

COURT'S ASSISTANCE IN CONDUCT OF ARBITRAL PROCEEDINGS

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Abstract

An arbitral tribunal, being a private forum, has inherent limitations in taking evidence and relies on the court's assistance for procuring or summoning the same. While providing such assistance, the court cannot go behind an order of the arbitral tribunal and adjudicate upon its correctness. This paper delves into Section 27 of the Arbitration and Conciliation Act, 1996 and elaborates on the procedure for application and execution in taking evidence in arbitration, the powers and limitations of the court in making an order for evidence and the effect of non-compliance with such orders. This article also discusses the newly introduced Section 17(2) of the 1996 Act, its effect on the enforcement of interim orders of the tribunal and briefly compares the Indian position with the English jurisprudence on non-compliance with arbitral orders.

I. Introduction

Section 27 of the Indian Arbitration and Conciliation Act, 1996 [**"1996 Act"**] deals with applications for court assistance in taking evidence in arbitration proceedings. The tribunal, or a party with the approval of the tribunal, may apply to the court to seek such assistance. The expression 'court' under Section 27 means a court as defined under Section 2(1)(e)¹ of the 1996 Act. Section 17(2) of the 1996 Act was introduced by way of enactment of the Arbitration and Conciliation (Amendment) Act, 2015 [the **"Amendment Act"**]. Section 17 pertains to interim measures ordered by an arbitral tribunal and by virtue of Section 17(2), such a measure would be enforceable as if it is an order of a court. Orders passed by the arbitral tribunal will be deemed to be orders of the court and would be enforceable under the Code of Civil Procedure, 1908 [**"CPC"**].

This article deals with several aspects involved in adjudicating upon an application made under Section 27 of the 1996 Act. The article first examines the scheme of Section 27 of the 1996 Act. It then analyzes the requirement for application of mind and consequences of non-compliance with such orders. The next section relates to non-compliance with orders interim passed under Section 17 of the 1996 Act. The article also briefly sets out the English law position on issues related to taking evidence, followed by the concluding remarks of the authors.

II. Scheme of Section 27

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¹ "Court" means—

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.

Section 27 is based on Article 27 of the UNCITRAL Model Law on International Commercial Arbitration. In addition to allowing court assistance in taking evidence, Section 27(5)² covers non-compliance with any order of the court/tribunal, refusal to give evidence, and contempt of the tribunal as well as any other default like refusal to produce documents directed to be produced, refusal to allow inspection of properties, etc. Such persons shall be subject to “like disadvantages, penalties and punishment” as may be incurred for like offences committed in suits tried before the court.

Before the enactment of the Amendment Act, a court’s assistance in this regard was necessary, as no power had been conferred under the 1996 Act on the arbitral tribunal to summon a witness or to issue a process. Since a tribunal cannot force (a) unwilling witnesses to appear before it³ or (b) unwilling parties to produce documents and allow their inspection, the parties approached the arbitral tribunal to seek the court’s assistance under Section 27 of the 1996 Act. With the addition of Section 17(2) of the 1996 Act, a party seeking enforcement of orders passed by the tribunal may now approach the court directly.

However, before applying to a court or allowing for an application to be filed before a court, the arbitral tribunal (while adjudicating upon an application for assistance in taking evidence) is required to apply its mind and cannot act mechanically.⁴

In *Rasiklal Ratilal v. Fancy Corporation Ltd. and Anr.*⁵ the High Court of Bombay discussed the scheme of Section 27 of the 1996 Act. The High Court observed that an application under Section 27 ought to contain (i) the names and addresses of the parties and arbitrators, (ii) general nature of claim and reliefs sought, (iii) evidence to be obtained such as (a) names and addresses of persons to be heard as fact/expert witness and a statement of the subject matter of testimony; and/or (b) description of documents for production; and/or (c) description of property to be inspected.

