(2019) 10 BOM CK 0100

Bombay High Court

Case No: Notice Of Motion No. 1726 Of 2019 In Arbitration Petition No. 74 Of 2018

Ramawatar Babulal Jajodia And Ors		APPELLANT
	Vs	
Rajeev Anand And Ors		RESPONDENT

Date of Decision: Oct. 16, 2019

Acts Referred:

- Arbitration And Conciliation Act, 1996 - Section 5, 12, 12(1)(a), 13, 13(5), 16, 16(6), 17, 34, 34(2), 34(5), 34(6), 34(2)(a)
- Code Of Civil Procedure, 1908 - Order 14 Rule 1

Hon'ble Judges: G.S. Kulkarni, J

Bench: Single Bench

Advocate: Nitin Thakkar, S.U. Kamdar, Yashesh Kamdar, Aniya S. Bhansali, Sakshi Saboo, Raval Shah, Anil Mishra, Neha Mhatre

Final Decision: Dismissed

Judgement

1. A short question which arises for consideration in this Notice of Motion is as to whether the applicant (original petitioner) can be permitted to bring

additional evidence on record in the proceedings of the above petition filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short

â€œthe Actâ€).

2. The petitioners have filed the Section 34 petition challenging the arbitral award dated 9 September 2017 read with the corrigendum dated 6

November 2017 read with the interim award dated 25 October 2016 passed by the learned Sole Arbitrator Mr.Sham Lilani, by which the disputes

between the petitioners and the respondents as arisen under the tripartite agreement dated 22 November 2006 stood adjudicated.

3. The prayer in the Notice of Motion in regard to the additional evidence sought to be placed on record reads as under:

â€œ(a) That this Honourable Court, may be pleased to take the Affidavit of Mr.Bakir Javeri (with annexures) and Affidavit of Mr.Ramawatar B.

Jajodia (with annexures), annexed at Annexure A and Annexure B respectively, to the Schedule of this Notice of Motion, on record of these arbitral

proceedings;â€

4. The case of the applicant in the Notice of Motion is that the applicant is compelled to file the present notice of motion inasmuch as one of the issues

raised in the Section 34 petition is about the applicant having justifiable doubts about the independence and impartiality of the arbitral tribunal. It is

contended that although the arbitrator was named in the arbitration clause in the tripartite agreement dated 22 November 2006, however, in view of

the events that had transpired between the year 2006 and till invocation of the arbitration clause in the year 2012, the applicant objected to the

arbitrator in participating in the adjudication of the disputes. The applicant has contended that vide letter dated 30 July 2012 the applicant had raised an

objection to the appointment of the learned arbitrator on the ground of independence, integrity and impartiality of the learned Arbitrator. It is stated that

the applicant had pointed out the facts that the learned Arbitrator in last three to four years was not handling any personal cases of the applicant

however the learned Arbitrator was looking after the personal matters of respondent no.1 and had very close relations with respondent no.1. The

applicant also stated in the said letter that as to how the situation had changed between the applicant and the learned Arbitrator, and the learned

Arbitrator himself has disclosed and confirmed that the learned Arbitrator had soft corner for respondent no.1.

5. The applicant contends that accordingly the applicant filed a Section 16 application before the learned Arbitrator on 21 April 2016 interalia

challenging the competency of the arbitral tribunal and contended that the learned arbitrator is de jure and de facto incompetent to decide the arbitral

dispute interalia on the ground of bias, as the learned arbitrator was the legal adviser of respondent no.1 and had failed to make a disclosure under

Section 12 of the Act as urged in paragraphs 4 ((b), (c) and (d) of the said application. The contention of the applicant was of the learned Arbitrator

handling legal matters of the respondent. The applicant had contended that the respondents filed a reply dated 9 June 2016 to the said Section 16

application expressly denying the allegations made by the petitioner in paragraphs 4(b), (c) and (d) of the Section 16 application. Respondents also

denied that the learned arbitrator was advising in their legal matters. The applicant filed an additional affidavit dated 19 August 2016 interalia setting

out in detail at paragraphs 5 to 8 the reasons which according to the applicant, compromised the independence and impartiality of the learned

