2019 INSC 1068

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7544-7545 OF 2019
(Arising out of SLP(C) Nos.35673-74 of 2014)

M/S. CANARA NIDHI LIMITED ...Appellant

VERSUS

M. SHASHIKALA AND OTHERS …Respondents

J U D G M E N T

R. BANUMATHI, J.

Leave granted.

2. In the application under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) seeking to set aside the award, whether the parties can adduce evidence to prove the specified grounds in sub-section (2) to Section 34 of the Act, is the question falling for consideration in these appeals.

3. These appeals arise out of the judgment dated 12.09.2014 passed by the High Court of Karnataka at Bangalore in Writ Petition Nos.18374-75 of 2010 (GM-RES) in and by which the High Court set aside the order passed by the District Judge and directed the District Judge to “recast the issues” and permit respondent Nos.1 and 2 to file affidavits of their witnesses and also permitting cross-examination of the witnesses.

4. Brief facts which led to filing of these appeals are as under:-

The appellant is the financial institution and the appellant advanced a loan of Rs.50,00,000/- to respondent No.1 and respondent Nos.2, 4 and 5 to 8 were the guarantors in respect of such loan. The loan was secured by a mortgage with deposit of title deeds and respondent No.1 is also said to have executed a demand promissory note for repayment of the loan. There was an arbitration clause in the agreement to resolve dispute between the parties. It is alleged that the first respondent did not repay the loan and failed to discharge the liabilities arising out of the transaction. The dispute between the appellant and the first respondent was referred to arbitration to the third respondent-Arbitrator. Before the arbitrator, both the parties adduced oral and documentary evidence. The arbitrator passed an award dated 15.12.2007 and directed the respondents to pay an amount of Rs.63,82,802/- with interest on Rs.50,00,000/- at 14% per annum from 11.08.2000 and cost of Rs.52,959/-.

5. Assailing the award, respondent No.1 filed AS No.1 of 2008 under Section 34 of the Act in the Court of District Judge at Mangalore. Before the District Judge, respondent Nos.1 and 2 filed an application under Section 151 CPC to permit the respondents to adduce evidence. The appellant filed objections to the said application. By the order dated 02.06.2010, the learned District Judge dismissed the said application. Holding that the grounds urged in the application can very well be met with by the records of the arbitration proceedings and by perusing the arbitral award, the learned District Judge further held that in any event, there is no necessity of adducing fresh evidence in the application filed under Section 34 of the Act.

6. Aggrieved by the dismissal of their application under Section 151 CPC, respondent Nos.1 and 2 filed writ petitions before the High Court under Articles 226 and 227 of the Constitution of India. The High Court by the impugned judgment allowed the writ petitions and directed the learned District Judge to "recast the issues" and allow respondent Nos.1 and 2 to file affidavits of their witnesses and further allow cross-examination of the witnesses. After referring to the judgment in *Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited and another* **(2009) 17 SCC 796**, the High Court observed that in order to prove the existence of the grounds under Section 34(2) of the Act, respondent Nos.1 and 2 are permitted to file affidavits of their witnesses. In the impugned judgment, the High Court concluded that the reasoning of the District Judge not permitting respondent Nos.1 and 2 to file their own affidavits and affidavits of other witnesses to prove their case is erroneous and opposed to settled principles of law. As pointed out earlier, the learned District Judge was directed to "recast the issues" and the court below was directed to permit respondent Nos.1 and 2 to file

affidavits of their witnesses and extend corresponding opportunity to the appellant to place their evidence by affidavit. Being aggrieved, the appellant has preferred these appeals. This Court ordered notice vide order dated 06.01.2015 and further ordered that there shall be stay of the proceedings in AS No.1 of 2008.

7. Assailing the impugned judgment, Mr. S.N. Bhat, learned counsel appearing for the appellant submitted that it is well-settled that proceedings under Section 34 of the Act is summary in nature and the scope of the said proceedings is very limited. It was submitted that the validity of the award has to be decided on the basis of the materials produced before the arbitrator and there is no scope for adducing fresh evidence before the court in the proceedings under Section 34 of the Act. The learned counsel submitted that the High Court, in the present case, misread the ratio of the decision of the Supreme Court in ***Fiza Developers***. It was *inter alia* urged that in any event, in the present case, respondent Nos.1 and 2 did not make out any exceptional grounds for permission to lead fresh evidence in the proceedings under Section 34 of the Act and

the learned District Judge rightly rejected the application filed by respondent Nos.1 and 2 for permission to lead evidence. The learned counsel urged that the High Court erred in interfering with the order passed by the trial court in interlocutory application.

