

Dispute Resolution Hotline

July 06, 2018

WITNESS NOT IN THE COUNTRY? HIGH COURT ORDERS TRAVEL TO SINGAPORE!

- Court appoints a commission to a foreign country to record the evidence of a witness;
- Evidence recorded on commission in another country does not amount to a change in venue of arbitral proceedings;
- Courts do not have power to review an order passed by an arbitral tribunal granting leave to apply to court for appointment of commissioner.

INTRODUCTION

The Bombay High Court ("**Bombay High Court**") recently in *Stemcor (S.E.A.) Pte Limited and Anr. v. Mdeast Integrated Steels Limited*,¹ addressed a critical issue on examination of witnesses, in case of them not being physically present at the seat of arbitration. In this case, one of the key witness of the Petitioners refused to visit India ostensibly due to certain regulatory enquiries pending against him as he feared prosecution. The Bombay High Court, under Section 27 of the Arbitration and Conciliation Act, 1996 ("**Act**"), appointed the Arbitrator as the Court Commissioner and directed the team of lawyers alongwith the Commissioner, to travel to Singapore for recording his evidence. A Letter of Request was also issued to the High Court of Singapore for issuance of directions on cross examination and transmitting witness testimony back to the Bombay High Court.

FACTS

Disputes arose between the parties, Stemcor (SEA) Pte Limited and Moorgate Industries Pvt. Ltd ("**Petitioners**") and Mideast Integrated Steels Limited and Ors. ("**Respondents**") in 2004. The parties filed consent terms on June 14, 2016 ("**Consent Order**"). The Consent Order held:

"The said Agreements are/shall be governed by the laws of India. The seat and venue of arbitration shall be Mumbai. The courts at Mumbai shall have exclusive jurisdiction in relation to the arbitration".

During the arbitral proceedings, the Respondents examined four witnesses, including Mr. Mathew Scott. The Petitioner proposed to examine two witnesses, including Mr. Gerard Craggs a resident of Singapore, the Managing Director of Petitioner No. 1. However, the Petitioners could not carry out the cross-examination of Mr. Craggs as he refused to travel to Mumbai.

The Petitioners filed an application under Section 19 of the Act for directing the recording of Mr. Craggs' evidence through video conferencing. The Respondents opposed the application. The Arbitrator allowed the application and held that the cross examination would be conducted in Singapore at the Petitioners' cost. However, the Arbitrator subsequently recalled this order and directed Mr. Craggs' to be present in Mumbai on January 29 and 30, 2018 for his cross examination.

The Petitioners filed an application before the Arbitrator to recall its previous order and allow recording of evidence of Mr. Craggs' through video conferencing. In the alternative, the Petitioners prayed that they be granted leave to apply to the court for issuing a commission to record the evidence of Mr. Craggs under Section 27 of the Act. The Arbitrator granted leave to the Petitioners, leading to the present petition.

Separately, during pendency of arbitration proceedings, the Respondents had previously requested the Arbitrator for leave to approach the court for appointing a commissioner to examine their witness, Mr. Mathew Stock, a resident of another country, as he was not able to visit India. The Arbitrator had then allowed the application for issuance of a commission on the condition that the Respondents shall bear all the related expenses. However, eventually, Mr. Mathew Stock visited India for the recording his evidence.

SOME ISSUES:

1. Whether ordering of a commission to Singapore for recording evidence of Mr. Craggs would effectively change the venue of arbitration and thus, against the terms of the Consent Order?
2. Whether the Respondents had waived their right to object to an application filed under Section 27 of the Act, considering they had raised similar application before the Arbitrator in the past?
3. Whether an order of an Arbitrator allowing an application to the Court under Section 27 of the Act can be challenged before the Court?

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After hearing the parties, the Bombay High Court proceeded to appoint the Arbitrator as a Commissioner (subject to his approval) as well as issue a Letter of Request to the High Court in Singapore. A brief analysis on various points raised during arguments are as under:

Waiver by the Respondents

The Arbitrator granted liberty to the Respondents to file an application before the court under Section 27 of the Act seeking permission for recording evidence of Mr. Stock, if they were unable to procure his affidavit. The Respondents made an application for appointment of commission and issuance of a letter of request. Though that was granted, Mr. Stock eventually appeared before the Arbitrator in India. Further, in the case of Mr. Stock, the Respondents had not denied that: (i) an application for issuance of witness summons or for issuance of a commission or a letter of request was without jurisdiction; (ii) the Arbitrator's order granting liberty to take assistance of the court was without jurisdiction. Therefore, Respondents had sought and been granted such order in the past, had effectively waived their rights to object to appointment of commission for recording evidence on ground of the same amounting to change in venue.

Taking evidence in Singapore does not amount to a change in venue

The Bombay High Court considered whether taking evidence in Singapore would amount to a change in venue under Section 20 of the Act as the Consent Order records that seat and venue of arbitration shall be Mumbai.