Arbitrator. The applicant has also pointed out the fact that the applicant had become aware that the learned Arbitrator was advising respondent no.1

on a property transaction in Udaipur in the year 2012 and the learned Arbitrator had travelled to Udaipur with respondent no.1 in regard to the said

property transaction. Before the arbitral tribunal, respondent no.1 filed an additional affidavit in reply denying the contentions of the applicant and

reiterating the stand taken in their previous affidavit dated 9 June 2016, denying the allegations as made by the applicant. Respondent no.1 contended

that there was no evidence to support the objection as raised by the applicant against the independence and impartiality of the learned Arbitrator.

6. The case of the applicant is that the learned Arbitrator despite being aware of the specific allegations made by the applicant against the learned

Arbitrator acting as legal adviser to respondent no.1 and being in close relation with respondent no.1, proceeded to pass an interim award dated 25

October 2016 on the Section 12 and Section 16 applications filed by the applicant, dismissing the said applications, on the ground that there was no

cogent evidence in supporting such contentions of the applicant. Learned Arbitrator rejected the contentions of the respondent that the learned

Arbitrator had attended any personal matter of respondent no.1. It is stated that thereafter the arbitral proceedings culminated into the learned

arbitrator making a final award against the applicant/ petitioner(s), which is subject matter of challenge in the present Section 34 petition.

7. The applicant has contended that the applicant in paragraphs 18 to 24 of the present petition filed under Section 34 of the Act has raised the

grounds on independence and impartiality of the learned Arbitrator in deciding the disputes between the parties and has reiterated the applicantâ€™s

case against the learned arbitrator lacking independence and impartiality. The applicant contends that in the reply affidavit filed to the Section 34

petition, the case of the applicant has been denied by the respondens, whereby the respondents confirm their stand that there has never been any

professional association with the respondents herein. The applicant contends that in order to deal with the issue of bias, the respondents have filed

additional affidavit dated 7 December 2018 whereby, according to the applicant, the respondents have made an attempt to mislead this Court by

producing some documents not forming part of the arbitral proceedings and it appears to the applicant that these documents were supplied by the

learned Arbitrator himself to the respondents.

8. The applicant contends that in June,2019 the applicant met one Mr.Bakir Javeri on some business issues and during the course of conversation with

him, it was learnt that Mr.Bakir Javeri was associated with respondent no.1 in a transaction pertaining to Udaipur property and the learned arbitrator

Mr.Shyam Lilani was acting as their legal adviser. It is stated that when the applicant requested Mr.Bakir Javeri to give him documents to show the

connection he promised to search and provide such documents. Mr.Bakir Javeri informed the applicant that since he later on quit from the project he

would procure further documents from the landlords. Accordingly, Mr.Bakir Javeri furnished to the applicant various documents in the nature of e-

mails and air tickets exchanged between him, the learned arbitrator, respondent no.1 and other persons towards their land transaction at Udaipur in the

year 2012. It is contended that on perusal of the documents, applicant realized that the contentions raised by the applicant that the learned Arbitrator is

closely related to respondent no.1 and has been acting as his legal advisor, can be established through these documents.

9. The applicant has contended that so far the applicant was sure that the learned Arbitrator is associated with respondent no.1, however, the

applicant did not have documentary evidence to prove the said contention. The applicant always had a hint that respondent no.1 and other Lavlesh

group members are carrying out some business transaction in Udaipur taking legal advice of the learned arbitrator but the applicant did not know that

Mr.Bakir Javeri was also one of the party of such transaction and he was concerned in the said transaction. The applicant contends that it is only as a

sheer coincidence that it was revealed in the business meet, about the business transaction of Mr.Bakir Javeri with respondent no.1 â€" Rajeev Anand

and the learned Arbitrator being their legal advisor. It is accordingly contended that Mr.Javeri agreed to place on record of the present section 34

petition, all these documents and accordingly he has made an affidavit dated 8 July 2019 annexed at â€˜Annexure Aâ€™ to this notice of motion

interalia stating about his business dealing with respondent no.1 at Udaipur which was undertaken under the legal advice of the learned arbitrator from

the year 2012 onwards. It is stated that Mr.Bakir Javeri had also annexed all the material documents to the affidavit to prove the same.