Upon an application under Section 27 being allowed by the arbitral tribunal, the court is empowered to issue the same ‘processes’ as it may issue in suits before it.⁶ These ‘processes’, to procure the evidence as sought by the arbitrator/tribunal, are in the nature of directions under Section 31 of CPC⁷ for the following:

- (a) Issuance of summons to witnesses (akin to Order XVI Rule 1 of CPC);
- (b) Orders for production of documents in custody of third parties (akin to Order XVI Rule 6 read with Order XI of CPC);

² Arbitration and Conciliation Act, No. 26 of 1996 (India), § 27(5) - Persons failing to attend in accordance with such process, or making any other fault, 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.

³ RUSSELL ON ARBITRATION 207-208 (22 ed. 2002), ¶ 5.171.

⁴ Hindustan Petroleum Corporation v. Ashok Kumar Garg, 2007 (1) ARBLR 368 (Del).

⁵ Rasik Lal Rati Lal v. Fancy Corporation Ltd. and Anr., (2007) 5 AIR Bom. R 617.

⁶ Arbitration and Conciliation Act, No. 26 of 1996 (India), § 27(4). This provision states, “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.”

⁷ Section 31 of the CPC deals with summons to witnesses and states as follows: The provisions in Sections 27, 28 and 29 shall apply to summons to give evidence or to produce documents or other material objects.

- (c) Orders for inspection of documents (akin to Order XI Rule 15 of CPC);
- (d) Issue commission for examination of witness (akin to Order XXVI Rule 1-2 of CPC);
- (e) Issue commission for local/scientific investigation, performance of ministerial acts, sale of movable property, examination of accounts (akin to Order XXVI Rule 9, 10A, 10B, 10C, 11, 13 onwards of CPC).

III. Powers exercised by courts under Section 27

The legislative purpose of Section 27 is to ensure that parties do not suffer due to the inherent limitations of a tribunal, as tribunals do not have the power to issue witness summons or compel the attendance of a witness or production of documents, etc. The High Court of Bombay has explained this in the case of *National Insurance Company Limited v. M/S SA Enterprises*⁸ as follows:

“The purpose of Section 27 of the Arbitration Act, in my view, is to provide assistance to the arbitral tribunal or to a party in taking evidence with a view to expedite the arbitral proceedings. Merely because the arbitral tribunal has no power to issue a witness summons or to compel the attendance of the witnesses, the parties should not suffer. The legislature has inserted the Section 27 of the Arbitration Act to avoid this inconvenience to the parties to the arbitral proceedings and has thus empowered the arbitral tribunal as well as the parties to take assistance of the Court. The Court is empowered to issue direction to a party or even third party to produce documents or witnesses by summoning the party or even third party if the arbitral tribunal has granted permission and is of the opinion that production of such documents or evidence of such party including third party would be necessary for proper and effective adjudication of the dispute before it.”

The scope of the arbitral tribunal’s power to direct the production of documents was also discussed at length by the High Court of Delhi in *Silor Associates v. Bharat Heavy Electrical Ltd.* [“**Silor Associates**”].⁹ In this case, the learned Single Judge of the High Court of Delhi held that the view of the tribunal that it lacked the power or jurisdiction to direct the production of documents on its own, was erroneous. On appeal, the Division Bench in *Bharat Heavy Electricals v. Silor Associates*¹⁰ upheld the decision of the Single Judge and said that the arbitral tribunal was competent to deal with applications concerning the production of documents from parties to the arbitration. It was only applications concerning third parties that would require an invocation of Section 27 of the 1996 Act.

A. Application of Mind

The court’s power under Section 27(3) to execute a request for assistance in taking evidence contemplated under Section 27(1) is discretionary. The court is not expected to pass an order automatically once an application is made under Section 27. The court has the discretion to decide whether to order the request or not. Similarly, even the arbitral tribunal, while considering an application under Section 27 for leave to approach the court, has to apply its mind and not act in a mechanically.¹¹

⁸ *National Insurance Company Limited v. M/S SA Enterprises*, Review Petition No. 51 of 2015 in Arbitration Petition No. 1544 of 2015 decided on October 16, 2015, ¶ 41.