Relying on the case of *Vithaldas Damodar v. Lakhmidas Hariwan*,² and *International Planned Parenthood Federation v. Madhu Bala Nath*,³ the Bombay High Court held that the provisions of Order XXVI Rules 7 and 8 are relevant in this context clarifying that evidence recorded on commission has to be read as evidence before the court before whom it is considered as evidence.

Therefore, when the evidence recorded by the commission is read before the Arbitrator in Mumbai, the evidence would be considered to have been *tendered in Mumbai*. Thus, there is no change in venue if the evidence is recorded on commission in Singapore.

Validity of the Arbitrator's Order

The Respondents questioned the validity of the Arbitrator's order to allow Petitioners to approach the court under Section 27 of the Act. The Bombay High Court held that the purpose of an application under Section 27 is to facilitate and expedite the arbitral proceedings by taking assistance of the court in production of documents and witnesses, which is necessary for effective adjudication of a dispute.

Under Section 5 of the Act, there is a clear bar on courts to intervene in arbitral proceedings unless expressly specified. Since the Act does not specify an intervention, the Bombay High Court held that at the stage of hearing an application under Section 27, it cannot adjudicate on the correctness and validity of the Arbitrator's order. In the event, the Respondents are aggrieved by the award passed, they can challenge the order passed by the Arbitrator granting permission to seek assistance of the court under Section 27, along with the award, under Section 34 of the Act.

Reasons for Ordering Commission

The Bombay High Court held that Section 27(6) of the Act clarifies that commissions and summons can be issued for the examination of witnesses and production of documents. The court has the power to order a commission for examination of witnesses. Further, the Arbitrator had held that if Mr. Craggs was unable to visit Mumbai due to his perception of the likelihood of detention or impounding of passport, the Petitioners would be denied the benefit of his evidence. Considering Mr. Craggs was the officer/Managing Director of the Petitioner, his evidence was relevant and material to the proceedings and could not be ignored.

The Bombay High Court held that it was beyond reasonable doubt that the evidence of Mr. Craggs was material and relevant to the arbitral proceedings. Relying on a Supreme Court ruling,⁴ the Bombay High Court held that recording of evidence by a commission is more authentic than evidence recorded through video conferencing. The commission would be the agent of the court for the purposes of recording evidence and therefore ordered a commission to Singapore to examine the evidence of Mr. Craggs.

Procedure for Ordering Commission

The Bombay High Court provided directions under Section 27 and for issuance of a Letter of Request to the High Court in Singapore.

- The Arbitrator (subject to his confirmation) to be the court commissioner for recording the examination of Mr. Craggs in Singapore;
- The Prothonotary and Senior Master of the Bombay High Court will issue a Letter of Request to the High Court of Singapore to issue directions for the examination of Mr. Craggs pursuant to the Supreme Court of Judicature Act. The Singapore High Court was requested to transmit the testimony of Mr. Craggs along with a report, if any, to the Bombay High Court.
- If the Arbitrator declines to act as commissioner, the Letter of Request will include a request to the Singapore High Court to appoint a fit and proper person as commissioner.
- All the costs of recording the evidence of Mr. Craggs will be borne by the Petitioners.

ANALYSIS

The Bombay High Court has adopted a pro-arbitration approach by facilitating the recording of evidence of the witness in Singapore and overcoming procedural hurdles.

The law allows the Arbitrator to grant permission to seek assistance of the court for production of witnesses and documents. The Bombay High Court in its earlier ruling in *Montana Developers Pvt. Ltd vs Aditya Developers*,⁵ had clarified that courts are not empowered to adjudicate upon the validity of an order passed by an arbitral tribunal under Section 27 of the Act. The court cannot go into the merits of such an application and/or the order itself. The

nature of power under Section 27 is limited to executing the request of the tribunal and court cannot second guess the admissibility, relevance, materiality, and weight of any evidence. This also ensures that parties do not have a second bite at the apple (before the Court) and the orders of the Tribunal are adhered to.

The Bombay High Court placed reliance on recording of evidence by commission than video-conferencing, despite advantages associated. Video-conferencing may be cost effective but may possibly prevent capturing demeanor and body language of parties during cross-examination. While deciding whether video conferencing should be permitted or commission to be appointed, courts are likely to weigh the unavailability of the witness, the prejudice to the cross-examining party, and the importance of the testimony. It should be kept in mind that various courts across the country have issued guidelines for adoption of technology and factors to be considered for permitting video-conferencing.

However, since a one size fits all approach cannot be the norm, it remains to be seen how courts in the future will exercise such powers in different factual scenarios especially in situations where parties may have financial constraints.

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You can direct your queries or comments to the authors

¹ Arbitration Petition No. 332 of 2018.

² (1942) 44 BOM LR 609.

³ FAO (OS) No. 416 of 2015.

⁴ State of Maharashtra v. Praful Desai, AIR 2003 (4) SCC 601.

⁵ Arbitration Petition (Lodging) No. 680 v 2016

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