10. The applicant has contended that from the said affidavit of Mr.Bakir Javeri, considering the cogent value of the said documents, these documents

would have a bearing on the outcome of this case. It is contended that these are third party documents and would prove beyond reasonable doubt that

the learned Arbitrator being associated with respondent no.1, hence the learned arbitrator ought to have recused himself from the arbitral proceedings.

11. The applicant contends that the main ground for rejecting the applicantâ€™s application under Section 16 of the Act was that there was no

evidence to support the applicantâ€™s contentions of bias against the learned arbitrator. It is contended that respondent no.1 and the learned

arbitrator had knowledge of this fact but they deliberately suppressed it. It is contended that the respondent no. 1 and the learned Arbitrator have

acted in the manner which confirms the doubt of the applicant about the integrity and partiality of the learned arbitrator. It is contended that by

production of the documents through the affidavit of Mr.Javeri, the applicant is seeking leave of the Court to produce evidence in support of these

grounds already laid in the petition, as at the relevant time this evidence was not in possession, power and control of the applicant at the time of

Section 16 application was filed before the learned Arbitrator. It is contended that these documents were received by the applicant in the last week of

June 2019 and thus it is in the interest of justice to take on record the said affidavit of Mr.Bakir Javeri, which is made at the request of the applicant. It

is contended that in any case, respondent no.1 and the learned arbitrator ought to have disclosed these facts before and while the arbitration was in

progress. If the prayers as made are not granted, it would cause irreparable harm and injury to the applicant.

12. Respondent no.4-Vinay Bhasin has filed a reply affidavit to this notice of motion. At the outset it is contended that the notice of motion is not

maintainable under the provisions of the Act or Rules made thereunder and there is no provision to take out such notice of motion for the reliefs as

prayed for. It is contended that it is a settled law that the provisions of the Act are Code by itself and therefore, no other provisions of any other act

can be relied upon. It is contended that the award passed by the arbitral tribunal can be challenged by filing Section 34 petition and on the basis of the

record which was before the arbitral tribunal. It is thus not permissible under Section 34 of the Act to introduce new material, new documents or

agitate any points which were not raised or agitated before the arbitral tribunal.

13. Respondent no.4 has contended that this notice of motion seeks to introduce additional documents and oral evidence in the form of affidavit by

Mr.Bakir Javeri who cannot be introduced in a Section 34 petition because Mr.Bakir Javeriâ€™s oral evidence is required to be tested by cross

examination which can be done only before the arbitral tribunal and not in the proceedings under Section 34 which are summary proceedings. It is thus

contended that this notice of motion seeking to introduce new oral as well as the written documents needs to be proved by the normal method of proof

as the veracity and contents of each of the said documents has been vehemently denied by the respondents.

14. It is next contended that none of the documents which are sought to be introduced in the proceedings under Section 34 for the first time before this

Court can form part of the proceedings without the same being proved and tested on the touch stone of cross-examination and thus the evidence

which is not produced before the arbitral tribunal and not verified or tested on the touch stone of cross examination, cannot form part of the arbitration

petition under Section 34. Respondent no.4 has contended that the application preferred by the petitioner under Sections 12, 13 and 16 of the Act did

not contain any pleadings pertaining to the engagement of the arbitrator by any of the companies in which respondent no.1 has share and/or interest.

These applications simply proceeded on the foundation that there are large financial transactions between respondent no.1 and the arbitrator. The

learned arbitrator in deciding these applications held that there are no transactions or any financial dealings between the arbitrator and respondent no.1

in his individual and personal capacity. It is thus contended that in the absence of any pleadings in the application under Sections 12, 13 and 16 of the

Act filed by the applicant, before the arbitral tribunal, the evidence sought to be produced now cannot be led at all, as there is no foundation in the

pleading in that behalf.

