Dispute Resolution Hotline

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INTRODUCTION OF FRESH EVIDENCE FOR SETTING ASIDE ARBITRAL AWARD

- Proceedings under Section 34 of Arbitration Act are summary in nature
- Courts should not look beyond the record of arbitral tribunal to set aside arbitral awards
- Leading evidence in Section 34 proceedings should not be allowed unless absolutely necessary

The Supreme Court ("**Court**") recently ruled in the case of *M/s Emkay Global Financial Services Ltd. v. Girdhar Sondhi,*[1] that unless absolutely necessary, the courts should not go beyond the record before the arbitrator in deciding an application for setting aside an award. The court also reiterated that "seat" in the context of arbitration proceedings is akin to an exclusive jurisdiction clause and would vest the seat courts with exclusive jurisdiction over the arbitration proceedings.

FACTS

The dispute arose between M/s Emkay Global Financial Services Ltd. ("**Appellant**"), who was a registered broker with the National Stock Exchange ("**NSE**") and Mr. Girdhar Sondhi ("**Respondent**") who was Appellant's client. The Respondent had initiated arbitration proceedings against Appellant and claimed an amount of INR 736,620 (Rupees Seven Hundred and Thirty Six Thousand Six Hundred and Twenty) in arbitration.

The arbitration proceedings took place under Agreement dated July 3, 2008 ("**Agreement**") and the NSE bye-laws. Under the Agreement, exclusive jurisdiction was granted to the courts in Mumbai. Similarly, under the NSE bye-laws, exclusive jurisdiction was also granted to the courts of Mumbai. The bye-laws further prescribed seats of arbitration for different regions, geographical locations for conducting arbitrations etc. NSE referred the present dispute to a sole arbitrator who conducted proceedings at Delhi and passed an award dated December 8, 2009 ("**Award**") rejecting the claim of Respondent.

Subsequently, the Respondent filed an application to set aside the Award under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") before District Court in Delhi ("**District Court**"). The District Court dismissed the application under Section 34[2] on the ground that it would not have the jurisdiction in light of the exclusive jurisdiction clause. However, on appeal, the Delhi High Court held that the issue of jurisdiction in the present case was a question of fact and parties were not allowed to lead evidence on it. Accordingly, the High Court directed District Court to decide this question (in relation to existence of territorial jurisdiction of Delhi Courts) after framing a specific issue and permitting parties to lead evidence on it.

JUDGMENT

Seat is akin to exclusive jurisdiction clause

The Court took note of its several judgments on the effect of exclusive jurisdiction clause. Noting that the concept of 'juridical seat' which was evolved by courts in England have taken root in India, the Court, referred to its recent judgment in the case of *Indus Mobile Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*[3] In this case, it was opined that the moment a seat is designated in arbitration, it is akin to an exclusive jurisdiction clause. The court held that, under law of arbitration, unlike the Code of Civil Procedure ("**CPC**") which applies to civil suits, a reference to "seat" is a concept by which a neutral venue can be chosen by parties to an arbitration clause. Such neutral venue may not in the classical sense have jurisdiction – implying that it may not have jurisdiction as per CPC. However, in arbitration, the moment a "seat" is determined, it would vest the "seat" courts with exclusive jurisdiction i.e. if the "seat" is Mumbai, it would vest Mumbai courts with jurisdiction for the purposes of regulating arbitral proceedings arising out of the agreement between the parties.

Following the above judgment, the court held that Mumbai courts will have exclusive jurisdiction owing to the Agreement and NSE bye-laws in the present case.

Leading evidence under Section 34 proceedings should not be allowed

Subsequently, the Court analyzed the second aspect of the Delhi High Court's order. The Delhi High Court had directed District Court to conduct a trial on the question of fact relating to jurisdiction by allowing parties to lead evidence on it.

