M/S Alpine Housing Development ... vs Ashok S Dhariwal on 19 January, 2023

Author: M.R. Shah

Bench: C.T. Ravikumar, M.R. Shah

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 73 OF 2023

M/s Alpine Housing Development Corporation Pvt. Ltd. …Appellant

Versus

Ashok S. Dhariwal and Others …Respondents

JUDGMENT

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 1.9.2021 passed by the High Court of Karnataka at Bengaluru in Writ Petition No. 50799/2019, by which the High Court has allowed the said writ petition and while quashing and setting aside the order passed by the learned Additional City Civil and Sessions Judge, Bengaluru, has permitted the respondents – original writ petitioners to adduce evidence in an application under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act'), the original respondent before the High Court and in whose favour the award has been passed by the learned Arbitral Tribunal has preferred the present appeal.

2. The facts leading to the present appeal in a nutshell are as under:

> That against the award passed by the learned arbitrators dated 12.03.1998, an application under Section 34 of the Act being Arbitration Case No. 38/1998 has been filed by the respondents. That the respondents filed an interim application being IA No. 4 in section 34 application to adduce additional evidence. At this stage, it is required to be noted that as such the award passed by the learned arbitrators was an ex-parte award and no evidence was led by the respondents herein, who subsequently assailed the award by way of section 34 application.

The appellant herein filed objections to the said interim application seeking permission to adduce evidence on the ground that the same was not maintainable in accordance with the provisions of the Arbitration Act, 1996. The grounds on which the respondents submitted an application to permit them to adduce evidence shall be dealt with and considered hereinafter.

2.1 The Court dealing with interim application being IA No. 4 in section 34 application rejected the said interim application and refused to permit the respondents to adduce evidence by observing that if such a permission is granted, it would defeat the object and purpose of early disposal of arbitration proceedings and it would delay further hearing of section 34 application. For that purpose, reliance was placed on the provisions of Section 34(2)(a) of the Act, as amended in the year 2019, by which expression "furnish proof" in section 34(2)(a) came to be substituted with the expression "establish on the basis of record of arbitral tribunal". Therefore, the Court dealing with section 34 application opined that the said amendment intended to limit the scope of judicial review under Section 34 of the Act only in exceptional circumstances enumerated under Section 34(2)(a) of the Act on the basis of the record available and even if the grounds urged relate to section 34(2)(b) of the Act, the applicants cannot have a right to produce additional evidence. The order passed by the Court dealing with Section 34 application which rejected the interim application being IA No. 4 preferred by the respondents permitting them to adduce additional evidence/evidence was the subject matter of writ petition before the High Court. 2.2 Before the High Court, it was conceded on behalf of the appellant herein – original respondent before the High Court, so recorded in paragraph 8 of the impugned judgment, that the provisions of Section 34 (2)(a) of the Act, as it stood prior to Act 33 of 2019 would apply, namely, pre-amendment to section 34(2)(a) of the Act shall be applicable. That thereafter, by the impugned judgment and order, after following the decision of this Court in the case of Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited & Another, reported in (2009) 17 SCC 796, the High Court has allowed the said writ petition and set aside the order passed by the court below and has allowed the application preferred by the respondents herein permitting them to adduce evidence in the proceedings under section 34 of the Act. The impugned judgment and order passed by the High Court permitting him respondents to adduce evidence/additional evidence in the proceedings under Section 34 of the Act is the subject matter of present appeal before this Court.

3. Shri Krishnan Venugopal, learned Senior Advocate has appeared on behalf of the appellant and Shri Balaji Srinivasan, learned Advocate has appeared on behalf of the respondents – original writ petitioners. 3.1 Shri Krishnan Venugopal, learned senior counsel appearing on behalf of the appellant has vehemently submitted that in the facts and circumstances of the case, the High Court has committed a very serious error in permitting the respondents to adduce evidence in an application under section 34 of the Act. It is submitted that the impugned judgment and order passed by the High Court permitting the respondents to adduce additional evidence in an application under section 34 of the Act is against the object and purpose of the amending section 34(2)(a), amended vide Act No. 33/2019. It is submitted that if in an application under section 34 of the Act, the applicant who is aggrieved by the award passed by the arbitral tribunal is permitted to adduce evidence, it would defeat the object and purpose of amending section 34(2)(a) of the Act by which the expression "furnishes proof" has been substituted with the expression "establish on the basis of record of the arbitral tribunal". It is submitted that the object and purpose of amending

section 34(2)(a) of the Act is to decide and dispose of the arbitration proceedings at the earliest and to avoid delay.

