Therefore, it is evident that the arbitral tribunal is empowered on its own, without taking resort to Section 27 of the Act, to direct, a party to produce documents, and upon the failure to comply with the tribunals direction to produce documents, the aggrieved party-who is aggrieved by the non production of documents, may either require the arbitral tribunal to draw an adverse inference against the defaulting party, or may chose to require the arbitral tribunal to enforce the direction to produce the relevant document with the assistance of the court by resort to Section 27 of the Act.

30. It may be that the aggrieved party (who is aggrieved by the non production

of the documents by the opposite party) may be satisfied by the arbitral tribunal drawing an adverse inference against the defaulting party, and may not wish to pursue the aspect of production of documents by the opposite/defaulting party by resort to Section 27 of the Act. It is not necessary for the arbitral tribunal in every such case to seek assistance of the court, and it would depend on the facts and circumstances of each case, whether such assistance should be sought. In any event, there would be no cause to seek assistance of the court by resort to Section 27 of the Act, without first issuing a direction to the concerned party to produce the document, and only upon the failure to comply with such a direction, the arbitral tribunal would be justified in seeking the assistance of the court u/s 27 of the Act - if so desired by the aggrieved/non defaulting party.

31. I find merit in the submission advanced by the petitioner before the arbitral tribunal that if the arbitral tribunal is held not to have jurisdiction to evolve its procedure requiring production of documents (when there is no agreed procedure laid down by the parties themselves), the same would delay the conclusion of the arbitration proceedings as, in every case, the arbitral tribunal would necessarily have to move for the courts assistance u/s 27 of the Act to obtain a direction for production of the relevant documents by one of the parties, even though the party from whom documents are required to be produced may be willing to comply with such a direction if it were to be so directed by the arbitral tribunal. It would also mean that even in a case where a party requiring production of documents were to be satisfied with the drawing of adverse inference against the defaulting party, the resort to Section 27 of the Act would necessarily have to be undertaken-leading to unnecessary waste of time and resources of the parties and delay in the arbitral process.

32. The scheme of the Act, when seen as a whole, is to minimise the interference by the courts during the arbitration proceedings. That is why Section 5 specifically prohibits any judicial authority to intervene in the arbitration proceedings, notwithstanding anything contained in the 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. The aforesaid scheme is also evident from Sections 13 and 16 of the Act, which provide that issues relating to challenge to the arbitral tribunal on grounds of justifiable doubt, competence (qualification), and jurisdiction of the tribunal cannot be agitated midway when the arbitral proceedings are on, and such challenges should await the making of the award by the tribunal.

33. Reliance placed by the arbitral tribunal on Managing Director, Army Welfare Organisation (*supra*) appears to be misplaced. That was a case dealing with the Arbitration Act, 1940 ("1940 Act" for short). Moreover, in that case, the issue was whether the arbitrator had the jurisdiction to pass an interim order of injunction. The Supreme Court examined the provisions of the 1940 Act and held that the arbitrator appointed under the 1940 Act had no power or jurisdiction to pass any interim order. The Supreme Court held that an arbitrator is not a court

and such jurisdiction could not be vested in an arbitrator even by consent of parties. The jurisdiction to pass interim orders vested in the court by virtue of Section 41 of the 1940 Act read with second schedule to the 1940 Act, and the said power was also a restricted power.

34. It was in the aforesaid context that the Supreme Court observed in paras 42, 43, 47, 51, 52 as follows:

42. An arbitrator in a situation of this nature had no jurisdiction to pass the interim order under the Arbitration Act, 1940 in absence of any specific agreement in relation thereto. The learned arbitrator by an interim order could not have placed the parties in a situation which would travel beyond the subject of disputes and differences referred to for arbitration. As no claim and counterclaim had been filed before the arbitrator, the arbitrator was not even aware of the nature of claims of the parties. He neither found any *prima facie* case nor balance of convenience for passing the said interim order. Furthermore, an arbitrator is bound by the terms of reference.

43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power *ex debito justitiae*. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.

