Before Nirmaljit Kaur, J.

RAJENDER SHARMA—*Petitioner*

versus

M/S TANMAY DEVELOPERS PVT.LTD.—*Respondent*

CR No.4079 of 2019

December 04, 2019

A. ***Arbitration and Conciliation Act, 1996—S.34 (2) (a) and (5)—Code of Civil Procedure, 1908—O.41 R.22—Objections to arbitral award by respondent-Claimant/petitioner filed reply as well as cross objections—Respondent sought leave to file rejoinder to the petitioner's reply—Commercial court granted leave without issuing notice—Also directed the parties to furnish affidavits in support of pleadings—Both the orders challenged by the claimant/petitioner in revision—Respondent's contention that affidavit is necessary to support the objections, not accepted—Held, nothing beyond the record is required while filing application/objections under S.34(2) (a), unless the issue required to be determined is not contained in the record—Need to file an affidavit would be decided by the party concerned, as only the party laying challenge to award knows whether it is being impugned on the basis of material beyond the record—On facts, commercial court's direction to file affidavits was held absolutely not necessary as the respondent had not prayed for setting aside of award on the basis of material not contained in the record.***

Held that the only conclusion, therefore, that can be drawn is that it is for the concerned party to determine whether they have to file the affidavit or not, since, the party alone knows as to whether they are praying for setting aside the Award on the basis of material beyond the record or not.

(Para 10)

Further held that, it is the Court that directed the parties to file their affidavit in support of the pleadings, which was absolutely not necessary as it is not the case of the respondent that they were praying for setting aside of the Award on the basis of material, which were not contained in the record.

(Para 11)

B. ***Arbitration and Conciliation Act, 1996—S.34(2)(a) and (5)—***

Commercial Courts Act, 2015 —O.VI R.3—A and 15—A, O.IX R.3—Objections to arbitral award by respondent—Claimant/petitioner filed reply as well as cross objections—Respondent sought leave to file rejoinder to the petitioner's reply—Commercial Court granted leave without issuing notice—Also directed the parties to furnish affidavits in support of pleadings—Both the orders challenged by the claimant/petitioner in revision— Respondent's contention that matter to be proceeded with as per provisions of 2015 Act necessitating filing of affidavits, not accepted—Held, provisions of O.VI R.3—A and 15—A of 2015 Act do not apply to application/objections under S.34 of 1996 Act—2015 Act requires only pleadings to be verified by affidavit, that too in a suit—Application under S.34 is neither pleadings nor suit—S.34(5) 1996 Act requires filing of affidavit only as a proof of prior notice having been issued to the other party—No requirement of filing affidavit with application/objections under S.34—No notice or hearing needed before allowing a party to file rejoinder.

Held that, Rule 3-A in Order VI and insertion of Rule 15-A requires the verification of the pleadings related to commercial dispute is no doubt correct but the same does not apply to the application under Section 34 of the 1996 Act, inasmuch as, the application under Section 34 of the 1996 Act is neither pleadings and nor a suit, whereas, the above mentioned amendments require only the pleadings to be verified and that too in a suit.

(Para 12)

Further held that, the argument of the learned counsel for the respondent that since the matter is pending before a Commercial Court and, therefore, the matter can only be proceeded as per the provisions of the Commercial Court will not help in view of the above discussion that the said provisions of filing an affidavit along with pleadings will apply to a suit and not to an application made under Section 34 and the present matter relates to an application and not a suit.

(Para 14)

Further held that, in fact, it is clear from perusal of Section 34(5) of the 1996 Act that an affidavit has to be filed only as a proof that a prior notice has been issued to the other party. In case the affidavit was required to be filed with the application under Section 34 of the 1996 Act, the same would have been incorporated in the said Section.

(Para 15)

S.K.Garg Narwana, Sr.Advocate with
Mukesh Rao and Japjit Singh Johal, Advocates
for the petitioner.

Shekhar Verma, Advocate
for the respondent.

NIRMALJIT KAUR, J.

(1) The present revision is filed for setting aside the order dated 31.10.2018 vide which an application seeking permission to file rejoinder moved on behalf of the petitioner (respondent herein) was allowed as well as the order dated 02.04.2019 and 16.05.2019 passed by the Additional District Judge-cum-Presiding Judge, Special Commercial Court at Gurugram, vide which the parties were directed to furnish proper affidavit in support of the pleadings.

