

FIZA DEVELOPERS & INTER-TRADE P. LTD.

v.

AMCI (I) PVT. LTD. & ANR.
(Civil Appeal No. 5139 of 2009)

JULY 27, 2009

**[R.V. RAVEENDRAN AND B. SUDERSHAN
REDDY, JJ.]**

ARBITRATION AND CONCILIATION ACT, 1996:

s. 34(2) – Application for setting aside an award – Framing of issues – HELD: Framing of issues as contemplated under Or.14, r.1 CPC is not an integral part of the process of proceedings u/s 34 of the Act – Having regard to the object of the Act in providing an expeditious alternative binding dispute resolution process with minimal court intervention, proceedings u/s 34 are summary in nature and are not envisaged as full-fledged regular suits under CPC – An application u/s 34 has to be considered, bearing three factors in mind (i) that the Act is a special enactment and s.34 provides for a special remedy; (ii) that an arbitration award can be set aside only if one of the grounds mentioned in sub-s. (2) of s.34 exists; and (iii) that proceedings u/s 34 require to be dealt with expeditiously – Burden of proof is on the person who makes the application – Therefore, the question arising for adjudication as also the person on whom the burden of proof is placed are statutorily specified – Framing of issues is necessary only where different types of material proposition of fact or law are affirmed by one party and denied by the other and it is, therefore, necessary for court to identify the issues and specify the party on whom the burden to prove the same lies – When this exercise has already been done by the statute, there is no need to frame the issues – An application u/s 34 of the Act is a single issue proceeding, where the very fact that the application has been instituted under the

- A *particular provision declares the issue involved – Any further exercise to frame issues will only delay the proceedings – It is, thus, clear that issues need not be framed in an application u/s 34 of the Act – Code of Civil Procedure, 1908 – Or. 14, r.1 – High Court of Karnataka Arbitration (Proceedings before the Courts) Rules, 2001 – r.4(b) r/w r.12.*

s.34 – Proceedings under – Nature of – Adversarial or otherwise – Explained.

- C *Law & Practice of Arbitration and Conciliation by O.P. Malhotra, First Edition, Page 768; and Advanced Law Lexicon by P. Ramanatha Iyer, Third Edition, Vol. 1, Page 152 – referred to.*

- D *HIGH COURT OF KARNATAKA ARBITRATION (PROCEEDINGS BEFORE THE COURTS) RULES, 2001:*

- E *r.4(b) r/w r12 – Proceedings under – Nature of – Though r.4(b) requires an application u/s 34 of 1996 Act to be registered as an arbitration suit attracting provisions of CPC, r.4 has to be read with r.12 which makes it clear that provisions of CPC will be applicable only to the extent considered necessary – Rules were made to give effect to the provisions of the Act and should be understood in consonance with specific provisions and object of the Act – Arbitration and Conciliation Act, 1996 – s.34(2) – Code of Civil Procedure, 1908 – Or. 14, r.1.*

CODE OF CIVIL PROCEDURE, 1908:

- G *Or. 14, r.1 – Framing of issues – HELD: The object of issues is to focus upon the questions on which evidence has to be led and to indicate the party on whom burden of proof lies – Framing of issues is necessary in every contested regular civil suit – But in proceedings which are intended to be summary in nature, issues are not framed – However, when it is said that issues are not necessary, it does not mean that*

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evidence is not necessary – Arbitration and Conciliation Act, 1996 – s.34. A

Makhan Lal Bangal v. Manas Bhunia 2001 (2) SCC 652, relied on.

Case Law Reference: B

2001 (2) SCC 652 relied on para 7

CIVIL APPELLATE JURISDICTION : Civil Appeal No.5139 of 2009. C

From the Judgment & Order dated 27.2.2009 of the High Court of Karnataka at Bangalore in Writ Appeal No. 1681 of 2008.

P.P. Rao, C. Paramasivam, P. Ramesh, R. Aneeshan, Rakesh K. Sharma for the Appellants. D

P.V. Shetty, G.N. Reddy, Vijay Kumar for the Respondents.