⁹ *Silor Associates v. Bharat Heavy Electrical Ltd.*, 213 (2014) DLT 312, ¶ 15.

¹⁰ *Bharat Heavy Electricals v. Silor Associates*, (2014) 145 DRJ 142 (DB).

¹¹ *Hindustan Petroleum Corporation v. Ashok Kumar Garg*, AIR 2006 Del. 366.

In this regard, the Single Judge of the Delhi High Court, in *Silor Associates*,¹² observed that a petition under Section 27 of the Act is not an appeal from the order passed by the tribunal. However, the High Court noted that it is not bound to act on the request of the arbitral tribunal mechanically and where the order appears to have been passed on a misconception of law, the court would be entitled and duty bound to correct the error.

*“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.”*¹³

Despite being obliged to ‘apply its mind’, courts have been wary of using the discretion conferred upon them in a manner that may violate the spirit of Section 5 of the 1996 Act¹⁴ and allow parties to render the arbitration process infructuous by indulging in dilatory tactics. In *Thiess Iviinecs India v. NTPC Limited*,¹⁵ the High Court of Delhi held that there is nothing in Section 27 that suggests that the court could determine the admissibility or relevance of any material, and to attempt to do so would amount to interference by the court. Further, in the absence of wording to that effect in Section 27, it should be concluded that the competence of a court in this regard does not include determining the admissibility, relevancy, materiality and weight of evidence.

The High Court of Bombay has also held in *National Insurance Company Limited v. SA Enterprises*¹⁶ that the necessity for production of a document was for the arbitrator to decide. The court cannot, at the stage of an application under Section 27, go into the issue of correctness of the order of the arbitrator granting permission to a party to seek the assistance of the court in taking evidence.

However, while appreciation of evidence by the arbitrator is not a matter that the court questions, this does not translate into courts automatically allowing an application under Section 27 of the 1996 Act merely because the arbitral tribunal has allowed a party to move such an application before the court. In the matter of *Ennore Port Ltd. v. Hindustan Construction Co. Ltd.*¹⁷ the applicant, after taking the arbitral tribunal’s leave, moved an application before the court seeking production of a CBI charge sheet. Despite the leave granted by the arbitral tribunal, the court disallowed the application under Section 27 on the ground that that the evidentiary value of the charge sheet was questionable and its production would jeopardize the defence. The Court refused the application on the ground that the documents sought for were in relation to

¹² *Silor Associates v. Bharat Heavy Electrical Ltd.*, 213 (2014) DLT 312.

¹³ *Id.* ¶ 16

¹⁴ Arbitration and Conciliation Act, No. 26 of 1996 (India), § 5. It states, “*Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*”

¹⁵ *Thiess Iviinecs India v. NTPC Limited*, (2016) 229 DLT 721.

¹⁶ *National Insurance Company Limited v. M/S SA Enterprises*, Review Petition No. 51 of 2015 in Arbitration Petition No. 1544 of 2015 decided on Oct. 16, 2015.

¹⁷ *Ennore Port Pvt. Ltd. v. Hindustan Construction Co. Ltd.*, AIR 2007 Mad. 73.

ongoing criminal proceedings and that if its production were to be directed, the respondents may be forced to disclose their defence before the criminal trial.

More recently, the High Court of Bombay has held that their discretion to refuse an application under Section 27 does not extend to adjudicating upon the validity of the order passed by the arbitral tribunal.¹⁸ The powers exercised by the court under Section 27 are not adjudicatory in nature. The Bombay High Court in *Montana Developers Pvt. Ltd. v. Aditya Developers* [**“Montana Developers”**]¹⁹ held that when an arbitral tribunal or a party to the arbitral proceeding files an application seeking the court’s 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 or order.