8. Reiterating the findings of the impugned judgment of the High Court, Ms. E.R. Sumathy, learned counsel appearing for respondent Nos.1 and 2 submitted that in order to prove the grounds stated in the application filed under Section 34 of the Act adducing additional evidence is necessary. It was submitted that respondent Nos.1 and 2 sought to adduce evidence to prove the grounds enumerated under Section 34(2)(a) of the Act. The learned counsel submitted that the grounds for setting aside the award are specific and therefore, necessarily respondent Nos.1 and 2 will have to plead and prove the grounds mentioned in Section 34(2) of the Act and prove the same and the High Court rightly allowed the writ petitions giving an opportunity to respondent Nos.1 and 2 to adduce evidence in the proceedings under Section 34 of the Act.

9. The proceedings under Section 34 of the Act are summary in nature. The scope of enquiry in the proceedings under Section 34 of the Act is restricted to a consideration whether any of the grounds mentioned in Section 34(2) or Section 13(5) or Section 16(6) are made out to set aside the award. The grounds for setting aside the award are specific. It is imperative for expeditious disposal of cases that the arbitration cases under Section 34 of the Act should be decided only with reference to the pleadings and the evidence placed before the arbitral tribunal and the grounds specified under Section 34(2) of the Act.

10. The learned counsel for respondent Nos.1 and 2 submitted that in view of Rule 4(b) of the High Court of Karnataka Arbitration (Proceedings before the Courts) Rules, 2001, (Karnataka High Court Arbitration Rules) all the proceedings of the Civil Procedure Code, 1908 shall apply to such proceedings and therefore, the High Court rightly allowed the writ petitions and permitted respondent Nos.1 and 2 to file their own affidavits and also the affidavits of the witnesses. Rule 4(b) of the Karnataka High Court Arbitration Rules

provides that all the proceedings of the Civil Procedure Code shall apply to such proceeding/application filed under Sections 14 or 34 of the Act insofar as they could be made applicable. Rule 4(b) of Karnataka High Court Arbitration Rules, in our view, are only procedural. In ***Fiza Developers***, the Supreme Court noticed Rule 4(b) of Karnataka High Court Arbitration Rules and made it clear that there is no wholesale or automatic import of all the provisions of Civil Procedure Code into the proceedings under Section 34 of the Act as that will defeat the very purpose and object of the Arbitration Act, 1996.

11. In ***Fiza Developers***, the question which arose for consideration by the court was whether issues as contemplated under Order XIV Rule 1 of Civil Procedure Code should be framed in the application under Section 34 of the Act. The court held that framing of issues as contemplated under Order XIV Rule 1 CPC is not required in an application under Section 34 of the Act which proceeding is summary in nature. In paras (14), (17), (21) and (24) of ***Fiza Developers***, it was held as under:-

> **"14.** In a summary proceeding, the respondent is given an opportunity to file his objections or written statement. Thereafter,

the court will permit the parties to file affidavits in proof of their respective stands, and if necessary permit cross-examination by the other side, before hearing arguments. Framing of issues in such proceedings is not necessary. We hasten to add that when it is said issues are not necessary, it does not mean that evidence is not necessary.

……..

17. The scheme and provisions of the Act disclose two significant aspects relating to courts vis-à-vis arbitration. The first is that there should be minimal interference by courts in matters relating to arbitration. Second is the sense of urgency shown with reference to arbitration matters brought to court, requiring promptness in disposal.

……….

21. We may therefore examine the question for consideration by bearing three factors in mind. The first is that the Act is a special enactment and Section 34 provides for a special remedy. The second is that an arbitration award can be set aside only upon one of the grounds mentioned in sub-section (2) of Section 34 exists. The third is that proceedings under Section 34 requires to be dealt with expeditiously.

……..

24. In other words, an application under Section 34 of the Act is a single issue proceeding, where the very fact that the application has been instituted under that particular provision declares the issue involved. Any further exercise to frame issues will only delay the proceedings. It is thus clear that issues need not be framed in applications under Section 34 of the Act.”