(2) An Award dated 12.12.2017 came to be passed for an amount of Rs.35.13 crores, to be paid by the respondent. The respondent filed objections to the Award by way of an application under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, 'the 1996 Act') on the ground that the Award has been passed in excess and constitutes improper exercise of jurisdiction on the part of the learned sole Arbitrator. The claimant-petitioner filed their reply dated 04.07.2018 to the above application praying for dismissal of the said application. The claimant- petitioner also filed their cross-objections under Order 41 Rule 22 of the Code of Civil Procedure (for short,'CPC'). An application for dismissal of the cross-objections was also filed. The respondent, accordingly, moved an application for granting permission to file rejoinder to the reply filed by the petitioner. Learned Additional District Judge-cum-Presiding Judge, Special Commercial Court, Gurugram allowed the application for filing the rejoinder and vide order dated 02.04.2019 and again on 16.05.2019 directed the parties to furnish proper affidavits in support of the pleadings.

(3) While praying for setting aside the orders dated 31.10.2018, 02.04.2019 and 16.05.2019, learned counsel for the petitioner submitted as under:

> (a) that the Court cannot direct for furnishing of the affidavits in order to adjudicate the question before it and under no circumstances, the Court can take evidence or affidavit regarding anything in an application under Section 34;

(a) the application under Section 34 of the 1996 Act is not a suit and is only an application. Hence, no affidavit is required;

(b) The proof is required to be furnished by a party only qua what is not available on the record of the Arbitrator and only in exceptional cases;

(d) Reliance was placed on the judgment rendered by the Apex Court in the case of ***Emkay Global Financial Services Limited vs Girdhar Sondhi*** (2018) 9 Supreme Court cases 49 to support his argument;

(e) No order for filing rejoinder could have been passed and that too without giving any opportunity to the petitioner to file reply to the application seeking the filing of rejoinder as the application under Section 34 of the 1996 Act is not a suit and no trial can be held.

(f) The rejoinder/replication can be permitted to be filed only in a civil suit under Order 8 Rule 9 of CPC and Order 8 Rule 9 of CPC and CPC was not applicable to the proceedings held under Section 34 of the 1996 Act.

(g) The object behind doing away with the filing of the affidavit was to reduce the delay in deciding the application under Section 34 of the 1996 Act to a minimum.

(4) Learned counsel for the respondent, on the other hand, while referring to the provisions of the Commercial Courts Act, 2015 (for short, 'the 2015 Act') submitted that in Order VI, after Rule 3, Rule 3-A has been inserted, which provides for pleadings in a particular form and after Rule 15, Rule 15-A has been inserted, which requires the pleadings in the commercial dispute to be verified by an affidavit in the manner prescribed in the schedule. A perusal of the said declaration in the form of affidavit in 'Appendix I', as per the first Schedule, Order VI, Rule 15-A and Order XI, Rule 3 shows that it is simply to verify the pleadings and nothing more. The same does not amount to any evidence or leading of any evidence. Secondly, since the very matter is pending before the Commercial Court, the matter has to be proceeded as per the provisions of the 2015 Act. Learned counsel also referred to Sub Section (5) of Section 34 of the 1996 Act to contend that an application was required to be accompanied by an affidavit.

(5) Learned counsel for the parties were heard at length.

(6) In order to adjudicate, it necessary to reproduce Section 34 of the 1996 Act, which reads as under:-

> "34. **Application for setting aside arbitral award**.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection(3).
>
> (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 matters beyond the scope of the submission to arbitration:
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (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 from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
>
> (b) the Court finds that—
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or 28
>
> (ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take

such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(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.]"

(7) It is evident from the perusal of the above reproduced Section 34 that:

(a) an application can be moved for setting aside the Award;

(b) the said Award can be set aside only in case the party makes an application furnishing proof of the grounds as mentioned in Section 34(2)(a);

(c) A prior notice has to be issued of the application to the other party;

(d) the said application has to be accompanied by an affidavit and the said affidavit shall be only to the extent that the requirement of furnishing prior notice have to be complied with and the said application under Section 34 of the 1996 will be decided within one year;

(e) It is evident from the above that there is no mention about any affidavit to be filed alongwith an application under Section 34 except to the extent that advance notice was given before filing application under Section 34;

(8) Therefore, the argument of learned counsel for the respondent that a party is required to furnish proof as mentioned in 2(a) of Section 34 of the 1996 Act for setting aside the Award means that an affidavit would have to be necessarily furnished is answered by the Apex Court in the case of ***Emkay Global Financial Services Limited*** (supra) holding that nothing beyond the record is required while filing an application under Section 34 of the 1996 Act, unless, an issue which is required to be determined, is not contained in the record. It is only then that an affidavit is required to be filed by both the parties. Para 21

of the said judgment reads:-

> "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 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 Sections 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."