15. Respondent no.4 without prejudice to the above contentions has urged that no such evidence produced in the present notice of motion is irrelevant

to the facts of the present case. This for the reason that the company-Ishaan Clubs & Hotels Pvt.Ltd, formerly known as Crown Clubs & Hotels Pvt.

Ltd. had no financial dealings with the Arbitrator and that the said company had executed documents pertaining to the land through an advocate

known as Mr.Bhanwarsingh Raj Purohit and had paid the legal dues for his legal assistance in that behalf. Respondent no.4 has denied the

correspondence which is annexed to the affidavit of Mr.Bakir Javeri and would contend that unless Mr.Bakir Javeri is cross examined, the respondent

is advised not to deal with the said correspondence at this juncture. As regards the plane tickets to Udaipur are concerned, it is contended that the

same were issued and booked by Mr.Bakir Javeri through his travel agent and the same were in fact booked not for the purpose of any legal

transaction but for a trip to Shreenathjias and the arbitrator was known to everybody. It is contended that the arbitrator has made several visits to the

places including Vaishnavdevi where the petitioner as well as the respondents were also accompanying him, the details of which are not being

presently disclosed. In the aforesaid circumstance, it is contended that such notice of motion be held to be not maintainable and be dismissed.

Submissions on behalf of the parties

16. Mr.Thakkar, learned Senior Counsel for the applicant in referring to the affidavit of Mr.Javeri would submit that this is a clear case where the

ground of bias, integrity, is not only pleaded by the applicant/petitioner before the arbitral tribunal in the interim proceedings filed under Sections 12, 13

and 16 of the Act but also specific ground in that regard are also taken in the Section 34 petition. Mr.Thakkar drawing my attention to the provisions

of Section 12 of the Act would contend that it was a solemn obligation on the part of the learned Arbitrator to disclose throughout the arbitral

proceedings any circumstance as specified in sub-section (1)(a) of Section 12. Mr. Thakkar would submit that by virtue of the provisions of Section

13(5) read with section 16(6) the applicant is entitled to raise the issue of bias in the proceedings of a Section 34 petition in challenging the award

passed by the arbitrator. Mr.Thakkar would urge that the issue of bias as raised by the applicant would go to the root of the arbitral proceedings,

hence is necessary that the Court grants an indulgence by accepting additional evidence in the form of affidavit of Mr.Bakir Javeri, alongwith the

annexures, as prayed for in the notice of motion. In support of his submissions Mr.Thakkar has placed reliance on the decision of this Court in

Murlidhar Roongta & Ors. vs. M/s.Jagannath Tiberwala & Ors 2005(2) All MR 42,0 as also the decision of the Supreme Court in Emkay Global

Financial Services Ltd. Vs. Girdhar Sondhi (2018)9 SCC 49.

17. On the other hand Mr.Kamdar, learned Senior Counsel for the respondents in opposing this notice of motion has drawn my attention to the reply

affidavit contending that this notice of motion is not maintainable both in law and on facts. It is contended that the applicant has already urged this

issue of bias before the arbitral tribunal by an interim application on which an order was passed by the learned Arbitrator, rejecting such contention of

the applicant.

18. Mr.Kamdar would submit that even the affidavit of Mr.Bakir Javeri would not demonstrate any ground which would attract the provisions of

Section 12 to disqualify the named arbitrator. Mr.Kamdar has drawn my attention to the objection application dated 30 July 2012 (page 222 of the

paperbook) filed by the applicant before the learned Arbitrator raising similar contentions and the order passed thereon by the learned Arbitrator. In

this context, Mr. Kamdar also refers to the affidavit in reply of the respondent-claimants to the said Section 17 application and also to the affidavit of