12. Though this Court held that the applications under Section 34 of the Act are summary proceedings, an opportunity

to the aggrieved party has to be afforded to prove existence of any of the grounds under Section 34(2) of the Act. This court thus permitted the applicant thereon to file affidavits of his witnesses in proof thereof. In para (31) of ***Fiza Developers***, this Court held as under:-

> **31.** Applications under Section 34 of the Act are summary proceedings with provision for objections by the respondent-defendant, followed by an opportunity to the applicant to "prove" the existence of any ground under Section 34(2). 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. Where the case so warrants, the court permits cross-examination of the persons swearing to the affidavit. Thereafter, the court hears arguments and/or receives written submissions and decides the matter. This is of course the routine procedure. The court may vary the said procedure, depending upon the facts of any particular case or the local rules. What is however clear is that framing of issues as contemplated under Rule 1 of Order 14 of the Code is not an integral part of the process of a proceedings under Section 34 of the Act."

13. After referring to the judgment in ***Fiza Developers***, in the impugned judgment, the High Court held that respondent Nos.1 and 2 are to be afforded an opportunity to file their and their witnesses' affidavits in proof of their case to prove the grounds set out in Section 34(2)(a) of the Act.

14. After the decision in ***Fiza Developers***, Section 34 was amended by Act 3 of 2016 by which sub-sections (5) and (6) of Section 34 were added to the Principal Act w.e.f. 23.10.2015. Sub-sections (5) and (6) to Section 34 of the Act read as under:-

> "**34. *Application for setting aside arbitral award***.—
>
> (1)-(4) ……..
>
> (5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.
>
> (6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party."

15. The judgment in ***Fiza Developers*** was considered by Justice B.N. Srikrishna Committee which reviewed the institutionalisation of the arbitration mechanism and pointed out that opportunity to furnish proof in proceedings under Section 34 of the Arbitration Act has led to inconsistent practices. The said Committee reported as under:-

> "5. *Amendment to Section 34(2)(a) of the ACA*: Sub-section (2) (*a*) of Section 34 of the ACA provides for the setting aside of arbitral awards by the court in certain circumstances. The party

applying for setting aside the arbitral award has to furnish proof to the court. This requirement to furnish proof has led to inconsistent practices in some High Courts, where they have insisted on Section 34 proceedings being conducted in the manner as a regular civil suit. This is despite the Supreme Court ruling in *Fiza Developers & Inter-Trade (P) Ltd.* v. *AMCI (India) (P) Ltd.* (2009) 17 SCC 796 that proceedings under Section 34 should not be conducted in the same manner as civil suits, with framing of issues under Rule 1 of Order 14 of the CPC.

In light of this, the Committee is of the view that a suitable amendment may be made to Section 34(2)(*a*) to ensure that proceedings under Section 34 are conducted expeditiously.

Recommendation: An amendment may be made to Section 34(2)(*a*) of the Arbitration and Conciliation Act, 1996, substituting the words 'furnishes proof that' with the words 'establishes on the basis of the Arbitral Tribunal's record that'."

[**Report of Justice B.N. Srikrishna Committee quoted in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi (2018) 9 SCC 49***]

16. Based upon Justice B.N. Srikrishna Committee's report, Section 34 of the Principal Act has been amended by Arbitration and Conciliation (Amendment) Act, 2019 as under:-

"**7. *Amendment of Section 34***.—In Section 34 of the principal Act, in sub-section (2), in clause (*a*), for the words "**furnishes proof that**", the words "**establishes on the basis of the record of the Arbitral Tribunal that**" shall be substituted."

17. After referring to Justice B.N. Srikrishna Committee's report and other judgments and observing that the decision in

Fiza Developers must be read in the light of the amendment made in Section 34(5) and Section 34(6) of the Act and amendment to Section 34 of the Arbitration Act, 1996, in *Emkay Global Financial Services Limited v. Girdhar Sondhi* **(2018) 9 SCC 49,** it was held as under:-

> **"21.** It will thus be seen that speedy resolution of arbitral disputes has been the reason for enacting the 1996 Act, and continues to be the reason for adding amendments to the said Act to strengthen the aforesaid object. Quite obviously, if issues are to be framed and oral evidence taken in a summary proceeding under Section 34, this object will be defeated. It is also on the cards that if Bill No. 100 of 2018 is passed, then evidence at the stage of a Section 34 application will be dispensed with altogether. Given the current state of the law, we are of the view that the two early Delhi High Court judgments in *Sandeep Kumar v. Ashok Hans* 2004 SCC OnLine Del 106, *Sial Bioenergie v. SBEC Systems* 2004 SCC OnLine Del 863, cited by us hereinabove, correctly reflect the position in law as to furnishing proof under Section 34(2)(*a*). So does the Calcutta High Court judgment in *WEB Techniques and Net Solutions (P) Ltd. v. Gati Ltd.* 2012 SCC OnLine Cal 4271. We may hasten to add that if the procedure followed by the Punjab and Haryana High Court judgment in *Punjab SIDC Ltd. v. Sunil K. Kansal* 2012 SCC Online P&H 19641 is to be adhered to, the time-limit of one year would only be observed in most cases in the breach. We therefore overrule the said decision. We are constrained to observe that *Fiza Developers* was a step in the right direction as its ultimate ratio is that issues need not be struck at the stage of hearing a Section 34 application, which is a summary procedure.