3.2 It is further submitted by Shri Krishnan Venugopal, learned senior counsel appearing on behalf of the appellant that though it was conceded before the High Court by the counsel appearing on behalf of the appellant that section 34 of the Act prior to amendment amending section 34(2)(a) shall be applicable, the said concession is not binding as the same would be against the law and any concession contrary to law shall not be binding. It is submitted that therefore according to him the provisions of section 34(2)(a) post amendment shall be applicable by which in the proceedings under section 34 of the Act, the applicant is not required to furnish proof on the grounds set out in section 34 (2)(a) to set aside the award and the court dealing with section 34 application has to decide the same only on exceptional circumstances enumerated under section 34(2)(a) of the Act on the basis of the record available. It is submitted that therefore the applicants cannot have a right to produce additional evidence/evidence.

3.3 It is further submitted that even otherwise and assuming that the provisions applicable prior to amendment (Act 33 of 2019) are applicable, in that case also, as the respondents – original applicants have assailed the award on the grounds enumerated under section 34(2)

(b) of the Act, the expression "furnish proof" in section 34(2)(a) cannot apply to section 34(2)(b). It is submitted that the award passed by the arbitral tribunal can be assailed either on the grounds enumerated under section 34(2)(a) or under section 34(2)(b). It is submitted that the grounds enumerated under section 34(2)(a) and section 34(2)(b) are separate grounds/clauses. It is submitted that therefore "furnish proof" in section 34(2)(a) of the Act cannot apply to section 34(2)(b) because if the Parliament intended so, Section 34(2) would have applied the proof requirement to all seven grounds, without any need for separate clauses

(a) and (b). It is submitted that the effect of "the court finds that" in section 34(2)(b) is that the court can on its own decide based on the arbitral award that the dispute was not arbitrable or that award conflicts with public policy. It is submitted that therefore, the disjunctive "or" between clauses (a) and (b) of section 34(2) cannot be read as the conjunctive "and".

3.4 It is further submitted that the ratio of this Court in the case of Fiza Developers(supra) was for framing of issues which is not required in section 34(2) proceedings. It is submitted that in the case of Emkay Global Financial Services Limited v. Girdhar Sondhi, reported in (2018) 9 SCC 49, this Court has explained the decision in the case of Fiza Developers (supra) and has expressly held that only section 34(2)

(a) contemplates furnishing proof. It is submitted that the subsequent decision of this Court in the case of Canara Nidhi Limited v. M. Shashikala, reported in (2019) 9 SCC 462 has approved the interpretation of section 34(2)(a) in Emkay Global (supra). 3.5 It is further submitted that in the case of Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited, reported in (2022) 1 SCC 753, this Court has treated 2019 amendment to section 34(2)(a) as clarificatory, while considering section 48(1) which are broadly in pari materia with section 34(2)(a) and 34(2)(b) as

they stood prior to the 2019 amendment. It is submitted that this Court in the aforesaid decision in paragraphs 39 & 40 held that grounds under unamended section 48 including conflict with public policy in section 48(2) are to be established only on basis of "record of arbitral tribunal" in the interest of speedy enforcement of foreign award. 3.6 It is submitted that as such there is no legal bar to the Parliament to provide two different procedures for two different sets of grounds in a proceeding or even having two different procedures for the same relief. It is submitted that the Parliament intended that grounds in section 34(2)

(b) must be established on the basis of the record of the arbitral tribunal. It is submitted that even assuming proof is required under section 34(2)

(b), it does not apply to a case of alleged conflict of an award with statute. Being a pure question of law, it can be considered on the findings/directions recorded in the award.

