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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**NOTICE OF MOTION (L) NO. 2007 OF 2019
IN
COMMERCIAL ARBITRATION PETITION (L) NO. 681 OF 2019**

Konkan Irrigation Development
Corporation, Kopri Colony, Thane (E)

... Applicant
(Org. Petitioner)

Versus

1. M/s. F.A. Enterprises, Plot No.112,
First Floor, TPS-III, 6th Floor,
Khar (W), Mumbai – 400 052.
2. City and Industrial Development
Corporation CIDCO Bhavan CBD
Belapur, Navi Mumbai – 400 614.
3. State of Maharashtra through
Water Resources Department
Mantralay Mumbai – 400 032.

... Respondents

**ALONG WITH
NOTICE OF MOTION NO. 2192 OF 2019
IN
COMMERCIAL ARBITRATION PETITION NO. 921 OF 2019**

The State of Maharashtra,
through Water Resources Department,
Mantralay, Mumbai – 400 032.

... Applicant
(Org. Petitioner)

Versus

1. M/s. F.A. Enterprises,
A partnership firm having their
office at Plot No.112, 1st Floor,
TPS-III, 6th Floor, Opp. Hotel Oriental Palace,
Khar (W), Mumbai – 400 052.
2. Irrigation Development Corporation,
Water Resources Department,
Sinchan Bhavan, Kopri Colony, Thane (E).
3. City and Industrial Development Corporation,
CIDCO Bhavan CBD-Belapur,
Navi Mumbai – 400 614.

... Respondents

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Mr.Gopal Krishna Shivaram Hegde along with Ms.Pinky Bhansali, Advocates for the Petitioner in ARBP/793/2019 and Respondent No.2 in CARBPL/681/2019 and Respondent No.3 in CARBP/921/2019.

Mr. S.G.Aney, Senior Counsel along with Ms.Shweta Sangtani, Mr.Yash Momaya i/by Mr. Dinesh B. Khaire, Advocate for the petitioner in CARBPL/681/2019 and Respondent No.3 in ARBP/793/2019 and Respondent No.2 in CARBP/921/2019/Applicant in NMCDL/2007/2019.

Ms.Geeta Shastri, Additional Government Pleader, State, Advocate for the Petitioner in CARBP/921/2019 and Respondent No.2 in ARBP/793/2019 and Respondent nos.3 & 4 in CARBPL/681/2019/Applicant in NMCD/2192/2019.

Mr. Anil Anturkar, Senior Counsel along with Mr. Vikram Nankani, Senior Counsel and Mr.P.Narayan, Mr.Prashant Patil, Mr.Kapil Chiddanand, Mr.Shubham Misar, Mr. Yatin Malvankar, Mr. Pranav Patil, Ms. Siddhi Sabne, Ms. Niharika Shewde, Ms. Shilpa Chidanand and Mr. Sachin Shintre, Advocates for the Respondent No.1 in all Arbitration Petitions.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 29th SEPTEMBER, 2019

PRONOUNCED ON : 22nd OCTOBER, 2019

ORAL ORDER :

The applicant i.e. Konkan Irrigation Development Corporation (KIDC), the original petitioner and applicant in Notice of Motion (L) No. 2007 of 2019 seeks permission to place on record in the Commercial Arbitration Petition (L) No. 681 of 2019, the charge-sheet dated 25th August, 2015 annexed as Exh.A to the affidavit in support of the Notice of Motion against various persons including the respondent no.1 i.e. M/s. F.A. Enterprises. The State of Maharashtra, the original petitioner in Commercial Arbitration Petition No. 921 of 2019 and the applicant in Notice of Motion No. 2192 of 2019 seeks permission to file on record the affidavit of Shri Sanjay Krishna Ghanekar, Secretary to Government (Project and Co-ordination), Water Resource Department, dated 21st August, 2019 for

placing on record the copy of FIR bearing 123/2015 with all the annexures and copy of charge-sheet dated 8th August, 2016 in Commercial Arbitration Petition No. 921 of 2019 under Section 34(2)(a) of the Arbitration and Conciliation Act, 1996.

2. By consent of parties both the aforesaid Notices of Motion were heard together and are being disposed of by a common order. The Commercial Arbitration Petition (L) No. 681 of 2019 and the Commercial Arbitration Petition No. 921 of 2019 are filed impugning the Arbitration Award dated 3rd April, 2019 passed by the Arbitral Tribunal directing the petitioner in Commercial Arbitration Petition (L) No. 681 of 2019 to pay a sum of Rs.303 Crores approximately with other reliefs against the petitioner in that Commercial Arbitration Petition. The petitioners in Commercial Arbitration Petition No. 921 of 2019 have impugned the same arbitral award. The City and Industrial Development Corporation (CIDCO) has also filed a separate Arbitration Petition bearing No. 793 of 2019 *inter-alia* praying for setting aside the same arbitral award as against the said petitioner. CIDCO however has not filed any separate notice of motion in the said arbitration petition for the reliefs as sought by the other two petitioners referred to aforesaid.

