

1. Emkay Global Financial Services Ltd. Vs Girdhar Sondhi, AIR 2018 SC 3894

2. Alpine Housing Development Corp. Pvt. Ltd. Vs Ashok S. Dhariwal & ors., AIR 2023 SC 558

3. Fiza Developers and Inter-Trade Pvt. Ltd. Vs AMCI India Pvt. Ltd., (2009) 17 SCC 796

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. The land of petitioner was acquired for road widening by National Highways Authority of India (NHAI) invoking Section 3A of National Highways Act, 1956 (*hereinafter called as "the Act of 1956"*) in the year 2017. The competent authority/Additional District Magistrate made an award on 29.05.2018. An objection was filed by petitioner against the said award which was rejected on 15.12.2021 and the award dated 29.05.2018 was confirmed.

2. Petitioner filed application under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter called as "the Act of 1996"*) for setting aside the arbitral award dated 29.05.2018 and 15.12.2021. During the pendency of the said application, petitioner moved an application for filing of certain documents which were kept in some box and came to his knowledge on 20.10.2024, which led to filing of an application on 22.10.2024. The court below by order impugned dated 09.12.2024 considering the said application to be under Order XLI Rule 27 CPC has rejected the same. Hence, the present writ petition.

3. Learned counsel for the petitioner submits that court below had wrongly rejected the application holding it to be an application under Order XLI Rule 27 CPC

as it was not filed during appellate proceedings. Further, as the award was made on 29.05.2018, the unamended provision of Section 34(2)(a) would apply and the party making the application may file documents in support of his claim. He has relied upon the decision of Apex Court rendered in case of **Emkay Global Financial Services Limited vs. Girdhar Sondhi, AIR 2018 SC 3894; MMTC Ltd. vs. Vedanta Ltd., AIR 2019 SC 1168 and Alpine Housing Development Corporation Pvt. Ltd. vs. Ashok S. Dhariwal and others, AIR 2023 SC 558.**

4. Learned counsel appearing for NHAI submitted that application moved for additional evidence was not maintainable and application has to be decided on the basis of the record which was present before the Arbitrator. Reliance has been placed upon the decision of Apex Court in case of **Alpine Housing Development Corporation Pvt. Ltd. (supra).**

5. I have heard respective counsel for the parties and perused the material on record.

6. The short controversy for consideration before this Court is as to whether the court below had rightly proceeded to reject the application filed by petitioner holding it to be an application under Order XLI Rule 27 CPC or not, and also as to whether the provisions of unamended Act of Section 34(2)(a) would be applicable or not in the instant dispute.

7. Section 34 of the Act of 1996 provides for recourse against arbitral award. By the amending Act 33 of 2019, the words "furnishes proof that" were deleted from sub-section (2)(a) of Section 34 and the words "establishes on the basis

of the record of Arbitral Tribunal that" were added w.e.f. 30.08.2019.

8. Prior to amendment of 2019, the party making an application for setting aside the arbitral award could have maintained an application for bringing on record documents relevant to determination of issues arising under Section 34 by way of affidavit, but post amendment the arbitral award can only be set aside by party making the application on the basis of records of Arbitral Tribunal and no fresh material can be brought on record. The Hon'ble Apex Court in **Emkay Global Financial Services Limited (supra)** while dealing with pre amendment stage held as under:-

"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 [Sandeep Kumar v. Ashok Hans, 2004 SCC OnLine Del 106 : (2004) 3 Arb LR 306] , [Sial Bioenergie v. SBEC Systems, 2004 SCC OnLine Del 863 : AIR 2005 Del 95] , 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 [WEB Techniques & Net Solutions (P) Ltd. v. Gati Ltd., 2012 SCC OnLine Cal 4271] . We may hasten to add that if the procedure

followed by the Punjab and Haryana High Court judgment [Punjab SIDC Ltd. v. Sunil K. Kansal, 2012 SCC OnLine P&H 19641] 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 [Fiza Developers & Inter-Trade (P) Ltd. v. AMCI (India) (P) Ltd., (2009) 17 SCC 796 : (2011) 2 SCC (Civ) 637] 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 [Girdhar Sondhi v. Emkay Global Financial Services Ltd., 2017 SCC OnLine Del 12758] of the Delhi High Court and reinstate that of the learned Additional District Judge dated 22-9-2016. The appeal is accordingly allowed with no order as to costs."