The court observed in *Montana Developers* that merely because a party had resorted to arbitration, it could not be put to a disadvantage because powers of summoning a witness had not been provided to the arbitral tribunal under the 1996 Act.²⁰ It was for this very reason that the Act had provided for Section 27, which enables the arbitral tribunal to do that which it cannot do itself by seeking the assistance of the court. The court said that like witness examination in a civil suit where the respondent was not required to be heard by the court, 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 as to the merits of the order passed by the arbitral tribunal before the court.²¹ To do otherwise would violate the Section 5 bar on a court from intervening in any proceedings except as specifically provided under the Act. The High Court therefore held that challenging the validity of the arbitrator’s order could only be made later along with an appeal against the final award under Section 34 of the Act.

Despite there being no amendment made to Section 27 of the 1996 Act under the Amendment Act, this judgement is in consonance with the legislative intent behind the Amendment Act as it points to decreasing interference by the courts in arbitral proceedings and a low tolerance towards dilatory tactics often employed by parties to derail the arbitration process.

B. Procedure for issuing summons

Section 27(4) of the 1996 Act provides that while making an order, the court may issue the same ‘processes’ to witnesses as it may issue in suits tried before it. Further, Section 27(6) provides the meaning of the expression “processes”, which includes ‘summonses’ and commissions for the examination of witnesses and summonses to produce documents.

The Division Bench of the Delhi High Court in *National Highway Authority of India v. Oriental Structure Engineers Ltd.*²² held that provisions of CPC can be invoked in an application under Section 27(3) which empowers the court to issue the same processes as it may to witnesses before it, in a suit being tried before the court. Consequently, upon failure of ‘persons’ to comply with such processes, committing a default or refusing to give evidence before the

¹⁸ *Montana Developers Pvt. Ltd v. Aditya Developers*, (2017) 3 Bom. CR 236.

¹⁹ *Id.*

²⁰ *Id.* ¶ 16.

²¹ *Id.* ¶ 17.

²² *National Highway Authority of India v. Oriental Structure Engineers Ltd.- Gammon India Ltd (JV)*, (2012) 132 DRJ 769 (Del.) (DB).

tribunal, 'they' would be subject to such like disadvantages, penalties and punishments, upon a representation by the arbitral tribunal, which the court may ordinarily impose.

IV. Non-compliance with Court's orders and its consequences

Section 27(5) provides the consequence of non-compliance with the order of the court passed under sub section (3) of Section 27. The circumstances under which Section 27(5) can be invoked are as follows:

- (1) Persons failing to attend in accordance with such process or;
- (2) Making any other default, or
- (3) Refusing to give their evidence, or
- (4) Guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings.

Under these circumstances, the tribunal can make a representation to the court and seek its assistance to facilitate the effective working of the tribunal. The non-compliance with the orders of the court may result in the party being subject to "like disadvantages, penalties or punishments".

Such persons are therefore treated under Section 27(5) in the same manner as they would have been for like offences committed in suits tried before the court. The scheme of this Section suggests that it is for the court and not the arbitral tribunal to pass an order against a person (either a witness or the party themselves²³) who fails to attend, makes any other fault, refuses to give evidence or is guilty of any contempt to the arbitrator during the investigation of the reference.

In *Delta Distilleries*, the arbitral tribunal while adjudicating upon a dispute between parties related to an outstanding amount payable on a running account between them, had directed the respondent to produce certain relevant documents which the respondent failed to produce for more than four years. Subsequently, the arbitral tribunal permitted the claimant to seek the court's assistance under Section 27. The court observed that non-production of relevant documents would entitle the tribunal to draw adverse inference against the party.

This view was also taken by the Single Judge of the Delhi High Court in *Silor Associates* (as discussed above). However, before drawing an adverse inference, the arbitral tribunal should have made every effort to ensure production of the documents and only draw such an inference on the refusal of the party to comply with such an order. It may further be noted that this may not necessarily be the "highest" power available to the arbitrator. The language of the court would suggest that while this is an option available to the arbitral tribunal, other penalties and punishments could also be pursued depending upon the fact and circumstances of each case.

²³ *Delta Distilleries Limited v. United Spirits Ltd. & Anr.* (2014) 1 SCC 113 (India), wherein the Supreme Court held the expression "any person" used in Section 27 is wide enough to cover not merely the witnesses, but also the parties to the proceedings.