> However, this judgment must now be read in the light of the amendment made in Sections 34(5) and 34(6). <u>So read, we clarify the legal position by stating that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(*a*), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties.</u> We, therefore, set aside the judgment in *Girdhar Sondhi v. Emkay Global Financial Services Ltd.* 2017 SCC OnLine Del 12758 of the Delhi High Court and reinstate that of the learned Additional District Judge dated 22-9-2016. The appeal is accordingly allowed with no order as to costs."

The legal position is thus clarified that Section 34 application will 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.

18. The question falling for consideration is whether the present case is such an exceptional circumstance that it was necessary to grant opportunity to respondent Nos.1 and 2 to file affidavits and to cross-examine the witnesses is made out. The

affidavit filed by the respondents along with application filed under Section 151 CPC does not indicate as to what point the first respondent intends to adduce except stating that the first respondent intends to adduce additional evidence relating to the subject of dispute. The affidavit does not disclose specific documents or evidence required to be produced except stating that the first respondent intends to adduce additional evidence or otherwise the first respondent will be subjected to hardship in the arbitration suit filed by her under Section 34 of the Act. As rightly contended by the learned counsel appearing for the appellant that there are no specific averments in the affidavit as to the necessity and relevance of the additional evidence sought to be adduced.

19. By perusal of the award, it is seen that before the arbitrator, respondent No.1 filed her written statement and other respondents also filed separate written statements. It was contended that the documents were forged. Both parties adduced oral and documentary evidence. The appellant led evidence by examining two witnesses Balakrishna Nayak (PW-1) and B.A. Baliga (PW-2) and exhibited documents P1 to

P47. Respondent Nos.1 and 2 also examined five witnesses viz. M. Shashikala (RW-1), Mamatha @ Mumtaz Hameed (RW-2), Latha (RW-3), Chitralekha Umesh (RW-4) and B.R. Nagesh (RW-5). Respondent Nos.1 and 2 also produced documentary evidence Ex.-R1 to R13. As held by the District Judge, the grounds urged in the application can very well be considered by the evidence adduced in the arbitration proceedings and considering the arbitral award. Further, the application filed by respondent Nos.1 and 2 seeking permission to adduce evidence, no ground was made out as to the necessity of adducing evidence and what was the nature of the evidence sought to be led by respondent Nos.1 and 2. The proceedings under Section 34 of the Act are summary proceedings and is not in the nature of a regular suit. By adding sub-sections (5) and (6) to Section 34 of the Act, the Act has specified the time period of one year for disposal of the application under Section 34 of the Act. The object of sub-sections (5) and (6) to Section 34 fixing time frame to dispose of the matter filed under Section 34 of the Arbitration Act, 1996 is to avoid delay and to dispose of the application expeditiously and in any event within a period of one year from the date of which the notice referred to in Section 34(5) of the Act is served upon the other party. In the arbitration proceedings, the parties had sufficient opportunity to adduce oral and documentary evidence. The High Court did not keep in view that respondent Nos.1 and 2 have not made out grounds that it is an exceptional case to permit them to adduce evidence in the application under Section 34 of the Act. The said directions of the High Court amount to retrial on the merits of the issues decided by the arbitrator. When the order of the District Judge dismissing the application filed by respondent Nos.1 and 2 does not suffer from perversity, the High Court, in exercise of its supervisory jurisdiction under Articles 226 and 227 of the Constitution of India, ought not to have interfered with the order passed by the District Judge and the impugned judgment cannot be sustained.

20. In the result, the impugned judgment dated 12.09.2014 passed by the High Court of Karnataka at Bangalore in Writ Petition Nos.18374-75 of 2010 (GM-RES) is set aside and these appeals are allowed. The order of the District Judge dismissing the application filed under Section 151 CPC in AS

No.1 of 2008 is affirmed. The learned District Judge shall take up AS No.1 of 2008 and dispose of the same expeditiously in accordance with law. No costs.

…………………………..J.
[R. BANUMATHI]

…………………………..J.
[A.S. BOPANNA]

New Delhi;
September 23, 2019