ADDUCING EVIDENCE UNDER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996

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INTRODUCTION

The objective of the Arbitration and Conciliation Act, 1996 is to reduce the interference of the courts, speedy disposal of cases, and providing a system that is different from the traditional court system. With the recent amendments to the Arbitration Act, 1996, the Act is desired to get quick results as it has now fixed the time-limit for disposal of cases to be of One-year, which, of course, can be extended in some cases. In cases of settlement of disputes through the arbitral tribunal, the Act leaves a very narrow scope for setting aside the said arbitral award. For setting aside the arbitral award, the applicant has to make an application before the District Court under section 34 of the Arbitration and Conciliation Act, 1996. The grounds for setting aside the arbitral award are provided in section 34 (2) of the Act and are very limited. Generally, the application under section 34 for setting aside the award has to be considered given the materials which are available on record before the court and no new additional evidences or documents can be adduced. The moot question here is that whether any additional evidence can be adduced under section 34 of the Act? And if, yes, then under what circumstances? And that whether adducing additional evidence in an application under section 34, defies the object of speedy disposal under the Act?

A party to the arbitration agreement, who is not satisfied with the decision so rendered by the Arbitral Tribunal can make an application for setting aside the award so rendered by the tribunal under section 34 of the act. The grounds for setting aside the arbitral award are as follows:

That the party making the application furnishes proof that:

- *a party was under some incapacity, or*
- *the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
- *the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
- *the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration*

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- *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or*

The Court finds that:

- *the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or*
- *the arbitral award is in conflict with the public policy of India.*

FRAMING OF ISSUES IN SECTION 34 APPLICATION- NOT AN INTEGRAL PART OF PROCESS OF PROCEEDINGS

The routine procedure in a section 34 application for setting aside the arbitral award is that the applicant is permitted to file affidavits of his witnesses in proof. A corresponding opportunity is given to the Respondent-Defendant to place his evidence by affidavit. The court permits the cross-examination of the persons swearing to the affidavits only in circumstances where the case so warrants. Thereafter, the court hears arguments and/or receives written submissions and decides the matter. However, the court does not sit in to frame the issues, adduce evidences and then decide the matter. This would dilute the entire objective of speedy resolution sought to be achieved by the Arbitration Act, 1996.

The question whether issues as contemplated under order XIV rule 1 of CPC can or should be framed in an application under section 34 of the Act arose in Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited and Anr. MANU/SC/1485/2009. The court held that the proceedings under section 34 of the Arbitration Act, 1996 is a summary proceeding and the scope of enquiry in the proceedings under section 34 of the act is restricted to the grounds mentioned in section 34 (2) or section 13 (5) or section 16 (6) as made out to set aside the award and framing of issue, however, is not necessary.

The court said that the question of framing of issues should be examined while considering the three factors in mind:

- That the Arbitration is a special enactment and section 34 provides for a speedy remedy.
- That the arbitral award can be set aside only on the grounds mentioned in sub-section (2) of section 34 of the Act.
- That the proceedings under section 34 is to be dealt expeditiously.

READING FIZA DEVELOPERS AND THE ARBITRATION (AMENDMENT) ACT, 2015

In 2015, the Arbitration Act, 1996 was amended and it sought to insert sub-section 5 and 6 to section 34 of the Act. Sub-section 5 of the Act provided that to file an application under section 34 of the Act, the party has to send a notice to the other party and the application has to be accompanied by an affidavit of the applicant endorsing compliance. Sub-section 6 of the Act provided that an application filed under section 34 of the Act should be disposed of expeditiously within a period of one year from the date of issuing notice under sub-section 5 of section 34. Thus, reading the said amendments in the light of the Fiza Developers Case, it is clear that if issues are allowed to be framed in a summary proceeding like in a section 34 application, and oral evidence is allowed to be taken, then the entire objective of speedy resolution of disputes under the arbitration act would be frustrated. And similar view was also taken by the Delhi High Court in **Sandeep Kumar v. Ashok Hans 2004 SCC OnLine Del 106 and Sial Bioenergie v. SBEC Systems MANU/DE/1138/2004** which reflect the correct position of law.

JUSTICE B.N. SHRIKRISHNA COMMITTEE REPORT

In 2017, a committee headed by Justice B.N Shrikrishna was formed to suggest the changes to be made to the existing law and to review the Institutionalization of Arbitration Mechanism in India. The committee had commented upon the phrase 'party making the application furnishes proof' appearing under section 34 of the Act as it led to inconsistencies. The committee suggested that the above phrase could be substituted with the words ‘establishes on the basis of the Arbitral Tribunal's Award’. The recommendation of the committee was accepted by the legislature and the following words were substituted vide the Arbitration (Amendment) Act, 2019. This show that the scope of adducing anything new beyond what is already on record before the Tribunal is very made very narrow. Thus, reading the amendments in 2015 and 2019 along with the decision of the Supreme Court in Fiza Developers it is quite clear that for speedy resolution of disputes the proceedings under section 34 of the Act is to be treated as a summary proceeding and nothing new can be brought except what is on record before the Arbitral tribunal.

EVIDENCE CAN BE ADDUCED IN EXCEPTIONAL CASES

In **Emkay Global Financial Services Limited v. Girdhar Sondhi MANU/SC/0875/2018**, the court had held that ordinarily in an application under section 34 of the Act nothing more is required beyond the record of the Arbitrator. However, the court also added that if anything which was not on record before the Arbitrator but which was relevant in determining the issues arising under section 34 (2) of the Act, could be brought to the notice of the court by way of affidavits filed by both the parties and cross-examination of persons swearing to the affidavits could be allowed only in cases where it was absolutely necessary. This position of law was also settled by the Hon'ble Supreme Court in **Canara Nidhi Limited v. M. Shashikala and Ors.**

MANU/SC/2064/2019 where the court held that Fiza Developers was a step in the right direction as its ultimate ratio was that the issues need not be struck at the stage of hearing a Section 34 application, which is a summary procedure and also clarified that Section 34 application would not ordinarily require anything beyond the record that was before the arbitrator and that cross-examination of persons swearing in to the affidavits should not be allowed unless absolutely necessary.

PRESENT POSITION OF LAW

Today, the position of law is that any application filed under section 34 must be read in light of the decisions set forth in Fiza Developers Decision and the Emkay Decision. Furthermore, the decision of the Supreme Court in Canara Nidhi Case has clarified that only in exceptional circumstances should evidence in the form of affidavits and cross-examination of those witnesses be permitted. If there does exist any exceptional circumstance wherein parties are required to adduce evidence in the form of an affidavit, then it must be indicated as to what point a party intends to adduce evidence for and should disclose specific documents or evidence that would be required to be produced. Thus, if an exceptional circumstance does arise, then there must be specific averments in the affidavit as to the necessity and relevance of the additional evidence sought to be adduced which would be beyond the record that was before the arbitrator.