Mr.Ramawatar B.Jajodia of August 2016, as filed before the learned Arbitrator (Exhibit L, page 289 of the paperbook) pointing out that the applicant

had raised a similar contention in the following words:-

â€œI say and submit that it is also a known fact that the Ld.Arbitrator has advised the Claimant on a recent property transaction which was being

attempted by the Claimant in Udaipur in an around the year 2012. I say that there ought to have been monetary exchanges between the Ld.Arbitrator

and the Claimant in this connection; which fact is in the exclusive knowledge of the Arbitrator and the Claimant. I say that even if there were no such

monetary exchanges, it only further evidences the existence of a bond and relationship between the Ld. Arbitrator and the Claimant.I say that it

cannot be disputed that the Ld. Arbitrator had travelled with the Claimant to assist the Claimant in an attempted property transaction. It is imperative

that the captioned Arbitral reference was also initiated in the year 2012. Accordingly, I say and submit that there exists reasonable apprehension of

lack of independence and impartiality on the part of the Ld.Arbitrator. Hence, I pray that thisHonâ€™ble Tribunal may kindly recuse itself from the

adjudication of the present dispute between the parties.â€

19. My attention is also drawn to the reply as filed to the said affidavit as made on behalf of the applicant. In paragraph 5(e) (page 303-304 of the

paperbook) the respondent no.1 had made the following statements:-

â€œâ€¦ I state that the Learned Arbitrator had been the Solicitor/Advocate of the company almost since the inception of the company even before the

Respondent joined the Company during the year 2004. The Learned Arbitrator has rendered advice to almost all the directors/shareholders of the

company. After the respondent no.1 joined the owner Company as a shareholder he too started taking legal advice and services of the Ld.Arbitrator.

The Arbitrator has also rendered and continued to render his advise/legal services even to Respondent No.1 and other shareholders of the company.

The baseless, false and malicious allegations/apprehensions of the Respondent no.1 shall fall flat and proved baseless without any substance merely on

the fact that even today the Learned Arbitrator continues to enjoy the confidence of the owner company where Respondent no.1 is the Chairman and

Respondent No.1 has even signed a cheque payment of Rs.1 lac less TDS to the Learned Arbitrators on 20th July,2016, towards the legal services

rendered in connection with the pending court cases of his owner company. Thus all the allegations, insinuations and apprehensions made by the

Respondent No.1 are being hyped with a malicious design to thwart the current arbitration. I further deny that there exists any special bond or and

relationship between the Claimants and the Learned Arbitrator and the Respondent No.1 to strict proof thereof. I once again deny that there exist

reasonable apprehensions of lack of independence and impartiality on the part of the Learned Arbitrator as alleged or at all.â€

20. Mr.Kamdar has also drawn my attention to the interim award dated 25 October 2016 to urge that the learned Arbitrator has dealt with all the

issues and now these issues are the subject matter of consideration in Section 34 petition.

21. Mr.Kamdar would also contend that the prayer as made on behalf of the applicant ought not to be accepted considering the decision of the

Supreme Court in Emkay Global Financial Services Ltd. Vs. Girdhar Sondhi (supra). He would submit that in an application for setting aside of an

arbitral award, the Court would not ordinarily require anything beyond the record, that was before the arbitrator. Mr.Kamdar would contend that there

is nothing extraordinary and which can be said to be not the part of the arbitral record, in the facts of the case, which would require such additional

evidence to be placed on record in the Section 34 proceedings, even considering the observations of the Supreme Court in paragraph 21 of the said

decision. He submits that in any case, the Supreme Court has made observations in regard to the recent recommendations of Mr. Justice

B.N.Srikrishna Committee and 2018 Amendment Bill (Bill No.100 of 2018) proposing amendment to Section 34 of the Act for deletion of the words

â€œfurnishes proof thatâ€ in sub-section (2) in Clause (a) and for insertion of the words â€œestablishes on the basis of the record of the Arbitral

Tribunal thatâ€. Mr. Kamdar submits that the Supreme Court in paragraph 21 has made categorical observations that once the amendment bill was

passed, then the evidence at the stage of Section 34 application is dispensed with altogether. Mr.Kamdar would submit that the decision of the learned

Single Judge of this Court in Murlidhar Roongta & Ors. vs. M/s.Jagannath Tiberwala & Ors. (supra) is not applicable in the facts of the case, as in

the said case there was no contest on the part of the respondent to bring additional affidavit of evidence on record and accordingly, it does not lay

down a legal principle that it would be permissible in a Section 34 petition to tender evidence.