V. Non-compliance with an interim order of the tribunal

Before the Amendment Act, in *Sri Krishan v. Anand*,²⁴ Justice Endlaw of the Delhi High Court held that a violation of an interim order passed under Section 17 of the 1996 Act could be remedied by holding the party in contempt of the arbitral tribunal under the provisions of Section 27(5).

*“[...] Any person failing to comply with the order of the arbitral tribunal would be deemed to be “making any other default” or “guilty of any contempt to the arbitral tribunal during the conduct of the proceedings”. Thus the remedy of the other party is to apply to the arbitral tribunal for making a representation to the court to [mete] out such punishment, penalty to the guilty party, as would have been incurred for default in or contempt of the court. Naturally, the arbitral tribunal would make such a representation to the court only upon being satisfied that the party/person is in default or in contempt. Once such a representation is received by this court from the arbitral tribunal, this court would be competent to deal with such party in default or in contempt as if in contempt of order of this court, i.e., either under the provisions of the Contempt of Courts Act or under the provisions of Order 39 Rule 2A Code of Civil Procedure, 1908.”*²⁵

This interpretation arose in the circumstances prior to the Amendment Act, where under Section 17, while the arbitral tribunal had the power to grant interim reliefs, it did not have the power to enforce its own order nor provide for judicial enforcement of such order.²⁶ The Delhi High Court held that although the remedy for “*making another other default*” or for being “*guilty of any contempt to the arbitral tribunal during the conduct of the proceedings*” were nestled under the heading of “*Court assistance in taking evidence*”, the heading should not be interpreted in a manner that limits or narrows the scope of Section 27(5).

This position of law was confirmed by a subsequent judgment of the Delhi High Court in the case of *India Bulls Financial Services Limited v. Jubilee Plots and Housing Private Limited*.²⁷ The facts being similar to the provisions of the *Sri Krishan* case, the Court similarly held that orders obtained by the petitioner from the arbitral tribunal under Section 17 of the Act are enforceable under Section 27(5) of the 1996 Act.

It would appear from these cases that the remedy available to an aggrieved party in a case of violation of the order of the arbitral tribunal by the other party is to seek the permission of the arbitral tribunal to make a representation to the court to impose such punishment as would have been warranted for contempt of court. Further, once the court receives such a representation from the arbitral tribunal, the court is competent to deal with such non-complying party as if it were in contempt of an order of the court. This could either be under the provisions of the Contempt of Courts Act, 1979 or under Order 39 Rule 2A of the CPC, which provides for consequences of disobedience or breach of injunction.

²⁴ *Sri Krishan v. Anand*, (2009) 112 DRJ 657.

²⁵ *Id.* ¶ 11.

²⁶ *MD Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.*, AIR 2004 SC 1344, ¶ 56. *See also Sundaram Finance Ltd v. NEPC India Ltd.*, 1999 (1) SCR 89.

²⁷ *India Bulls Financial Services Limited v. Jubilee Plots and Housing Private Limited.*, OMP. Nos. 452/2009 and 453/2009 (Delhi High Court, Aug. 18, 2009); *See also Deva Swimming Institute Ltd v Anita Yadav*, COCP No. 1037 of 2015 (Punjab & Haryana High Court, May 4, 2015).

However, in *Smt. Alka Chandewar v. Shamshul Ishtar Khan*²⁸, the single judge bench of the Bombay High Court disagreeing with *Sri Krishan v. Anand*, took a much narrower view and barred the utilization of Section 27(5) to punish the contempt of an order passed under Section 17 of the Act. Here, it was held by the court that Section 27(5) of the 1996 Act could only be used by the tribunal to make a representation to the court for contempt if a party violates the orders passed by the arbitrator in respect of taking evidence (and not for violation of other orders, such as orders for interim measures that may be passed by the tribunal under Section 17 of the 1996 Act).