3.7 It is further submitted that even otherwise on merits also, general rule is that unless exceptional circumstances are made out, no additional evidence is permissible. It is submitted that the present case does not fall within the meaning of "exceptional circumstances" as held by this Court in the case of Canara Nidhi (supra). It is submitted that the directions in the award that the parties shall apply for statutory permissions is the legally correct decree to pass in a suit for specific performance. Therefore, the award cannot be said to be in conflict with "public policy of Indian law." 3.8 It is submitted that the respondents' contention that the award is frustrated because corporation refused permission for clubbing of khatas which is the basis for award to be executed does not fall within the conflict with public policy ground under section 34(2)(b) because it is the award and not its execution that must conflict with the public policy of India. It is submitted that apart from the fact that the respondents contention is premised on his having accepted the award, the corporation's alleged refusal is admittedly a subsequent event after the award. It is submitted that it is the executing court that would determine that the decree is inexecutable due to change in circumstances. It is submitted that the evidence can be led during execution. It is submitted that the respondents are bound to suffer the consequence of their wilful failure to participate in the arbitration proceedings before the arbitral tribunal, despite attending them after the rejection of their objection to the jurisdiction of the Tribunal. It is submitted that therefore the respondents cannot be allowed to lead evidence by taking advantage of their own wrong.

3.9 It is further urged by the learned senior counsel appearing on behalf of the appellant that if this Court is inclined to allow the respondents to lead evidence, in that case, (a) the appellant may be permitted to lead evidence including the permission for clubbing khatas where there are nalas and the corporation's later endorsement dated 28.6.2004 agreeing to consider clubbing of khatas concealed by the respondents, and (b) the questions of law regarding whether the corporation's refusal falls under section 34(2)(b) may kindly be left open.

4. The present appeal is vehemently opposed by Shri Balaji Srinivasan, learned counsel appearing on behalf of the respondents. It is submitted that in the present case initially the respondents challenged the arbitration proceedings/constitution of the arbitral tribunal and therefore did not participate in the arbitration proceedings. It is submitted that thereafter the arbitral tribunal

proceeded with the hearing ex-parte. It is submitted that therefore as such no evidence was adduced or led by the respondents before the arbitral tribunal. 4.1 It is submitted that in the present case the arbitration proceedings begun on 7.2.1997 under old Arbitration Act, 1940 and on 25.03.1997 arbitrators arbitrarily decided to proceed with the arbitration proceedings under the Arbitration Act, 1996. It is submitted that the respondents withdrew from the arbitration. That thereafter the respondents filed an application challenging the bias and higher fees before the arbitral tribunal. However, ex-parte award dated 12.03.1998 came to be passed for specific performance of the agreement reserving liberty to apply for amalgamation of khatas. It is submitted that in fact though it was for the appellant to apply for amalgamation of khatas but it did not and it was the respondents who applied for the same twice. It is submitted that applications for amalgamation of khatas made by respondents twice have been rejected due to presence of RzajaKaluve or rain water drain. It is submitted that therefore the respondents made an application to produce the evidence in section 34 application to produce the final endorsement dated 17.03.2003 by which the prayer for amalgamation of khatas to plots were rejected and thereafter it is required to examine the concerned officer. It is submitted that therefore it is the case on behalf of the respondents that the award is incapable of being implemented and/or executed in view of section 34(2)(b) (i) & (ii) of the Arbitration Act, 1996 and section 56 of the Indian Contract Act. It is submitted that therefore according to the respondents the enforcement of the award is contrary to Public Policy, Local Law & void arbitration proceedings further leading to Section 56 of the Indian Contract Act. 4.2 It is submitted that as such in the present case the provisions prior to the amendment to section 34(2)(a) of the Act, i.e., prior to Act 33/2019 shall be applicable in which the words used are “furnish proof”. It is submitted that as such the words “ furnish proof” shall be applicable with respect to an application to set aside the award on the grounds set out in section 34(2)(a) & 34(2)(b) and not section 34(2)(a) alone, as sought to be contended on behalf of the appellant.