The Order of the Court was delivered by

ORDER E

R.V. RAVEENDRAN, J. 1. The respondent has entered appearance through caveat. Leave granted. Heard the learned counsel. F

2. Certain disputes between respondent and appellant were referred to arbitration. The Arbitrator made an award dated 14.9.2005 directing the appellant to pay to the first respondent, a sum of Rs.57.6 crores with interest. The appellant filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'Act') before the City Civil Court, Bangalore for setting aside the said award. The respondent filed its written statement, resisting the claim. The appellant made an application under Order XIV Rule 1 and 3 of Code of Civil Procedure ('Code' for short) read with Rule 4(b) of the H

A High Court of Karnataka Arbitration (Proceedings before the Courts) Rules, 2001 ('Rule' for short) requesting the Court to frame issues in the matter. The civil court rejected the application by an Order dated 12.9.2006.

B 3. The petitioner's Writ Petition challenging the said order was dismissed on 12.9.2008. The learned Single Judge was of the view that applications under section 34 were not necessarily in the nature of a adversarial proceeding where a dispute between two parties requires adjudication by the court; that there is a legal presumption in favour of the award being valid; and that whether the opposite party joins issue or not, the person challenging the award has to make out one of the grounds enumerated under section 34(2) of the Act. Therefore, he held that there is no need for the court to frame issues, as is done in a civil suit. The writ appeal filed by the petitioner was dismissed by the impugned order, affirming the decision of the learned Single Judge. Feeling aggrieved, the appellant has filed this appeal by special leave.

E 4. Sri P.P. Rao, learned Senior Counsel for the appellant, submitted that section 34(2) of the Act requires the party making the application to prove the existence of one of the grounds enumerated therein, to set aside an award. He contended that if the respondent filed a written statement contesting the application under section 34 of the Act, the court will have to frame issues to focus the attention of the parties on the specific questions in controversy requiring adjudication, so that evidence can be led by the parties with reference to the issues. He submitted that unless issues were framed, the evidence led by parties would not be precise and to the point, but lengthy and meandering. He also contended that Rule 4(b) of the Rules requires an application under section 34 of the Act, to be dealt with and decided as a suit under the Code of Civil Procedure, and therefore it is obligatory for the court to frame issues in proceedings under section 34 of the Act.

H 5. On the other hand, Sri P. Vishwanatha Shetty, learned

counsel for the respondents, contended that having regard to the scheme of the Act, and the need to dispose of the applications under Section 34 of the Act expeditiously, such proceedings are clearly intended to be summary in nature, and therefore issues were not required to be framed. A

6. The question that therefore arises for consideration is whether 'issues' as contemplated under Order 14 Rule 1 CPC should be framed in applications under section 34 of the Act. B

Need for framing issues

7. The object of issues is to focus upon the questions on which evidence has to be led and to indicate the party on whom the burden of proof lies. Rules 1 of Order 14 of the Code dealing with framing of issues is extracted below: C

"1. Framing of issues – (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. D

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. E

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. F

(4) Issues are of two kinds - (a) issues of fact, and (b) issues of law.

(5) At the first hearing of the suit, the Court shall, after reading the plaint and the written statements, if any, and after examination under Rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the G
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A issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.”

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In *Makhan Lal Bangal v. Manas Bhunia* [2001 (2) SCC 652], this Court held that the issues are important as they determine the scope of a trial by laying down the path for the trial to proceed, free from diversions and departures. This Court observed:

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“The evidence shall be confined to issues and the pleadings. No evidence on controversies not covered by issues and the pleadings, shall normally be admitted, for each party leads evidence in support of issues the burden of proving which lies on him. The object of an issue is to tie down the evidence and arguments and decision to a particular question so that there may be no doubt on what the dispute is. The judgment, then proceeding issue-wise would be able to tell precisely how the dispute was decided.”

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There is no doubt that framing of issues is necessary in every contested regular civil suit. Equally clear is the position that in proceedings which are intended to be summary in nature, issues are not framed. Proceedings for setting aside ex parte decrees, proceedings for restitution, proceedings for execution and proceedings for permission to sue as an indigent person, are illustrative of summary proceedings which are governed by the Code, where issues are not framed. In a summary proceeding, the respondent is given an opportunity to file his objections or written statement. Thereafter, the court will permit the parties to file affidavits in proof of their respective stands, and if necessary permit cross examination by the other side, before hearing arguments. Framing of issues in such proceedings is not necessary. We hasten to add that when it

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is said issues are not necessary, it does not mean that A
evidence is not necessary.

