



SECTION 27 ARBITRATION: DEFEATING THE PURPOSE OF ALTERNATIVE DISPUTE RESOLUTION

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Short Article on Section 27:

Section 27 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Section 27") provides a statutory mechanism for arbitral tribunals or parties (with the tribunal's permission) to approach courts to seek legal assistance for the purpose of obtaining evidence. For the ready reference, the Section 27 is reiterated below:

Section 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.

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 subsection (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.

In normal parlance, as per Section 27, a party seeking the Court's assistance in collecting evidence must first request permission from the arbitral tribunal. This application should explain the relevance, importance, and significance of the evidence which the arbitral tribunal has power to assess under Section 19(4) of the Act. Upon reviewing the application, the arbitral tribunal, which controls its own proceedings, decides whether to allow the party to approach the Court or reject the request. If permission is granted, the party can then file an application before the Court under Section 27(1) to enforce the tribunal's order for evidence collection. If the arbitral tribunal rejects the request, the party should raise the issue at the time of challenge to the final award under section 34 of the Arbitration and Conciliation Act.¹ However, contemplating the various precedents, the reliance on Section 27 for court assistance has raised several questions:

- Does such judicial intervention compromise arbitration's autonomy?
- How does it impact the efficiency and speed that arbitration is supposed to provide?

¹ Delta Distilleries Ltd. V. United Spirits Ltd, (2014)1 SCC 113



The purpose of enactment of the Arbitration and Conciliation Act, 1996 (“Act”), was consolidate and amend the law relating to domestic arbitration, international commercial arbitration (“ICA”) and enforcement of foreign arbitral awards and also to define the law relating to conciliation. This Act was enacted by specifically taking into account, the United Nations Commission on International Trade Law Model Law, 1985. (“**UNCITRAL Model Law**”)². The preference for arbitration is driven by three major factors: (i) flexibility of procedure; (ii) speed; and (iii) expertise of arbitrators.³ The legislative framework of arbitration, as reflected in the Act is premised on minimal judicial intervention, as articulated in Section 5 Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Section 5”).

However, as the various reports and surveys suggest that the delays have plagued arbitration in the Indian landscape. The 246th Report of the Law Commission also observed that proceedings in arbitrations are becoming a replica of court proceedings, despite specific provisions in Chapter V of the Act which provide adequate powers to the arbitral tribunal.⁴ There has been a significant decline in the level of satisfaction with arbitration as a method of dispute resolution because of the delayed conclusions. Though the provisions of the Code of Civil Procedure and Evidence Act do not apply to arbitral proceedings under the Arbitration Act, arbitrators often tend to follow them in conducting the proceedings. This results in arbitral proceedings becoming a replica of a civil suit and not a mode of alternative dispute resolution. Arbitrators prefer to err on the side of caution by adopting due process requirements due to

the abuse of due process rights by parties which resort to dilatory or guerilla tactics. Such tactics force the arbitrators to adopt the formal procedure followed in the trial of suits to ensure due process, leading to significant delays and costs that follow from prolonged proceedings and interlocutory interventions.⁵

Section 27 introduces judicial reliance, potentially conflicting with the goals of ADR.

The Hon’ble Delhi High Court held that Section 27(3) and Section 27(4) would show that the court may according to its rules of taking evidence, examine such an application and issue processes to the witnesses in the same manner as if the court was trying the suit which in turn would require the court to exercise powers in accordance with order 16 of the Code of Civil Procedure, 1908 (hereinafter referred to as the ‘said Code’).⁶ Hence in general practice, whenever a court intervenes under section 27, it applies the same procedural rigor and binding authority as it would have in a civil trial, thus defeating the entire motive behind introduction of arbitration under the ADR mechanism.