In reference to above, the Court identified two of Delhi High Court's own judgments[4], where High Court had earlier opined that there is no requirement under Section 34 for parties to lead evidence. Thereafter, the Court discussed its own judgment in the case of *Fiza Developers & Inter-trade Pvt. Ltd. v. AMCI (India) Pvt. Ltd. and Anr*[5]. The question

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in that case was whether issues are required to framed in a section 34 proceedings as they are required in a normal suit as per Order XIV Rule 1 of the CPC. Answering the question in negative, it was held that the Section 34 proceedings are summary proceedings and framing of issues was not an integral process of the proceedings under Section 34. Thus, the Court indicated that proceedings under Section 34 may not have the facets of a normal civil suit.

Subsequently, the Court also observed the report of High Level Committee to review the institutionalization of arbitration mechanism in India, 2017 ("**Srikrishna Committee Report**"). In the report, the committee had expressed its displeasure over practice that had evolved in some High Courts which allowed parties to lead evidence in Section 34 proceedings just like in a suit. Such practice was developed because of the language of Section 34(2)(a) which required parties to "*furnish proof*" as to the existence of the grounds under Section 34. Accordingly, Shrikrishna Committee Report recommended amending the language of Section 34(2)(a) such that petitions under Section 34 do not take form of a civil suit.[6] Taking heed from the Shrikrishna Committee report, the government recently introduced Arbitration and Conciliation (Amendment) Bill of 2018 ("**Proposed Amendments**") which proposes to incorporate this change into the Act.

Relying on the above, the Court clarified 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.*"

CONCLUSION

The Court recognised that speedy resolution of arbitral disputes has been the raison d'etre for enactment of Arbitration Act in 1996. If issues are framed and oral evidence is led in a summary proceeding under Section 34, then quite obviously, the object of legislation would be defeated. With the present judgment, the Court has tightened the lid around Section 34 proceedings and set the law in its right place.

However, at this juncture we may have to treat this judgment with slight caution. This is because the judgment still leaves room (howsoever minuscule) and rightly so for leading evidence in applications under Section 34 of the Arbitration Act. On the other hand, it also indicated that after the Proposed Amendments are passed, there may be no room for leading evidence in Section 34 proceedings at all. It is believed that this may raise certain concerns. There may be situations where parties may want to bring on record certain facts which came to light post the arbitral proceedings. A few examples could be:

a. Facts regarding incapacity of party to the agreement, being of unsound mind or minor etc.;
b. Misrepresentation of facts (or fraud played) by a party in arbitration not then known to other party;
c. Facts relating to impartiality / conflict of interest of the arbitrator, not then known to the innocent party.

Hence, under limited circumstances, certain material facts should be allowed to be examined in proceedings under Section 34. One may argue that even after the adoption of the language under the Proposed Amendments, the courts can still examine additional facts in light of arbitral tribunal's record and give their findings. However, it now remains to be seen how the new language of Section 34(2)(a) under the Proposed Amendments will operate in light of this judgment.

– Mohammad Kamran & Ashish Kabra
You can direct your queries or comments to the authors

[1] Civil Appeal No. 8367 of 2018

[2] Arbitration and Conciliation Act, 1996, Section 34 - Application for setting aside arbitral award
"*(1) …*
(2) An arbitral award may be set aside by the Court only if—
(a) the party making the application furnishes proof that—
(i) a party was under some incapacity, or
(ii) 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
(iii) 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
(iv) 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 matter beyond the scope of the submission to arbitration:
(v) 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 fromwhich the parties cannot derogate, or, failing such agreement, was not in accordance with this Past;
(2A)…"

[3] *Indus Mobile Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*, (2017) 7 SCC 678

[4] *Sandeep Kumar v. Dr. Ashok Hans*, (2004) 3 Arb LR 306; *Sial Boienergie v. SEBEC Systems*, AIR 2005 Del 95.

[5] *Fiza Developers & Inter-trade Pvt. Ltd. v. AMCI (India) Pvt. Ltd. and Anr.* (2009) 17 SCC 796

[6] Bill No.100 of 2018, The Arbitration and Conciliation (Amendment) Bill, 2018, p. 3 – *"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."*

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