Discussion and Conclusion

22. I have heard at length Mr.Thakkar, learned Senior Counsel for the applicant and Mr.Kamdar, learned Senior Counsel for the respondents. With

their assistance, I have also perused the record of the notice of motion as also of the Section 34 petition.

23. At the outset it may be observed absolute right for a party to tender additional under Section 34 of the Act, as these that it is not a matter of an

evidence in proceeding filed proceedings are summary proceedings. The intention of the legislation is expeditious disposal of the arbitral disputes in the

manner known to Section 34 of the Act. As evident from the legislative scheme of the Arbitration and Conciliation Act, the parties have all the

opportunity to object to the tribunal on all the counts as permissible under Sections 12 and 13 and in the manner recognized by Section 16 of the Act.

No doubt if such an objection fails, the same would be subject matter of consideration on the basis of the record of the arbitral tribunal in proceedings

of a Section 34 application.

24. In this context, Mr. Thakkar, learned Senior Counsel for the applicant would submit that the provisions of sub-section 2(a) of Section 34 as it stood

prior to its amendment, by the 2019 Amendment Act are relevant, which clearly provide that an arbitral award may be set aside by the Court on the

different grounds as set out by the provision only if the party making the application â€œfurnishes proofâ€ to support such grounds. It is submitted that

once the provision itself permits a party to furnish proof then surely it is permissible for the party to place additional documents on record by way of

affidavit, as held by the learned Single Judge of this Court in Murlidhar Roongta & Ors. vs. M/s.Jagannath Tiberwala & Ors. (supra). Mr.Thakkar,

learned Senior Counsel for the applicant would submit that the additional documents which are sought to be placed on record by this notice of motion,

are in support of the contentions as urged before the arbitral tribunal that the learned arbitrator is closely connected with the respondents in not only

giving legal advise but also otherwise as set out in affidavit in support of notice of motion and of Mr.Bakir Javeri.

25. The submissions of Mr. Thakkar at the blush can be said to be attractive. However, in my opinion, the law in this regard is no more res integra

considering the decision of the Supreme Court in Emkay Global Financial Services Ltd. Vs. Girdhar Sondhi (supra). The Supreme Court taking a

review of the law and referring to an earlier decision in Fiza Developers & Inter-Trade (P) Ltd. vs. AMCL (India) (P) Ltd. (2009) 17 SCC 79 h6as

reiterated and observed that Arbitration Act is a special enactment, whereunder Section 34 provides for a summary remedy. The principle of minimal

interference by Court in the matters relating to arbitration and promptness in disposal of such cases is recognized. The Supreme Court has also

referred with approval the decision of the learned Single Judge of the Delhi High Court inS andeep Kumar V. Ashok Hans 2004 SCC onLine Del 106

and in Sial Bioenergie V. SBEC Systems 2004 SCC OnLine Del 86 3as also the decision of the Calcutta High Court in WEB Techniques & Net

Solutions (P) Ltd. V. Gati Ltd. 2012 SCC OnLine Cal 4271, in observing that these decisions lay down the correct position in law that there is no

requirement of oral evidence to be led in the Section 34 proceedings. The decision also refers to the earlier decision of the Supreme Court in Cochin

Shipyard Ltd. Vs. Apeejay Shipping Ltd. (2015)15 SCC 52,2 which was a case under the Arbitration Act, 1940 in which the Court had held that the