4.3 Learned counsel appearing on behalf of the respondents has heavily relied upon the decisions of this Court in the cases of Fiza Developers (supra); Emkay Global (supra); and Canara Nidhi (supra). He has also relied upon the decision of this Court in the case of S.P. Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh, reported in (2019) 2 SCC 488 in support of his submission that the amending arbitration Act shall not be applicable with respect to arbitration proceedings commenced before the commencement of the amending act, unless the parties otherwise agree.

4.4 Making above submissions, it is prayed to dismiss the present appeal.

5. We have heard learned counsel for the respective parties at length.

6. The short question which is posed for the consideration of this Court is, whether the applicant can be permitted to adduce evidence to support the ground relating to Public Policy in an application filed under Section 34 of the Arbitration & Conciliation Act, 1996? At the outset, it is required to be noted that in the present case the arbitration proceedings commenced and even the award was declared/passed by the arbitral tribunal in the year 1998, i.e., prior to section 34(2)(a) came to be amended vide Act 33/2019. Apart from the fact that it was conceded by the learned counsel appearing on behalf of the appellant before the High Court that the law prevailing prior to the amendment of Section 34(2)(a) by Act 33/2019 shall be applicable, even otherwise, we are of the

opinion that the arbitration proceedings commenced and even the award was declared prior to the amendment of Section 34(2)(a) by Act 33/2019, Section 34(2)(a) pre-amendment shall be applicable. The view which we are taking is because by amendment of section 34(2)(a) by Act 33/2019, there is a substantial change. Prior to the amendment of section 34(2)(a), an arbitral award could be set aside by the Court if the party making an application "furnishes proof" and the grounds set out in section 34(2)(a) and section 34(2)(b) are satisfied. However, subsequent to the amendment of section 34(2)(a), the words "furnishes proof" have been substituted by the words "establishes on the basis of the record of the arbitral tribunal". In that view of the matter, we hold that in case of arbitration proceedings commenced and concluded prior to the amendment of section 34(2)(a) by Act 33/2019, pre-amendment of section 34(2)(a) shall be applicable.

7. Now so far as the question, whether in an application filed under section 34(2)(a) pre-amendment where the requirement is that the party making an application has to "furnish proof", whether such an applicant can be permitted to adduce evidence by way of affidavit or otherwise is concerned, few decisions of this Court are required to be referred to.

(i) In the case of Fiza Developers (supra), the question that was posed by the Court was, whether issues as contemplated under Order 14 Rule 1 CPC should be framed in applications under Section 34 of the Act. Answering the same, this Court observed and held in paragraphs 14, 17, 18, 21, 22, 24, 29 & 31 as under:

> "14. 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 is said issues are not necessary, it does not mean that evidence is not necessary.
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> 17. 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.
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> 18. 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.
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> 21. 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.

22. 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 [1st Edn., p. 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 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. The rest two grounds are contained in Section 34(2)
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> (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." 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.

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24. 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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29. 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 8 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 Sections 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.

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31. Applications under Section 34 of the Act are summary proceedings with provision for objections by the respondent-defendant, 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 respondent-defendant to place his evidence by affidavit. Where the case so warrants, the court permits cross-examination of the persons swearing to the affidavit. Thereafter, the 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."

(ii) The decision of this Court in the case of Fiza Developers(supra) has been subsequently considered by this Court in the case of Emkay Global (supra) and in paragraph 21, it is observed and 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."

(iii) The decision of this Court in the case of Fiza Developers(supra) again fell for consideration of this Court in the subsequent decision in the case of Canara Nidhi (supra). After taking note of the observations made in paragraph 21 in Emkay Global (supra), thereafter it is observed by this Court in the case of Canara Nidhi (supra) that the legal position is thus clarified that section 34 application will not ordinarily require anything beyond the record that was before the arbitration and that cross-examination of persons swearing in to the affidavits should not be allowed unless absolutely necessary.

8. 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.