Scope of proceedings under section 34 of the Act

8. Section 34 of the Act deals with applications for setting B
aside arbitral awards. Sub-section (1) provides that 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 (3). Relevant portion of sub-section (2) of
Section 34 is extracted below:

“(2) An arbitral award may be set aside by the Court only C
if –

(a) the party making the application furnishes proof that –

(i) a party was under some incapacity, or D

(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 E
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 F
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 decision on matters submitted to G
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 H

A 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 (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

C (ii) the arbitral award is in conflict with the public policy of India.

Explanation : xxxxxx

D Sub-section (3) makes it clear that an application for setting aside the award has to be made within three months (extendable by not more than thirty days).

E 9. The scheme and provisions of the Act disclose two significant aspects relating to courts vis-à-vis arbitration. The first is that there should be minimal interference by courts in matters relating to arbitration. Second is the sense of urgency shown with reference to arbitration matters brought to court, requiring promptness in disposal. Section 5 of the Act provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by part I of the Act, no judicial authority shall intervene except where so provided in the Act. Section 34 of the Act makes it clear that an Arbitral award can be set aside on the grounds enumerated in sub-section (2) of section 34 and on no other ground. Sub-section (3) of Section 34 provides that an application for setting aside may not be made after three months and the maximum delay that can be condoned is only 30 days. In other words, the maximum period for challenging an award is three months plus 30 days, even if there is sufficient cause for condonation of a longer period delay. Section 36 provides that an award shall be

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enforced in the same manner as if it were a decree of the court, but only on the expiry of the time for making an application to set aside the arbitral award under section 34, or such application having been made, only after it has been refused. Thus, until the disposal of the application under Section 34 of the Act, there is an implied prohibition of enforcement of the arbitral award. The very filing and pendency of an application under Section 34, in effect, operates as a stay of the enforcement of the award.

10. We may therefore examine the question for consideration, by bearing three factors in mind. The first is that the Act is a special enactment and section 34 provides for a special remedy. The second is that an arbitration award can be set aside only upon one of the grounds mentioned in sub-section (2) of Section 34 exists. The third is that proceedings under Section 34 requires to be dealt with expeditiously.

11. The scope of enquiry in a proceeding under section 34 is restricted to consideration whether any one of the grounds mentioned in sub-section (2) of Section 34 exists for setting aside the award. We may approvingly extract the analysis relating to 'Grounds of Challenge' from the Law & Practice of Arbitration and Conciliation by *Shri O. P. Malhotra* [First Edition, Page 768, Para (I) 34-14]:

"Section 5 regulates court intervention in arbitral process. It provides that notwithstanding anything contained in any other law for the time being in force in India, in matters governed by Part I of this Act, the court will not intervene except where so provided in this Part. Pursuant to this policy, section 34 imposes certain restrictions on the right of the court to set aside an arbitral award. It provides, in all, seven grounds for setting aside an award. In other words, an arbitral award can be set aside only if one or more of these seven grounds exists. The first five grounds have been set forth in section 34(2)(a). In order to successfully invoke any of these grounds, a party has to

A plead and prove the existence of one or more of such grounds. That is to say, the party challenging the award has to discharge the burden of proof by adducing sufficient credible evidence to show the existence of any one of such grounds.

B The rest two grounds are contained in section 34(2)(b) which provides that an award may be set aside by the court on its own initiative if the subject matter of the dispute is not arbitrable or the impugned award is in conflict with the public policy of India.”

C The grounds for setting aside the award are specific. Therefore necessarily a petitioner who files an application will have to plead the facts necessary to make out the ingredients of any of the grounds mentioned in sub-section (2) and prove the same. Therefore, the only question that arises in an application under section 34 of the Act is whether the award requires to be set aside on any of the specified grounds in sub-section (2) thereof. Sub-section (2) also clearly places the burden of proof on the person who makes the application. Therefore, the question arising for adjudication as also the person on whom the burden of proof is placed is statutorily specified. Therefore, the need for issues is obviated. Framing of issues is necessary only where different types of material propositions of fact or law are affirmed by one party and are denied by the other and it is therefore necessary for the court to identify the issues and specify the party on whom the burden to prove the same lies. When this exercise has already been done by the statute, there is no need for framing the issues. In other words, an application under section 34 of the Act is a single issue proceeding, where the very fact that the application has been instituted under that particular provision declares the issue involved. Any further exercise to frame issues will only delay the proceedings. It is thus clear that issues need not be framed in applications under section 34 of the Act.

