

Issues and findings

The sole issue for consideration before the Supreme Court was whether a party can be permitted to file evidence in support of the grounds under Section 34(2) of the Act.

Section 34(2) (a) of the Act provides that a Court may set aside an award if the party **furnishes proof** of the grounds for setting aside the award.

In deciding this issue, Supreme Court relied primarily on its earlier decision in *Emkay Global*³, which involved the same issue, and in which the Supreme Court had also taken note of the judgment in *Fiza Developers*.

In the matter of *Fiza Developers*, the Supreme Court had held that proceedings under Section 34 of the Act were summary in nature, and therefore framing of issues, as prescribed for civil proceedings under Order XIV Rule 1 of the Code of Civil Procedure, 1908, was not required, as it would defeat the purpose of the Act – namely, speedy resolution of disputes. However, the court had, in that particular case, permitted filing of witness affidavits in support of the Section 34 challenge.

In *Emkay Global*, where the issue involved was identical to the present case, the Supreme Court took note of certain developments since its decision in *Fiza Developers*. While *Fiza Developers* was decided in 2009, certain amendments were made to the Act in 2015 (**2015 Amendments**) whereby courts were required to dispose of a Section 34 petition within one year.

Further, a High-Level Committee led by Justice B.N. Srikrishna, had suggested certain amendments in the language of Section 34, so as to reduce delays caused by parties regularly filing witness affidavits in challenges to an award under Section 34. This had resulted in the Arbitration and Conciliation (Amendment) Bill, 2018 (**2018 Bill**) which proposed a change in the language in Section 34(2)(a) – namely, from “*the party making the application furnishes proof...*” to “*the party making the application establishes on the basis of the record of the Arbitral Tribunal...*”.

The Supreme Court, in *Emkay Global*, noted these developments and further opined that if the 2019 Bill was passed, “*evidence at the stage of a Section 34 application will be dispensed with altogether*”. Having noted thus, the apex court had clarified the legal position by stating that, **ordinarily**, adjudication of a challenge under Section 34 would not require evidence beyond the record of the arbitral tribunal. However, if certain relevant matters were not contained in such arbitral record, and were necessary to determine the Section 34 challenge, the court could allow filing of witness affidavits and their cross-examination.

Reiterating and following this decision in *Emkay Global*, the Supreme Court in the present case held that the Respondents had not made out any exceptional circumstances as to why it was necessary for them to lead further evidence for determination of their Challenge Petition. In fact, the District Court had specifically noted that the grounds in the Challenge Petition could sufficiently be proved by way of the evidence as filed in the arbitral proceedings.

The Supreme Court held that the High Court had misread the decision in *Fiza Developers*. Hence, the Supreme Court set aside the High Court’s judgment, and restored the decision of the District Court, disallowing the filing of witness affidavits by the Respondents.

Conclusion

Notably, *Fiza Developers*, *Emkay Global* and the present matter all relate to arbitrations commenced prior to the 2015 Amendments. The Supreme Court was hence dealing with Section 34 as it stood unamended in 2015 and 2019. Even so, the apex court has repeatedly laid down that the proceedings under section 34 are summary in nature and only in exceptional circumstances should evidence be adduced over and above the evidence already tendered before the arbitral tribunal.

With the Arbitration and Conciliation (Amendment) Act, 2019 (**2019 Amendment Act**) being enacted, Section 34(2)(a) now reads as, “*the party making the application establishes on the basis of the record of the Arbitral Tribunal that...*”.

While it is unclear whether the Supreme Court in arriving at its decision has taken into account the promulgation of the 2019 Amendment Act, its decision is in line with the legislative intent behind the same. However, it remains to be seen whether, in cases where the 2019 Amendment Act is applicable, the courts will continue to allow parties to file witness affidavits in exceptional circumstances, or whether such evidence in Section 34 proceedings will be done away with completely as opined by the Supreme Court in *Emkay Global*.

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³ *Emkay Global Financial Services Limited v. Girdhar Sondhi*, (2018) 9 SCC 49.