*“[...]Section 27 is included in Chapter V of the Act which deals with the conduct of the arbitral proceedings comprising from Section 18 to Section 27 of the Act. Under Section 17 of the Act, the arbitral Tribunal has powers to pass interim measures. The Section 9 is also regarding the powers to pass the interim measures. However, the powers under Section 9 of the Act vest with the Court and not with the Arbitrator. Thus, Section 9 and 17 give powers to issue interim orders/ measures, to different fora i.e. the Court and the Arbitrator. This fact itself indicates that the arbitral Tribunal is not a Court but it is altogether a different entity. It is a creature of contract between the parties. Its functions are not judicial functions. The Contempt of Courts Act is applicable to the breach or the violation of the orders of the Court and pertains to the Civil or Criminal contempt which is defined under the Contempt of Courts Act committed by the parties causing interference in the judicial proceeding.”*²⁹

The Bombay High Court was of the opinion that in interpreting the statute, it was pertinent that Section 17 came under Chapter IV of the Act and had not been included in Chapter V, which is for the “conduct of arbitral proceedings”. Thus, the court held that by use of the word ‘conduct’ in Section 27(5) of the Act, the legislature had restricted its meaning to the contempt during the ‘conduct’ of arbitral proceedings, which is necessarily limited to Sections 18 to 27 and does not include the contempt committed by a person during the entire arbitral proceedings.

However, the Supreme Court,³⁰ on appeal against the Bombay High Court judgment, did not accept this reasoning. Vide its judgment delivered on July 6, 2017, the Supreme Court held,

“[...]In the present case we must go by the plain meaning of sub-section (5). This being the case, we find it difficult to appreciate the reasoning of the High Court. Also, in consonance with the modern rule of interpretation of statutes, the entire object of providing that a party may approach the Arbitral Tribunal instead of the Court for interim reliefs would be stultified if interim orders passed by such Tribunal are toothless. It is to give teeth to such orders that an express provision is made in Section 27(5) of the Act.”

Delving further into the issue, the Supreme Court also referred to Report No. 246 of the Law Commission of India.³¹ Claiming that the Law Commission “found the need to go one step further than what was provided in Section 27(5) as construed by the Delhi High Court (in *Sri Krishan’s* case)”, the Supreme Court held that the cumbersome procedure of an arbitral tribunal having to apply to the High Court for contempt of its orders has now been effectively done away with. The

²⁸ *Smt. Alka Chandewar v. Shamshul Ishtar Khan*, (2016) 1 Mah LJ 52 (Bom.).

²⁹ *Id.* ¶ 13.

³⁰ *Smt. Alka Chandewar v. Shamshul Ishtar Khan*, 2017 SCC OnLine SC 758.

³¹ Law Commission of India, *Report No. 246 Amendments to Arbitration and Conciliation Act 1996*, ¶¶ 46-49 (2014), available at <http://lawcommissionofindia.nic.in/reports/report246.pdf>.

Amendment Act which was passed pursuant to the above referred Law Commission report, has introduced sub-section (2) to Section 17.

“Subject to any orders passed in an appeal under Section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.”

With the Supreme Court’s judgment on July 6, 2017, it is now amply clear that a contempt proceeding for violation of an interim order of the arbitral tribunal could be made directly under the provisions of Section 17 itself without having to resort to the provisions of Section 27(5). Since Section 17(2) clearly states that orders by a tribunal would be deemed to be orders of the court for all purposes and would be enforced under the CPC in the same manner as if they were orders of the court, a party seeking enforcement of tribunal’s orders may apply to the court directly to seek enforcement thereof.

VI. English Law position under (English) Arbitration Act, 1996 and prosecution for non-compliance with Tribunal’s orders

Sections 42 to 45 of the English Arbitration Act deal with the powers of the Court in relation to arbitral proceedings. In England, as is similar to India, courts make orders upon an application by the tribunal or either party in an arbitration upon securing the permission of the tribunal. The English Arbitration Act permits the utilization of the same court procedures that are available to a party in legal proceedings before the court, to secure attendance of witnesses³². Further, Section 44 specifically notes that court have the same power of passing orders, for the purposes of and in relation to arbitral proceedings, as it would have for matters in relation to taking of evidence.