(9) From the perusal of the judgment, it is evident that

(a) an affidavit is not ordinarily required to be filed;

(b) It is required to be filed in case the party wants to agitate something beyond the record.

(c) Cross-examination of all persons swearing affidavit is normally not allowed unless necessary, which means that it can be allowed in certain cases where it is extremely necessary. Otherwise, the affidavit in itself is sufficient.

(10) The only conclusion, therefore, that can be drawn is that it is for the concerned party to determine whether they have to file the affidavit or not, since, the party alone knows as to whether they are praying for setting aside the Award on the basis of material beyond the record or not.

(11) In the present case, it is the Court that directed the parties to file their affidavit in support of the pleadings, which was absolutely not necessary as it is not the case of the respondent that they were praying for setting aside of the Award on the basis of material, which were not contained in the record.

(12) The submission of learned counsel for the respondent that insertion of Rule 3-A in Order VI and insertion of Rule 15-A requires the verification of the pleadings related to commercial dispute is no doubt correct but the same does not apply to the application under Section 34 of the 1996 Act, inasmuch as, the application under Section 34 of the 1996 Act is neither pleadings and nor a suit, whereas, the above mentioned amendments require only the pleadings to be verified and that too in a suit. Appendix I, which is the affidavit but referred as the 'statement of truth' (under First Schedule, Order VI, Rule 15-A and Order XI Rule 3] mentions in the first column as under:

"1. I am the party in the above suit and competent to swear this affidavit."

(13) Thus, it is evident that the application is required to be filed in a suit. The definition of a suit, as per the Limitation Act, 1963, reads as under:-

"2. Definitions.-In this Act, unless the context otherwise requires,--

(a) to (k) XXX XXX XXX

(l) "suit" does not include an appeal or an application;**"**

(14) The argument of the learned counsel for the respondent that

since the matter is pending before a Commercial Court and, therefore, the matter can only be proceeded as per the provisions of the Commercial Court will not help in view of the above discussion that the said provisions of filing an affidavit alongwith pleadings will apply to a suit and not to an application made under Section 34 and the present matter relates to an application and not a suit.

(15) In fact, it is clear from perusal of Section 34(5) of the 1996 Act that an affidavit has to be filed only as a proof that a prior notice has been issued to the other party. In case the affidavit was required to be filed with the application under Section 34 of the 1996 Act, the same would have been incorporated in the said Section.

(16) However, the argument of learned counsel for the petitioner that the application for filing rejoinder was allowed without giving an opportunity to him to file reply is devoid of merit, inasmuch as, the learned counsel for the petitioner has not been able to point out any provision or rule that a reply is required to be filed to the application filed by the respondent under Section 34 of the 1996 Act. In spite of the same, a reply has been filed by him. Adopting the same analogy, the petitioner can have no objection to the filing of the rejoinder to the said reply and, therefore, it was not necessary to issue notice for an application praying for placing on record/filing of the rejoinder.

(17) Before finally concluding the order, this Court cannot help but observe qua the dispute required to be adjudicated in this case. In case the requirement of the affidavit in a suit, as mentioned, as per the Appendix I under the Schedule is examined, it amounts to only an affidavit in support of the averments in the application. Hence, this Court does not see any harm or grievance caused to the opposite party in the Court demanding the said affidavit for verification of the contents of the application, especially taking into account that the raising of this objection by the petitioner has only delayed the matter and the same is contrary to the argument raised by the petitioner himself that filing of the said affidavit is against the object of the 1996 Act and Section 34 itself, which desires or stipulates that the application under Section 34 should be decided within one year. Learned counsel for the petitioner may be technically correct but otherwise, it is an affidavit simply verifying the contents of the application.

(18) However, in spite of what this Court feels, it is bound and required to decide as per law in view of the above discussion. Accordingly, the present revision is partly allowed and disposed of as

under:

1. No affidavit is required to be filed with the application under Section 34 of the 1996 Act except an affidavit needs to be filed only to the extent that the requirement of giving advance notice has been complied with. Hence, the orders dated 02.04.2019 and 16.05.2019 are set aside.

2. An affidavit needs to be filed only in case the contents have to be proved from material beyond the record.

3. Therefore, it is for the party to determine whether they need to file an affidavit in the circumstances or not.

4. No notice or hearing is required to be given before allowing a party to file the rejoinder as the same will only delay the matter further, which is contrary to the object of the Act requiring quick disposal.

Tribhuvan Dahiya