9. In **Alpine Housing Development Corporation Pvt. Ltd. (supra)**, the Apex Court was also considering a pre amendment case and taking note of the earlier judgment of **Emkay Global**

Financial Services Limited (supra) and Fiza Developers and Inter-Trade Private Limited vs. AMCI (India) Private Limited, (2009) 17 SCC 796 held that prior to amendment of Section 34(2)(a), an arbitral award could be set aside by court if party making an application furnishes proof and grounds set out in Section 34(2)(a) and 34(2)(b) are satisfied. However, subsequent to amendment of Section 34(2)(a), the words "furnishes proof" have been substituted by the words "establishes on the basis of record of the Arbitral Tribunal". The Court further held that application under Section 34 of the Act are summary proceedings and an award can be set aside only the grounds set out in Section 34(2)(a) and 34(2)(b). As the object and reason of enactment of the 1996 Act was speedy resolution of arbitral disputes, the amendment made in the Act was to strengthen the aforesaid object. Thus, there is no requirement under Section 34 for framing of issues. If the issues are framed and oral evidences are taken in summary proceedings, the object will be defeated. According to the Court, an application for setting aside the arbitral award will not ordinarily require anything beyond the record that was before Arbitrator, however, if there are matters not containing such records and the relevant determination to the issues arising under Section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both the parties. The cross-examination of the persons swearing in to the affidavits should not be allowed unless absolutely necessary as the truth will emerge from reading of affidavits filed by both the parties. The Court opined that in an exceptional case being made out and if it is brought to the notice of the Court on the matters not containing the record of Arbitrator that certain things are relevant to the

determination of the issues arising under Section 34(2)(a), then the party who has assailed the award on the grounds set out in Section 34(2)(a) can be permitted to file affidavit in the form of evidence. Relevant para 24 is extracted hereasunder:-

"24. The ratio of the aforesaid three decisions on the scope and ambit of section 34(2)(a) pre-amendment would be that applications under sections 34 of the Act are summary proceedings; an award can be set aside only on the grounds set out in section 34(2)(a) and section 34(2)(b); speedy resolution of the arbitral disputes has been the reason for enactment of 1996 Act and continues to be a reason for adding amendments to the said Act to strengthen the aforesaid object; therefore in the proceedings under section 34 of the Arbitration Act, the issues are not required to be framed, otherwise if the issues are to be framed and oral evidence is taken in a summary proceedings, the said object will be defeated; an application for setting aside the arbitral award will not ordinarily require anything beyond the record that was before the arbitrator, however, if there are matters not containing such records and the relevant determination to the issues arising under section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both the parties' the cross-examination of the persons swearing in to the affidavits should not be allowed unless absolutely necessary as the truth will emerge on the reading of the affidavits filed by both the parties. Therefore, in an exceptional case being made out and if it is brought to the court on the matters not containing the record of the arbitrator that certain things are relevant to the determination of the issues arising under section 34(2)(a), then the party who has assailed the award on the grounds set out

in section 34(2)(a) can be permitted to file affidavit in the form of evidence. However, the same shall be allowed unless absolutely necessary."

10. In the instant case, it is an admitted position to both the parties that award was made on 29.05.2018 i.e. prior to the amendment made in Section 34(2)(a) which came into effect from 30.08.2019. The application moved on 22.10.2024 by petitioner reveals that documents which are being tried to be placed on record by petitioner was discovered on 20.10.2024. Apart from this fact, no other compelling reason has been given for admitting the list of documents appended with the said application.

11. However, the court below has wrongly treated the application to be an application under Order XLI Rule 27 CPC.

12. This Court finds that the court below had wrongly interpreted the provisions of Order XLI Rule 27 as it is applicable in the case of an appeal where the party to an appeal makes an application for production of additional evidence at appellate stage. Section 34 is summary proceeding and is not an appeal as court below has held. The invocation of provisions of Order XLI Rule 27 by court below in rejecting the application of petitioner is wholly misconceived. It seems that court concerned does not know the scope of Order XLI Rule 27 CPC as well as Section 34 of the Act of 1996.

13. The court below on the wrong assumption has proceeded to reject the application on the basis of Order XLI Rule 27 CPC.

14. Considering the facts and circumstances of the case, the order

09.12.2024 is hereby set aside. The writ petition stands partly allowed.

15. The matter is remitted back to court below to consider the application of petitioner afresh in the light of the decision of Apex Court in case of **Alpine Housing Development Corporation (supra) & Emkay Global Financial Services Limited (supra)**, within a period of two months from the date of production of certified copy of this order, strictly in accordance with law.

(2025) 5 ILRA 1709
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2025

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Matters Under Article 227 No. 11867 of 2024
 (CIVIL)
 With
 Other Connected Cases

Sukhdev Singh Majithiya & Ors.
...Petitioners

Versus
Bhavnesh Kumar Jindal & Ors.
...Respondents

Counsel for the Petitioners:
 Sri Adya Prasad Tewari, Sri Shubham Dwivedi

Counsel for the Respondents:
 Sri R.S. Dubey, Ms. Savita Dubey

**Civil Law-The Constitution of India, 1950-
 Article 227 - The Registration Act,1908-
 Sections 17(1), 23 & 32 - The Code of Civil
 Procedure, 1908-Order XII, Rule 6---**
 "Whether the judgment and decree of the year
 1988 needs registration under Section 17(1) of
 the Act of 1908 being the compromise decree or
 otherwise?"--- Compromise decree dated