Act did not require any kind of oral evidence to be led. The Supreme Court has also referred to the 2018 Amendment Bill being moved on the floor of

the legislature being a step to review the institutionalization of the arbitration mechanism in India. In this context the Supreme Court in paragraph 17

has categorically observed that once the bill is passed then the evidence at the stage of Section 34 application will be dispensed with altogether. The

relevant observations in paragraphs 13, 17, 18 & 21 in this context are required to be noted, which read thus:-

â€œ13. We now come to a judgment of this Court in Fiza Developers & Inter-Trade Pvt. Ltd. v. AMCI (India) Pvt. Ltd. and Anr., (2009) 17 SCC

796. In this case, the question that was posed by the Court was whether issues as contemplated under Order XIV Rule 1 of the Code of Civil

Procedure, 1908 should be framed in applications under Section 34 of the Arbitration and Conciliation Act, 1996. This Court held:

â€œ14. 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.â€

17. The scheme and provisions of the Act disclose two significant aspects relating to courts vis-Ã -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.

18. Section 5 of the Act provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I of

the Act, no judicial authority shall intervene except where so provided in the Act.â€

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.â€

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.â€

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 â€œproveâ€ 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.â€

17. A recent report of the Justice B.N. Srikrishna Committee to review the institutionalization of the arbitration mechanism in India has found:

â€œ5. 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) Pvt. Ltd. & Anr. 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 2012 SCC OnLine Cal 4271 [C.O. No. 1532 of 2010 (decided on 02.05.2012)]. expeditiously.

Recommendation: An amendment may be made to Section 34(2)(a) of the Arbitration and Conciliation Act, 1996, substituting the words â€œfurnishes

proof thatâ€ with the words â€œestablishes on the basis of the arbitral tribunalâ€™s record that.â€

18. We have been informed that the Arbitration and Conciliation (Amendment) Bill of 2018, being Bill No.100 of 2018, contains an amendment to

Section 34(2)(a) of the principal Act,which reads as follows:

â€œ7. Amendment of Section 34- In section 34 of the principal Act, in sub-section (2), in clause (a), for the words â€œfurnishes proof thatâ€, the

words â€œestablishes on the basis of the record of the arbitral tribunal that"" shall be substituted.â€ Bill No.100 of 2018. The Arbitration and

Conciliation (Amendment) Bill,2018.

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, 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 (supra). We may hasten to add that if the procedure followed by the Punjab and Haryana High Court judgment (supra) 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 (supra) 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

Section 34(5) and 34(6). 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. We, therefore, set aside the judgment of the Delhi High Court and reinstate that of the learned Additional District Judge

dated 22.09.2016.The appeal is accordingly allowed with no order as to costs.â€

26. The principles as emerged from the decision in Emkay Global Financial Services Ltd. Vs. Girdhar Sondhi (supra) were followed in the recent

judgment of the Supreme Court in Canara Nidhi Ltd. Vs. M.Shashikala & Ors. 2019 SCC OnLine SC 124 w4herein the Supreme Court has reiterated

that ordinarily adjudication of the Section 34 proceedings would not require anything beyond the record that was before the arbitral tribunal and that

cross examination of a person swearing affidavit should not be allowed unless absolutely necessary. In any event now by virtue of the 2019

amendment Act Section 34 sub-section 2(a) has been amended by deletion of the words â€œfurnishes proof thatâ€ and being substituted by the words

â€œestablishes on the basis of the record of the arbitral tribunal thatâ€. Thus, the regime of the relevancy of the record of the arbitral proceedings in

adjudicating Section 34 proceedings has a legislative recognition, as ordinarily the position would be, prior to the amendment, as seen from the

decisions of the Supreme Court as referred above.

27. Mr.Kamdarâ€™s next submission is that in view of the amendment to the wordings of Section 34(2)(a) by deletion of the words â€œfurnishes

proof thatâ€ and by insertion of the words â€œestablishes on the basis of the record of the Arbitral Tribunal thatâ€, this notice of motion is required to

be dismissed as this being the procedural provision, is required to be considered to be retrospectively applicable. He has submitted that it is a settled

principle of law that the amendments which are procedural in nature are retrospectively applicable. Mr.Kamdar has supported this contention relying

on the decisions in Narayan Prasad Lohia Vs. Nikunj Kumar Lohia & Ors. (2002)3 SCC 57;2 M/s.Visakha Petroleum Products Pvt.Ltd. Vs.