The current legal position specifically presents a challenge for courts when dealing with application under Section 27, which allows parties to seek court assistance in taking evidence. The key issue is whether courts should examine whether the arbitral tribunal applied its mind before permitting such an application. Judicial interpretations on this issue have been divided. The Delhi High Court in *Bharat Heavy Electricals Ltd. v. Silor Associates S.A.*⁷ and

² T.K. Viswanathan, Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act, 1996 to make it alternative in the letter and spirit, (7-2-2024)

³ Federation of Indian Corporate Lawyers (FICL) and Centre for Trade and Investment Law (CTIL), Survey of Dispute Resolution in India, 2023: Growth and Future of Alternate Dispute Resolution in India 31 (2023).

⁴ Para 3.18.2 of the Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act, 1996 to make it alternative in the letter and spirit, (7-2-2024)

⁵ Para 4.5 of supra, at 2

⁶ Hindustan Petroleum Corp Ltd. V Ashok Kumar Garg, 2006 (91) DRJ 591

⁷ (2014) SCC Online Delhi 4442



*Hindustan Petroleum Corp Ltd. V Ashok Kumar Garg*⁸ has held that the Courts are duty-bound to correct the order of the Arbitral Tribunal if it is based on a non-application of mind or a misconception of law or an erroneous premise of law. It is imperative to observe that such findings defeat the concept of minimal judicial intervention as scope of “application of mind” is vast and an open ended theory. There can be dissenting opinion when it comes to the question whether there is application of mind while allowing the application under Section 27 of the Act. Courts occasionally exceed their mandate in attempting to address perceived shortcomings in the statute. Such overreach could conflict with the Act’s spirit, which seeks to promote arbitration as an efficient, cost-effective, and user-friendly means of dispute resolution.

The Hon’ble Bombay High Court, taking the dissenting view in *Montana Developers V. Aditya Developers*⁹ has taken a stricter view, emphasizing minimal judicial interference under Section 5. The Hon’ble Court held that under Section 5, there is a clear bar for a Court to intervene in any proceedings except the proceedings specifically provided under the provisions of the Act. If the arbitral tribunal denies the request, the party’s only available remedy is to raise the issue during a challenge to the final award under Section 34 of the Act.¹⁰ The Hon’ble Gujarat High Court, clarified that orders passed under Section 27 of the Arbitration and Conciliation Act are not subject to appeal. The Court emphasized that it lacks the authority to review or intervene in procedural decisions made during arbitration. It highlighted that the Court’s role under Section 27 is strictly limited to supporting the arbitration process when assistance is requested by the Arbitral Tribunal, rather than acting as an appellate authority over the Tribunal’s procedural rulings.¹¹ Thus, Indian courts have varied in their approach to Section 27. Some take a proactive stance, facilitating evidence production promptly,

while others interpret the provision restrictively, adding further uncertainty for disputing parties.

Section 27, while intended to strengthen arbitration proceedings, often works against the very principles of ADR by inviting delays, escalating costs, and diminishing autonomy. Retired Chief Justice of India, D.Y Chandrachud, stated, while delivering a lecture on the topic “Laws and Practice of commercial arbitration” at Supreme Court of United Kingdom, that the arbitration is no longer an “alternative” but it is in fact the preferred method of seeking commercial justice. Thus, if arbitration is to remain a viable preferred method to litigation, reforms must be introduced to ensure that judicial intervention under Section 27 is minimized, efficient, and only invoked as a last resort. Tribunals should be vested with greater authority to compel witnesses and evidence production. For instance, provisions could allow arbitral tribunals to directly issue binding orders, reducing dependency on courts. The courts’ role should be that of a facilitator, guiding arbitration proceedings without overstepping their boundaries. As discussed before, the court’s role under Section 27 should be limited to the facilitation of the arbitration process rather than there should be a strict uniform interpretation on the provision as to the same. By maintaining a careful balance between intervention and restraint, courts can strengthen India’s arbitration framework. This approach not only aligns with the Act’s objectives but also supports India’s ambition to establish itself as a global hub for arbitration.

⁸ 2006 (91) DRJ 591

⁹ 2016 SCC Online Bom 5318

¹⁰ Delta Distilleries Ltd. V. United Spirits Ltd, supra at 1

¹¹ Aepl Infrastructure Pvt. Ltd. vs. Tehran Jonoob Technical and Construction Company, Date of Decision: 05.05.2023