The discretion of the court to consider issues related to evidence adjudicated upon by the tribunal in order to enforce the tribunal’s orders was discussed in detail in *Emmott v. Michael Wilson & Partners Limited*. [“**Emmott**”].³³ This case involved an application to the court for an order under Section 42 of the English Arbitration Act, 1996 [“**English Act**”]³⁴. Hon’ble Justice Teare stated that the proper role of the court is to support the arbitral process rather than review it at every step.³⁵ In this regard, he notes that judicial interference with the arbitral process should only be limited to the grounds and circumstances laid down in Section 67-69 of the English Act relating to challenge/appeal of an arbitral award.³⁶

Even though Justice Teare rejected the application seeking enforcement of orders of the tribunal, he laid down that Section 42 of the English Arbitration Act confers discretion upon the Court to review an order of the tribunal before enforcing it.

³² English Arbitration Act 1996, § 43(1) – “Securing the attendance of witnesses. (1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence”.

³³ *Emmott v. Michael Wilson & Partners Limited*, [2009] EWHC 1 (Comm) (U.K.).

³⁴ Section 42 deals with the enforcement of peremptory orders of tribunal.

³⁵ *Emmott v. Michael Wilson & Partners Limited*, [2009] EWHC 1 (Comm) (U.K.), ¶¶ 58, 59.

³⁶ *Id.*

Hon'ble Justice Sir William Blackburne confirmed the views laid down in *Emmott in Patley Wood Farm LLP v. Nihal Mohammed Kamal Brake* [**"Patley Wood Farm"**],³⁷ where he stated-

*"I am in entire and respectful agreement with what Mr. Justice Teare [...], that whereas the court should not simply act as a rubber stamp on orders made by the tribunal, it is not required to review the tribunal's decision and consider whether the tribunal ought to have made the order in question."*³⁸

Accordingly, it was Hon'ble Justice Sir Blackburne's view that the court may provide sanction to orders of a tribunal if the court is satisfied that the tribunal's rationale is backed by reasonable grounds.

In addition to the above, guidelines for the court to exercise its jurisdiction while enforcing the tribunal's orders were laid down in *Patley Wood Farm*.³⁹ In this case, Hon'ble Justice Peter Smith noted that two things must be born in mind by a court when enforcing a tribunal's order. *First*, the tribunal's decision is a decision of a judge at first instance and is therefore a persuasive authority. *Second*, it is a decision where a tribunal sets out how it exercised its discretion under the circumstances before it. A decision on the facts of a particular case is always of limited relevance when a judge is considering the exercise of a different discretion in a different case. Therefore, there can be no precedent by exercise of discretion in specific circumstances and even though a tribunal's decision would have to be interpreted as persuasive in nature, each case would have to be examined as per the facts and circumstances before it.

Apart from being permitted to pass orders in relation to taking evidence, the court is also entitled to grant interims injunction through Section 44 of the English Act. In the recent case of *Pan Petroleum AJE Limited v. Yinka Folawiyo Petroleum Co. Ltd.* [**"Pan Petroleum"**]⁴⁰, the court considered the test set out in *American Cyanamid Co. v. Ethicon Ltd.*⁴¹ while adjudicating upon issues related to contempt of court in relation to breach of an order. In *Pan Petroleum*, the defendant was said to have breached such an interim order by the court and the court considered the same to be contempt of court and laid down three principles in deciding so. The applicable legal principles in relation to construction of a court's interim orders were stated:

"(1) The sole question for the Court is what the Order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction.

(2) In considering the meaning of an Order granting an injunction, the terms in which it was made are to be restrictively construed. Such are the penal consequences of breach that the Order must be clear and unequivocal and strictly construed before a party will be found to have broken the terms of the Order and thus to be in contempt of Court.

³⁷ *Patley Wood Farm LLP v. Nihal Mohammed Kamal Brake*, [2014] EWC 4499 (Ch) (U.K.).

³⁸ *Id.* ¶ 56.

³⁹ *Patley Wood Farm LLP v Brake*, [2013] EWHC 4035 (Ch).