B.L.Bansal & Anr. 2015 SCC Online Bom 480; National Thermal Power Corpn. Ltd. Vs. WIG Brothers Builder and Engineers Ltd. ILR(2009) IV

Delhi 663 O.M.P; Thirumalai Chemicals Ltd. Vs. Union of India (2011)6 SCC 73;9 Securities and Exchange Board of India Vs. Ajay Agarwal

(2010)3 SCC 765; Canara Nidhi Ltd. Vs. M.Shashikala & Ors. 2019 SCC OnLine SC 1244

28. Prima facie I am not persuaded to accept this submission of Mr.Kamdar that the amendment to Section 34(2)(a) by the 2019 Amendment Act is

procedural in character, for the reason that Section 34 itself is a substantive provision conferring a right on a party to assail the award in a manner as

provided therein. However, I consider it appropriate not to delve on this issue considering the view I intend to take in deciding this notice of motion.

29. I am not persuaded to accept the contention as urged by Mr.Thakkar referring to the decision of the learned Single Judge of this Court in

Murlidhar Roongta & Ors. vs. M/s.Jagannath Tiberwala & Ors (supra) that this Court as a legal principle has recognized acceptance of additional

evidence in Section 34 proceedings. This was a case where the respondent did not object to the additional evidence being brought on record. In any

case this decision does not lay down as an absolute proposition of law that additional evidence as a matter of course, in adjudication of Section 34

petition can be accepted. Such a proposition in any event cannot be accepted, as it would be contrary to the decisions of the Supreme Court as noted

above.

30. Now coming to the reliefs as prayed for in notice of motion, on a perusal of the record, I am of the opinion that similar issues were raised by the

applicant under Sections 12 and 13 of the Act before the arbitral tribunal as noted above and which were subject matter of an order passed by the

arbitral tribunal on the Section 16 application as filed by the applicant. All these contentions would now be the subject matter of consideration in the

pending Section 34 proceedings. Thus the only question is whether the affidavit of Mr.Bakir Javeri can be accepted to as additional evidence which

was not before the arbitral tribunal. In my opinion, a perusal of the affidavit of Mr. Bakir Javeri and the annexures to the affidavit would not show any

direct relation of a legal advise being given by the learned arbitrator to respondent no. 1. These e-mails which are annexed to the affidavit of Mr.Bakir

Javeri indicate that the communication is by the regular e-mail idâ€™s (address) used by law firm Lilani Shah & Co., Advocates & Solicitors.

Referring to these emails, it cannot be said that the communication was between the learned arbitrator personally and the recipient of these e-mails. It

needs to be noted that both the parties earlier had good relations with the learned arbitrator and the arbitrator was the named arbitrator in the

arbitration agreement. As regards the e-mail dated 8 August 2016, it is between Sohil Anand to Yudhveer, the owner of the land at Udaipur. This is a

communication between third parties not parties to the arbitral proceedings. In my opinion all these documents annexed to the affidavit of Mr.Javeri

and the contents of the affidavit of Mr.R.B.Jajodia do not establish any substantive material /evidence in support of the applicantâ€™s contention of

the case of bias of the learned arbitrator.

31. Thus, considering the nature of the material as sought to be placed on record, there is no justifiable reason to convert this Section 34 proceedings in

a mini trial on these issues post the arbitral award and more particularly when these issues, were already before the arbitral tribunal and decided and

now falling for consideration in the Section 34 proceedings. Thus a prayer of the applicant for additional evidence to be placed on record, cannot be

granted.

32. The observations as made above are purely in the context of the present notice of motion and are no expression on any of the contentions of the

parties on merits of the Section 34 petition.

33. As a result of the above discussion, I find no merit in the notice of motion. It is accordingly rejected. No costs.