HIGH COURT OF MADHYA PRADESH

W.P. No. 1698/17

(M/s Shree G Aperals Vs. M/s Prakashchand Vasudeo & another)

Indore, Dated: 6/12/2018

Shri Raunak Chouksey learned counsel for petitioner.

Shri N.K. Maheshwari learned counsel for respondent no.1.

None for respondent no.2.

Heard.

By this writ petition under Article 227 of the Constitution of India the petitioner has challenged the order dated 7/2/2017 whereby learned Additional District Judge has rejected petitioner's application under Section 151 of CPC for filing the additional documents as also the affidavit in evidence.

The short facts are that in arbitration proceeding an award has been passed against the petitioner which is subject matter of challenge before the court below under section 34 of Arbitration & Conciliation Act, 1996 and in those pending proceedings petitioner has filed the aforesaid application under section 151 CPC, which has been rejected by the impugned order.

Learned counsel for petitioner submits that petitioner is required to file the documents as also the affidavit in evidence before the court below in order to establish that award which has been passed by the arbitrator is unsustainable in law.

As against this learned counsel for respondent no.1 has supported the impugned order.

Having heard the learned counsel for the parties and on

perusal of the record it is noticed that so far as the plea of petitioner in respect of filing of additional documents is concerned, nothing has been pointed out by counsel for petitioner to show that such a right exists in favour of petitioner in the proceeding under Section 34 of the Act.

The issue in this regard has been examined by the Supreme court in the matter of **Emkay Global Financial Services Ltd. Vs. Girdhar Sondhi reported in AIR 2018 SC 3894** wherein the Supreme court after considering the earlier judgment on the point in the matter of **Fiza Developers and Inter-Trade P. Ltd. Vs. AMCI(I) Ltd. and another reported in 2009 AIR SCW 6395** has taken the view that normally the proceedings under section 34 of the Act are confined to the record, but for matters not contained in such record and relevant for deciding the issue the parties may be permitted to file affidavits. But in said judgment also the right to file the additional document has not been recognized. The Supreme court in case of Emkay (supra) has held as under:

> **22.** 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 (AIR 2012 (NOC) 345 (Cal)(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 (2009 AIR SCW 6395)(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.

Having regard to the aforesaid, I am of the opinion that the court below has not committed any error in rejecting the petitioner's prayer seeking permission to file additional documents.

So far as the order relating to rejection of petitioner's prayer to file the affidavit is concerned, the same is required to be examined by the court below afresh in the light of the

judgment of the Supreme court in the case of Emkay (supra).

At this stage counsel for petitioner has prayed for liberty to file a fresh application disclosing the circumstances which require filing of affidavit in evidence.

Counsel for respondent no. 1 has no objection to the same.

Hence the writ petition is disposed off without interfering in the impugned order but granting liberty to petitioner to file a fresh application disclosing the circumstances requiring filing of affidavits in the pending proceedings. If such application is filed by petitioner the same will be considered and decided by the court below in accordance with law, keeping in view the pronouncement of the Supreme court in case of Emkay (supra) and without being influenced by any observation made in this order or the order which is under challenged in the present writ petition.

C.C. as per rules.

(Prakash Shrivastava)
Judge

BDJ

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