3. The final hearing of the three aforesaid Arbitration Petitions has already commenced. The petitioners in all the aforesaid three Arbitration Petitions have concluded their arguments. M/s. F.A. Enterprises, who is the contesting respondent has also commenced arguments in the aforesaid three Arbitration Petitions. During the argument of the respondent no.1, the applicants have filed the aforesaid two Notices of Motion for taking additional documents on record in these two Arbitration Petitions.

4. Sometime in the month of February, 2009, tender notice was issued by the Executive Engineer, KIDC for construction of Balganga Dam. The said contract was awarded to the respondent no.1. On 17th July, 2015, this Court constituted the Arbitration Tribunal in a Writ Petition filed by the respondent no.1 for deciding the disputes between the parties. On 9th September, 2016, respondent no.1 filed a statement of claim. After filing of the said statement of claim by the respondent no.1, the KIDC issued a notice on 28th October, 2016 terminating the contract awarded to the respondent no.1.

5. Before filing of statement of claim by the respondent no.1, an FIR was filed and charge-sheet was issued by the Police against the respondent no.1 and others relating to the work awarded to the respondent no.1. On 3rd April, 2019, Arbitral Tribunal made an award allowing part of the claims made by the respondent no.1. In the month of June, 2019, the petitioners filed these two Arbitration Petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act'). During the course of arguments of the respondent no.1, in two of the Petitions, the applicants filed the aforesaid two Notices of Motion.

6. Mr. Aney, learned Senior Counsel for the applicant in Notice of Motion (L) No. 2007 of 2019 invited my attention to the para 130 of the amended statement of claim filed by the respondent no.1, para 26, 33, 34, 35, 42 and 47 of the written statement filed by the KIDC to the amended statement of claim, affidavit of evidence of Mr. Godsey and in particular paragraphs 23 and 26, who was examined as one of the witness by KIDC. It is submitted by the learned Senior Counsel that the pleadings and evidence

on record before the Arbitral Tribunal would clearly indicate that the factum of pending criminal proceedings filed by the Police against the respondent no.1 and some of the officers of KIDC is admitted by the parties. The factum of pendency of criminal proceedings was thus known to the Arbitral Tribunal, in view of the reference to such criminal proceedings, filing of FIR and charge-sheet relating to the subject matter of the arbitral proceedings in the pleadings and some of the documents. He strongly placed reliance on the termination notice dated 28th October, 2016 issued by KIDC terminating the contract awarded to the respondent no.1.

7. It is submitted that in the said termination notice dated 28th October, 2016 itself there was a mention of the charge-sheet. He submits that Government Resolution dated 23rd September, 2016, also referred to the pending criminal proceedings as one of the reasons for issuance of the said Government Resolution, which was already brought on record by the KIDC. Upon receipt of the notice of termination dated 28th October, 2016, issued by KIDC, the respondent no.1 had applied for amendment to the statement of claim and sought to challenge the said notice of termination. He submits that respondent no.1 thus could not dispute that both the parties had referred to the FIR and the charge-sheet in their respective pleadings and had also referred to and relied upon by the Government Resolution dated 23rd September, 2016 and the notice of termination dated 28th October, 2016, which admittedly referred to the filing of FIR and charge-sheet against the respondent no.1 and against some of the officers of the applicant and others.

8. Learned Senior Counsel placed reliance on the judgment of the Supreme Court in case of ***Fiza Developers and Inter-Trade Private Limited***

v/s. AMCI (India) Private Limited and Another, (2009) 17 SCC 796 and in particular paragraph 31 and would submit that under Section 34 of the Arbitration Act, application filed by the applicant is in the nature of summary proceeding, which has to be followed by an opportunity to the applicant to prove the existence of any ground under Section 34(2) of the Arbitration Act. The applicant is permitted to file affidavit of his witnesses in proof. A corresponding opportunity is given to the respondents 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 procedure, depending upon the facts of any particular case or the local rules.

9. Learned Senior Counsel also placed reliance on the relevant portion from the report of High Level Committee to review the institutionalization of arbitration mechanism in India under the Chairmanship of Shri Justice B.N. Srikrishna, retired Judge of Supreme Court of India and more particularly suggesting amendment to Section 34(2) (a) of the Arbitration Act. It is submitted by the learned Senior Counsel that if there are matters not containing any record before the Arbitral Tribunal, however are relevant for the determination of issues arising under Section 34(2)(a) of the Arbitration Act, they may be brought to the notice of the Court by way of affidavits filed by both the parties.

10. Learned Senior Counsel for the KIDC also placed reliance on the judgment of Supreme Court in case of **Emkay Global Financial Services Limited v/s. Girdhar Sondhi, (2018) 9 SCC 49** and in particular paragraphs 4, 8 to 11, 13, 17 and 21. It is submitted by the learned Senior

Counsel that the Supreme Court in the said Judgment also after adverting to the judgment in case of ***Fiza Developers and Inter-Trade Private Limited*** (supra) had held 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 for the determination of issues arising under Section 34(2)(a) of the Arbitration Act, they may be brought to the notice of the Court by way of affidavits filed by both parties.