⁴⁰ *Pan Petroleum AJE Limited v. Yinka Folawiyo Petroleum Co. Ltd.*, [2017] EWCA Civil 1525 (U.K.).

⁴¹ *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (U.K.).

(3) *The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order.*⁴²

A more stringent view was laid down in *Asia Islamic Trade Finance Fund Ltd. v. Drum Risk Management Ltd.*,⁴³ later referred to in *Alfa-Bank v. Reznik*,⁴⁴ where the court went a step ahead of not only enforcing the orders of the tribunal, but also imposing a prison term as punishment. The asset disclosure freezing orders were made by the court under Section 44 to aid the arbitration. Since these orders were not an order by the tribunal, an order for contempt was passed as a result of the breach being of a court's order (which was issued to support arbitration). The principles which are applicable to sentencing in relation to a failure to comply with asset disclosure freezing orders leading to contempt were stated. These principles (set out below) are of such a nature that they have applicability in other contempt cases as well.

- (1) The object of penalty is to punish defiance of court's order, and to serve as a coercive function a possibility of future punishment.
- (2) Further, it is necessary to consider-
 - (a) whether committal to prison is necessary;
 - (b) the shortest time necessary for imprisonment;
 - (c) whether a sentence of imprisonment can be suspended; and
 - (d) the maximum sentence which can be imposed on any one occasion is two years.
- (3) A breach of a freezing order, and the disclosure provisions is in contempt of justice which merits an immediate sentence of a not in substantial amount.
- (4) The court should consider a long sentence where there is a continuing breach.
- (5) In case of a continuing breach, the court ought to note:
 - (a) what portion of sentence should be served as punishment for past breaches;
 - (b) what portion of a sentence the court might consider remitting/suspending in the event of prompt and full compliance.

It would appear that the remedy available to an aggrieved party in a case of violation of an order of the court, upon an application by the arbitral tribunal, is to impose such punishment as would have been warranted for contempt of court. The arbitral tribunal *per se* cannot make an order that warrants contempt proceedings, but the Courts may do so, upon an application made to it.

VII. Conclusion

Judicial interference by Indian courts previously rendered the arbitration process unviable, if not impractical. The Amendment to Section 17 solidified the pro-arbitration stance of India and,

⁴² *Id.* ¶ 41.

⁴³ *Asia Islamic Trade Finance Fund Ltd. v. Drum Risk Management Ltd.*, [2015] EWHC 3748 Com. (U.K.), ¶ 7.

⁴⁴ *Alfa-Bank v. Reznik*, 2016 WL 0409 7679 (U.K.), ¶ 25.

read with Section 27, limits the functions of the court to representation, assistance and persuasion. This comes as a major relief to parties willing to arbitrate in India that an arbitral order is considered to be an order of the court.

Section 27 overcomes the inherent limitations of an arbitral tribunal and the court is empowered to issue directions to produce documents or witnesses if the arbitral tribunal requires such assistance. Further, while resort to court assistance is not in the nature of an appeal, it is not a mechanical process. Where the order by the tribunal appears to have been passed on a misconception of law, the court would be entitled and duty bound to correct the error, but otherwise should not interfere in the arbitral process or adjudicate the matter in any circumstance. Hence, Section 27, read with Sections 5 and 17(2) of the 1996 Act, absolutely restricts court interference with arbitral orders.

Lastly, prior to the Amendment Act, while the arbitral tribunal had the power to grant interim reliefs, it did not have the power to enforce its own order nor provide for judicial enforcement of such order. Presently, as is similar to English law, a contempt proceeding for the violation of an interim order of the arbitral tribunal can be made directly under the provisions of Section 17(2) itself without having to seek permission to approach the court under Section 27(5). Accordingly, the arbitral framework put in place by the Amendment Act, intended to minimize delays caused by judicial interference by the courts is bolstered by the recent Supreme Court judgments. This substantially eliminates the civil courts' interference by bestowing such judicial power upon the arbitral tribunal, upholding the spirit of arbitration.