9. Now so far as the submission on behalf of the appellant that the requirement of "furnishing proof" as per pre-amendment of section 34(2)

(a) of the Arbitration Act shall not be applicable to the application for setting aside the award on the grounds set out in section 34(2)(b) and the submission that in the execution proceedings the subsequent development of refusing to grant permission for amalgamation of the plots can be considered and it will be open for the applicants to point out in the execution proceedings that the award is not capable of being executed is concerned, at the outset, it is required to be noted that even for establishing that the arbitral award is in conflict with Public Policy of India, in a given case, the evidence may have to be led and by leading evidence, the person who is challenging the award on that ground can establish and prove that the arbitral award is in conflict with Public Policy of India and/or the subject matter of dispute is not capable of settlement by arbitration under the law for the time being in force. However, at the same time, from the record before the arbitrator, if the same can be established and proved that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the Public Policy of India, in that case, the person may not be permitted to file the affidavit by way of evidence/additional evidence.

10. Now so far as the submission on behalf of the appellant that the subsequent development of refusing to grant permission by the appropriate authority to amalgamate the plots can be considered in the execution proceedings , a person against whom the award is passed and who alleges on the grounds set out in section 34(2)(b) before the executing court, the executing court may hold that the award is not capable of being executed is concerned, it is required to be noted that so far as one of the grounds set out in section 34(2)(b), namely, that the arbitral award is in conflict with the Public Policy of India, the said ground could be available only after passing of the award. Therefore, the same can be permitted to be agitated in an application under section 34 of the Act and the person shall not have to wait till the execution is filed. The defence that the arbitral award is in conflict with the Public Policy of India itself can be a ground to set aside the award in view of section 34(2)(b) of the Act. Therefore, the aforesaid submission has no substance.

11. Now the next question fell for consideration is, whether the present case is such an exceptional case that it is necessary to grant opportunity to the respondents to file affidavits and adduce evidence and whether any case is made out for the same.

From the affidavit, which is sought to be placed in the proceedings under Section 34 of the Act, it is seen that the respondents want to place on record the communication from the appropriate authority by which the application for amalgamation of the plots is rejected. At this stage, it is required to be noted that the arbitral tribunal has passed the decree for specific performance of the contract/agreement, subject to the amalgamation of the plots. Therefore, it is the case on behalf of the respondents that in view of the refusal of the permission by the appropriate authority to amalgamate the plots, the case falls under section 34(2)(b), namely, that the dispute is not capable of settlement under the law for the time being in force and that the arbitral award is in conflict with the Public Policy of India, namely, against the relevant land laws. The event of refusal to amalgamate the plots is subsequent to the passing of the award and therefore naturally the same

shall not be forming part of the record of the arbitral tribunal. Even otherwise, it is required to be noted that the award of the arbitral tribunal was an ex- parte award and no evidence was before the arbitral tribunal on behalf of the respondents. We are not opining on whether the arbitral tribunal was justified in proceeding with the further proceedings ex-parte or not. Suffice it to record that before the arbitral tribunal, such evidence was not there and nothing was on record on the amalgamation of the plots.

The affidavit thus discloses specific document and the evidence requires to be produced. In that view of the matter, a strong exceptional case is made out by the respondents to permit them to file affidavits/adduce additional evidence. However, at the same time, the appellant also can be permitted to cross-examine and/or produce contrary evidence.

12. In view of the above and for the reasons stated above, we are of the opinion that the High Court has not committed any error in permitting the respondents to file affidavits/additional evidence in the proceedings under section 34 of the Arbitration Act.

13. In view of the above and for the reasons stated above, the present appeal fails and the same deserves to be dismissed and is accordingly dismissed. However, it is observed that the appellant herein may also be permitted to cross-examine and/or lead contrary evidence including the permission for clubbing khatas where there are nalas as it is the case of the appellant that thereafter the corporation vide endorsement dated 28.6.2004 has agreed to consider clubbing of khatas. As and when such evidence is produced/led, the same may also be dealt with by the concerned court in accordance with law and on its own merits. However, at the same time, the court dealing with section 34 application shall finally decide and dispose of section 34 application expeditiously, considering the object and purpose of the Arbitration Act, namely, speedy disposal.

14. With these observations, the present appeal is dismissed. There shall be no order as to costs.

.....J.
[M.R. SHAH]

NEW DELHI; .....J.
JANUARY 19, 2023. [C.T. RAVIKUMAR]