

# Dispute Resolution Hotline

July 22, 2016

## COURT CANNOT ADJUDICATE UNDER SECTION 27 OF THE ARBITRATION ACT

- Court cannot go behind an order of an arbitral tribunal under Section 27 of the Arbitration & Conciliation, Act, 1996
- Section 27 prescribes a procedure to enable parties to take assistance of the court in support of arbitration proceedings
- Powers of the Court under Section 27 are not adjudicatory in nature

## INTRODUCTION

The Bombay High Court (“Court”), in *Montana Developers Pvt. Ltd vs Aditya Developers*<sup>1</sup>, held that courts are not empowered to adjudicate upon the validity of an order passed by an arbitral tribunal under Section 27 (“Section 27”) of the Arbitration and Conciliation Act, 1996 (“Act”). Further, the Court held that when an arbitral tribunal or a party to the arbitral proceedings files an application seeking assistance under Section 27 in pursuance of an order passed by an arbitral tribunal, the Court cannot go into the merits of such an application and/or the order itself.

Once an order is passed under Section 27 by the court, any deviance from the same during the arbitral proceedings will be held to be as contempt of court and the penalties relating to contempt will be applicable to the defaulting party. The scope and ambit of a court’s power under this section forms the point of consideration in the present case.

## FACTS

Montana Developers Private Limited (“Petitioners”) was the Claimant in the arbitral proceedings against Aditya Developers & Others (“Respondents”). The arbitral proceedings had commenced in 2013 with a former Chief Justice of India acting as a sole arbitrator in the matter. After completion of the production of evidence and examination of witnesses by the Petitioner, the arbitrator had proceeded to examine the evidence and witnesses of the Respondents.

At this juncture, the Petitioner filed an application under Section 27 seeking production of further documents and examination of additional witnesses. This was opposed by the Respondents. However, the arbitrator allowed the application by an order dated April 29, 2016 (“Order”). The Petitioner proceeded to file an application under Section 27 of the Act before the Court. This application was also opposed by the Respondents.

## ISSUES

- Whether the Court has adjudicatory powers under Section 27 of the Act?
- Whether the Court is empowered to question the validity of an order passed by an arbitrator under Section 27 of the Act?

## CONTENTIONS

The Respondents, inter alia, contended that merely because the arbitral tribunal was of the opinion that certain witnesses were required to be examined and various documents were required to be produced, the Court could not mechanically pass an order directing the same. They argued that Section 27(3) of the Act uses the term ‘may’, implying that the Court has the discretion to assist or not, based on the merits of the application. The Respondents relied upon certain judgments,<sup>3</sup> where it was held that the Court is empowered under Section 27 to assess the relevancy and the necessity of the documents that were ordered to be produced.

The Petitioner argued that under the Code of Civil Procedure 1908 (“CPC”), if a witness summon was filed, neither was it a pre-requisite to serve a notice on the Respondents nor was it a pre-requisite for the Respondents to be heard. It was stated that the same benefits as provided for under the CPC must be extended to arbitral proceedings as well. This was precisely why Section 27 had been incorporated in the Act. Relying on certain judgments<sup>4</sup>, the Petitioner contended that the Court was not empowered to give directions to the parties or the arbitrator under Section 27.

## JUDGMENT

The Court held that the purpose of the Section was to provide a procedure for providing assistance to the party in whose favor the tribunal had opined that the production of documents or witness was warranted.

1. The Court observed that as per Section 19 of the Act, the arbitral tribunal was not bound by the CPC or the Evidence Act, 1872. Therefore, the arbitral tribunal was not empowered to issue any witness summons itself or to compel a party to produce any documents under the provisions of the Act. If the arbitral tribunal was satisfied on

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- the application made that certain witness or documents were needed to be produced, then the arbitral tribunal could grant permission to such a party to take the assistance of a Court under Section 27.
- The Court drew an analogy of witness examination in an arbitration with that of a civil suit in so far as in a civil suit, the Respondent was not even required to be heard by the Court. The Court observed that merely because a party had resorted to arbitration in view of the agreement between the parties, it could not be put to a disadvantage in view of the powers of summoning a witness not having been provided to the arbitral tribunal under the Act. Therefore, once the arbitral tribunal was of the opinion that production of such document or witness was warranted, the Respondent could not have raised any objection on the order passed by the arbitral tribunal before the Court.
  - Under Section 5 of the Act, there is a bar on a Court to intervene in any proceedings except as specifically provided under the Act. There is no provision enabling a challenging an order passed by the arbitral tribunal granting permission to a party to seek assistance of a Court under the Section during pendency of the arbitral proceedings. Accordingly, the powers of the Court under the Section are not adjudicatory in nature and the Order can be only challenged along with the final award at a later stage under Section 34 of the Act.

## ANALYSIS

One of the biggest roadblocks towards establishing arbitration as the preferred medium of dispute resolution in India was judicial interference. Indian legislators and the judiciary have been constantly striving towards reducing judicial interference and amending the existing body of laws to make India an arbitration-friendly jurisdiction. The recent Amendment to the Act was a major step towards that vision.

While Section 27 was not amended, this judgment is in consonance with that vision and demonstrates a pro-arbitration approach that Indian courts have slowly but surely adopted. In this case, the Court was, very mindful of its role in support of arbitration proceedings under Section 27. The decision of the Court is another welcome step as Courts consistently need to show a low threshold of tolerance towards dilatory tactics and a strong pro-arbitration stance.

— **Arjun Gupta, Alipak Banerjee & Sahil Kanuga**

You can direct your queries or comments to the authors

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<sup>1</sup>Arbitration Petition (Lodging) No. 680 v 2016

<sup>2</sup>Section 27 enables a party to the arbitral proceedings to seek the court's assistance in taking evidence, production of documents and summoning of witnesses during the pendency of arbitral proceedings with the permission of the arbitral tribunal. Under the Act, an arbitral tribunal does not have such powers, but can request a court to carry out such an exercise. Accordingly, Section 27 is an enabling provision permitting one to approach the Court to avail of its assistance in arbitration proceedings by compelling the production of documentary and/or testamentary evidence before the arbitral tribunal.

<sup>3</sup>*Reliance Polycrete Limited vs. National Agricultural Co-operative Marketing Federation of India*<sup>[1]</sup> and *Bharat Heavy Electricals Limited v. Silor Associates S.A*

<sup>4</sup>*United Spirits Limited, Bangalore vs. Delta Distilleries Limited*<sup>[1]</sup> and *M/s.Rasiklal Ratilal vs. Fancy Corporation Limited & Anr*;

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