47. In the absence of an agreement to the contrary, in terms of the provisions of the Arbitration Act, 1940, an arbitrator can pass only an interim award or a final award. Such awards are enforceable in law. The award of an arbitrator, whether interim or final, is capable of being made a rule of court, decree prepared and drawn up in terms thereof and put to execution.

51. Even the court's jurisdiction u/s 41(b) of the Act is limited as it is confined to "for the purpose of and in relation to arbitration proceedings.

52. Courts, thus, have also no power to grant injunction *ex debito justitiae*.

The Supreme Court also examined Section 17 of the Act and in respect thereof observed as follows:

58. A bare perusal of the aforementioned provisions would clearly show that even u/s 17 of the 1996 Act the power of the arbitrator is a limited one. He cannot issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of court; the same is enforceable on its own force. Even u/s 17 of the 1996 Act, an interim order must relate to the protection of the subject-matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even u/s 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof. The said interim order of the learned arbitrator, therefore, being *coram non iudice* was wholly without

jurisdiction and, thus, was a nullity. [See *Kiran Singh and Others Vs. Chaman Paswan and Others*, , *Kaushalya Devi and Others Vs. Shri K.L. Bansal*, , *Union of India (UOI) Vs. Tarachand Gupta and Bros*, , *Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his Lrs.*, and *Smt. Kanak and Another Vs. U.P. Avas Evam Vikas Parishad and Others*, .

35. In *Managing Director, Army Welfare Organisation (supra)*, the Supreme Court was not concerned with the powers of an arbitral tribunal vested by virtue of Section 19 of the Act, namely, the power of the tribunal to conduct proceedings in the manner it considers appropriate, in the absence of an agreed procedure prescribed by the parties for conduct of the arbitral proceedings. The said decision has no application to the present case for the reason that the aspect of production of documents by one or the other party is a matter of procedure, and is not a matter relating to inherent judicial/quasi judicial power. Merely because the CPC does not apply to the arbitration proceedings, it does not follow that the nature of jurisdiction exercised by the adjudicatory body - be it a court or an arbitral tribunal, in the matter of direction to produce documents, changes. It continues to be a procedural aspect which, as noticed above, the arbitral tribunal is well within its right to prescribe, particularly when no other procedure has been agreed to between the parties.

36. The petitioner had relied upon the UNCITRAL Model Law which provides in Article 27(3) that "at any time during the arbitration proceedings, the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine". The reasoning adopted by the arbitral tribunal for rejecting the UNCITRAL mode law does not appear to be correct.

37. The Supreme Court in *M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.*, had, inter alia, observed that the provisions of the Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions, it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act. The UNCITRAL Model Law reinforces the position that the arbitral tribunal has the power and the jurisdiction to lay down its procedure (in the absence of an agreed procedure prescribed under the agreement of the parties) and that the tribunal is empowered - in exercise of its procedural powers, to require the parties to, inter alia, produce documents.

38. The rejection by the arbitral tribunal of the observations made by this court in *Thyssen Krupp Werkstoffe GMBH Vs. Steel Authority of India*, by placing reliance on *Managing Director, Army Welfare Organisation (supra)* also appears to be erroneous. As noticed above, it is not a matter of inherent power, but a matter of statutory right to regulate its own procedure by the arbitral tribunal, which governs aspects such as discovery and production of documents. In *Thyssen Krupp (supra)*, this court observed as follows:

81. As far as the rejection of discovery application is concerned, I am of the view

that the Arbitrator has erred in holding that the ICC Arbitration Rules did not have any provision for discovery and further that the Act, 1996 did not contain any provision for discovery of documents. The Arbitrator's reasoning that Section 27 of Act, 1996 gave power for discovery only in certain circumstances is also, in my view, not correct.

82. In my opinion, discovery is extremely important but it should be used by a contesting party to either contest its case or demolish the case of the opposite party. In majority of situations, early production of relevant documents would not only cut cost and time but would also ensure a fair outcome. I may mention that under the Arbitration Act, 1940, the Arbitrator had the power to direct discovery by virtue of para 6 of the First Schedule which provided that a party shall produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, documents within their possession or power. There is nothing in the Act, 1996 which suggests any limitation or any curtailment of this power.