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What is the effect of Rule 4(b) of the Karnataka Rules ? A

12. We may now examine whether rule 4(b) of the rules framed by the High Court of Karnataka require framing of issues. Rule 4 relied on by the appellant deals with "contents of application" and clause (b) which is relevant is extracted below: B

"(b) Application under section 14 or section 34 shall be registered as an arbitration suit, the applicant being treated as the plaintiff and the parties to the award other than the applicant being treated as defendants and the proceedings thereafter shall be continued as in the case of a suit and all the provisions of the Civil Procedure Code, 1908, shall apply to such proceeding insofar as they could be made applicable." C

It is no doubt true that the rule require that an application under Section 34 should be registered as an 'arbitration suit' and that the proceedings shall be conducted as in the case of a suit and all provisions of Civil Procedure Code which apply to such proceedings in so far as they could be made applicable. Rule 4 will have to read with Rule 12 which deals with "Applicability of the Civil Procedure Code, 1908". It reads as under: D

"Subject to what is provided for in the Arbitration and Conciliation Act and these Rules, the provisions of the Code of Civil Procedure and Karnataka Civil Rules of Practice may be applied to the proceedings under the Act to the extent considered necessary or appropriated by the court of Judicial Authority." E

Rule 12 makes it clear that the provisions of Code will be applicable only to the extent considered necessary or appropriate by the court. Thus there is no wholesale or automatic import of all the provisions of the Code, into proceedings under section 34 of the Act, as that will defeat the F

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A very purpose and object of the Act. As already noticed, the Code deals with and makes provisions for regular civil suits as well as summary suits and proceedings. Therefore, rule 4(b) cannot be read or understood as making applicable all provisions of the Code, which apply to regular civil suits, to proceedings under section 34. The Rules were made to give effect to the provisions of the Act and should be understood in consonance with the specific provisions and the object of the Act.

C **Conclusions:**

13. Before concluding, there is a need to clarify the observation by the High Court that a proceeding under section 34 may not be in the nature of adversarial proceedings. In an adversarial process, each party to a dispute presents its case to the neutral adjudicator seeking to demonstrate the correctness of his own case and the wrongness of the other. [See : *P.Ramanatha Iyer's Advanced Law Lexicon*, Third Edition, Vol.I, Page 152]. While an applicant in an application under section 34 is interested in getting an order setting aside an award, his opponent is equally interested in ensuring that it is not set aside, but upheld. While an applicant presents his case to the Judge to prove that the award is liable to be set aside, the respondent puts forth his case to refute the claim of the applicant that the award is liable to be set aside. An application under section 34 in that sense is adversarial in nature. But proceedings under section 34 differ from regular civil suits in a significant aspect. In a regular civil suit, in the event of failure to file a defence, it will be lawful for the court to pronounce the judgment on the basis of facts contained in the plaint [Vide Order VIII Rule 5(2) of the Code]. But in an application under section 34, even if there is no contest, the court cannot on the basis of the averments contained in the application, set aside the award. Whether there is contest or not, the applicant has to prove one of the grounds set out in section 34(2)(a) and (b). Even if the applicant does not rely

upon the grounds under clause (b), the Court, on its own initiative, may examine the award to find out whether it is liable to be set aside on either of the two grounds mentioned in section 34(2)(b). It is perhaps in this sense, the High Court has stated that the proceedings may not be adversarial. Be that as it may.

14. Having regard to the object of the Act, that is providing an expeditious alternative binding dispute resolution process with minimal court intervention, it is difficult to envisage proceedings under section 34 of the Act as full-fledged regular civil suits under Code of Civil Procedure. Applications under section 34 of the Act are summary proceedings with provision for objections by the defendant/respondent, followed by an opportunity to the applicant to 'prove' the existence of any ground under section 34(2). The applicant is permitted to file affidavits of his witnesses in proof. A corresponding opportunity is given to the defendant/respondent to place his evidence by affidavit. Where the case so warrants, the court permits cross-examination of the persons swearing to the affidavit. Thereafter, court hears arguments and/or receives written submissions and decides the matter. This is of course the routine procedure. The Court may vary the said procedure, depending upon the facts of any particular case or the local rules. What is however clear is that framing of issues as contemplated under Rule 1 of Order 14 of the Code is not an integral part of the process of a proceedings under section 34 of the Act.

15. We therefore find no reason to interfere with the impugned order of the High Court. The appeal is dismissed. As the award is of the year 2005, we request the City Civil Court to dispose of the application expeditiously.

R.P.

Appeal dismissed.