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DOMESTIC ARBITRAL AWARD CHALLENGE: PROOF TO BE FURNISHED BY AFFIDAVIT, TRAIL ONLY IN THE RAREST CASES

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On the anvil of the proposed amendment in the Arbitration and Conciliation Act, 1996 (Act), on 20 August 2018, the Supreme Court of India in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi* (Emkay case) has clarified that ordinarily, at the stage of challenge of arbitral award, only the arbitral tribunal's record is to be considered to determine the grounds of challenge. If matters beyond such record are at issue, parties should '*furnish proof*' of the grounds of challenge only by affidavits. Cross-examination of those testifying cannot be allowed unless '*absolutely necessary*'.

The Arbitration and Conciliation (Amendment) Bill of 2018 (Bill), based on the recommendations of Justice B.N. Srikrishna Committee, seeks to do away with the requirement of 'furnishing proof' at the stage of challenge to an arbitral award altogether. The Bill provides that the challenge to an arbitral award be considered only on the basis of arbitral tribunal's record.

Background

Emkay case arose out of a dispute between Emkay Global Financial Services Ltd, a registered broker with the National Stock Exchange (Emkay Global) and its client, Girdhar Sondhi. Mr Sondhi initiated arbitration proceedings against Emkay Global for recovering his losses. The venue of the arbitration was at New Delhi. Mr Sondhi's claim was rejected by the arbitral tribunal.

Mr Sondhi challenged the award under Section 34 of the Act before the New Delhi District Court which set aside the challenge on the ground of lack of territorial jurisdiction. However, on appeal, the Delhi High Court held that there is a dispute between the parties regarding territorial jurisdiction, presumably outside the arbitral tribunal's record. Accordingly, the High Court required that District Court to '*frame an issue and permit the parties to lead evidence on the same*'.

Emkay Global successfully sought special leave from the Supreme Court to appeal. The Supreme Court decided that there is no dispute as to territorial jurisdiction and, by agreement of the parties, the Courts at Mumbai alone would have jurisdiction to entertain the challenge to the arbitral award. However, the Supreme Court also took up the issue of whether mini trial is at all permissible at the stage of proceedings under Section 34 of the Act (Section 34 stage).

Supreme Court does away with mini-trial at Section 34 stage

In the Emkay case, the Supreme Court considered its precedent in *Fiza Developers & Inter-Trade Pvt. Ltd. v. AMCI (India) Pvt. Ltd*, (2009) 17 SCC 796, various judgments of the Delhi Hight Court and the recommendations of Justice B.N. Srikrishna Committee and the effect of additions of Section 34(5), 34(6) in the Act which prescribe a one year time line to decide a challenge to arbitral awards.

Justice R.F. Nariman opined that the law laid down in in *Fiza Developers & Inter-Trade Pvt. Ltd. v. AMCI (India) Pvt. Ltd*, (2009) 17 SCC 796 that no issue can be framed at Section 34 stage (being a summary procedure) is good law. In view of the amendments to the Act, i.e. Sections 34(5) and 34(6), requiring speedy disposal of Section 34 challenges, the Supreme Court has declared that ordinarily, nothing beyond the arbitral tribunal's record needs to be looked at, during the Section 34 stage. In rare cases however, when matters are beyond the record of the arbitral tribunal, parties should bring the issues to the Court's notice by way of affidavits. Cross-examination at the Section 34 stage should not be allowed unless absolutely necessary.

Comment

The Emkay case has brought clarity and has virtually obviated a mini trial at the Section 34 stage. This would go a long way in reducing the time taken in deciding challenges to domestic arbitral awards. The case leaves open to the Courts to allow parties to file affidavits in appropriate cases where the grounds cannot be proved from the arbitral tribunal's record and, if absolutely necessary, cross-examine those who file affidavits.

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