83. Though, in my opinion, there is no specific provision in the Act, 1996 which specifically confers power on the Arbitrator to direct discovery, the Arbitrator has absolute power and flexibility by virtue of Section 19 of Act, 1996 to conduct the proceedings in the manner it considers appropriate without being bound by the rules of the Indian Evidence Act, 1872 and Code of Civil Procedure, 1908. Section 27 of Act, 1996, in my view, only deals with third party discovery and not with regard to discovery of parties before the arbitral tribunal. This inherent power of discovery, in my view, is found in Section 19(3) of Act, 1996, which reads as under:

19. Determination of rules of procedure.-

xxxx xxxx xxxx xxxx

(3) Failing any agreement referred to in Sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

39. With due respect, the view of the arbitral tribunal that the general principles of CPC relating to discovery and inspection of documents would not be attracted in arbitration proceedings under the Act on account of the judgment of the Supreme Court in Managing Director, Army Welfare Organisation (supra) is a very narrow and incorrect reading of both - the judgment in Managing Director, Army Welfare Organisation (supra) and the provisions of the Act. I, therefore, hold that the arbitral tribunal had the power and jurisdiction, on its own, to direct the respondent to produce the documents that it found to be relevant.

40. In case the respondent were not to comply with the said direction within the time granted, and the petitioner were to seek enforcement of the said direction by resort to Section 27 of the Act, the arbitral tribunal would have been justified in approaching the court. However, the approach by the arbitral tribunal to this court to seek assistance for production of documents is without any cause;

founded upon on an erroneous premise that it does not have jurisdiction to itself direct production of the documents, and; is also premature, since it is possible that the respondent may produce the documents when so directed by the tribunal - to avoid the drawing of an adverse inference by the arbitral tribunal against the respondent, or the petitioner may be satisfied by the arbitral tribunal drawing of an adverse inference against the respondent on account of non production of the said documents, and may not want to pursue its endeavour to seek production of the documents by resort to Section 27 of the Act.

41. Mr. Chandhiok, learned senior counsel appearing for the respondents has sought to assail the order passed by the arbitral tribunal insofar as the arbitral tribunal has sought the assistance of the court for production of the reply of the respondent, submitted to the Vigilance Department, about the queries raised by the department in respect of payment. As noticed herein above, I am not hearing an appeal against the order passed by the arbitral tribunal on 20.07.2013, as the said order is not appealable. Insofar as the order passed by the arbitral tribunal on the aspect of relevance of the documents is concerned, a perusal of the same - on the face of it, does not call for interference in these proceedings u/s 27 of the Act. I, therefore, do not consider it necessary to deal with the submission of Mr. Chandhiok in this regard.

42. It shall be open to the respondent-if it has the courage of its conviction, not to produce the said documents. However, it shall do so entirely at its own risk and peril, and the respondent shall take the consequence of its failure to produce the relevant documents. Reference may be made to the observations of the Andhra Pradesh High Court in Rajesh Bhatia and Others Vs. G. Parimala and Another, , wherein the court observed:

42. Having regard to the view taken by me hereinabove, the individual parties cannot be compelled to produce the documents if they refuse to produce the documents pursuant to the notice served upon him by the adversary or an order as a matter of that passed by the Court so as to ascertain the truth in accordance with the provisions contained in Section 165 of the Act for non-compliance of such a direction to produce the documents the penal consequences will not follow as in the case of discovery of documents as per the provisions contained in Order 11, Rule 21 of the Code. However, certainly the Court is entitled to draw the adverse inference.

43. It shall be open to the respondents to raise the aspect of relevance of the documents, or the legality of the direction of the tribunal to produce the same, if eventually, an arbitral award is rendered against it and such an award is challenged by the respondent u/s 34 of the Act.

44. In view of the aforesaid discussion, I dispose of the present petition by holding that the arbitral tribunal had the power and jurisdiction to direct production of the relevant documents by the respondent on its own. The parties and the arbitral tribunal may proceed in the light of the observations made

herein above.

45. Petition stands disposed of.