11. It is submitted that there were several serious allegations of fraud made in the said charge-sheet, which is in public domain *inter-alia* against the contractor, which *ex-facie* are complex requiring detailed and voluminous evidence to appreciate. It is submitted that in view of the factum of serious allegations of fraud in the public domain made against the respondent no.1, such matters at the first instance could not be resolved by arbitration. He strongly placed reliance on the judgment of Supreme Court in case of ***A. Ayyasamy v/s. A. Paramasivam, (2016) 10 SCC 386*** and in particular, on paragraphs 16, 17, 23, 45.1 and 45.2. Learned Senior Counsel submits that the Arbitral Tribunal without taking into consideration the pendency of the criminal proceedings and charge-sheet has dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration and that the award contains decisions on matters beyond the scope of the submission to arbitration and is thus liable to be set aside under Section 34(2)(a)(iv) read with Section 34(2)(b) of the Arbitration Act.

12. It is submitted that in view of the filing of such criminal proceedings, the entire arbitration agreement resulted from the order dated

17th July, 2015 passed by this Court referring all disputes in Writ Petition No. 11019 of 2013 to the arbitration, are rendered invalid under the law for the time being in force. He submits that the law laid down by the Supreme Court in case of **A. Ayyasamy** (supra) holding that if there are serious allegations of fraud and criminality in the public domain, which *ex-facie* are complex and would require detailed and voluminous evidence to appreciate that such a dispute cannot be resolved by arbitration. He submits that the arbitration agreement between the parties referring disputes, which had already arisen in the face of criminality, which was already committed and which are already the subject matter of an on-going Anti Corruption Bureau enquiry. The arbitration agreement itself was not valid under the law for the time being in force and the arbitration award is liable to be set aside under Section 34(2)(a)(ii) read with Section 34(2)(b) of the Arbitration Act. The Arbitral Tribunal has committed an error of law amounting to jurisdictional error on the part of the Arbitral Tribunal.

13. It is submitted by the learned Senior Counsel that since the foundation in respect of the criminal proceedings and the charge-sheet and factum of issues of the FIR and charge-sheet already being on record and the foundation thereof is already laid, this Court has ample power to allow an application to produce material in support of such foundation already laid by the applicant. He submits that the Court is not required to introduce any new issue while dealing with issues even if the applicants are allowed to produce the additional documents, which are material and relevant to decide the issues raised under Section 34(2)(a) of the Arbitration Act. The Court can permit a party to produce additional material on record while hearing an arbitration petition, in view of the Section 34(2)(b) of the Arbitration Act.

14. Learned Senior Counsel for the KIDC submits that a committee constituted by the Ministry of Law and Justice, Government of India had already submitted its report on 30th July, 2017, making number of recommendations for change in the law of arbitration. Such committee had clearly noted that a requirement to furnish proof has led to inconsistent practice in some High Courts, which insisted on Section 34 proceedings being conducted in the manner as a regular civil suit with issues being framed under Order XIV Rule 1 of the Code of Civil Procedure, 1908. The said Committee had noted that the said procedure followed by some of the Courts was contrary to the ratio in case of ***Fiza Developers and Inter-Trade Private Limited*** (supra) delivered by the Supreme Court. He submits that the said Committee had recommended the amendment to Section 34(2) that the words “furnishes proof” appearing in Section 34(2)(a) of the Arbitration Act shall be substituted by “establishes on the basis of the arbitral tribunal’s record”. He submits that pursuant to the said recommendation made by the committee, Arbitration Act has been amended by the Arbitration and Conciliation (Amendment) Act, 2019 during the pendency of the present arbitration petition.

15. It is submitted by the learned Senior Counsel that the Amendment to Section 34(2)(a) of the Arbitration Act does not *ex-facie* restrict the power of this Court under Section 34 to take on record the charge-sheet. He submits that the charge-sheet is a document, the existence of which was pleaded before the Arbitration Tribunal and which finds mention in documents produced before the Arbitral Tribunal. The charge-sheet is sought to be placed on record to establish that grounds exist to set

aside the award. It is submitted by the learned Senior Counsel that the KIDC does not seek to bring on record the charge-sheet for the purposes of going into the veracity of the contents thereof but only to bring to the knowledge of this Court, the fact that there exist complicated criminal and serious proceedings touching upon the very subject matter of the arbitration proceedings. He submits that the charge-sheet is relevant to decide the above three arbitration petitions.

16. Learned Senior Counsel for the KIDC submits that assuming for the sake of argument and without admitting that the 2019 Amendment restricts the power of this Court under Section 34 to take on record the charge-sheet, the said 2019 Amendment does not and cannot apply in the present case. He submits that unless a contrary intention appears, legislation is presumed to be prospective in nature and not retrospective. The legislation which modifies accrued rights or which imposes obligations or imposes new duties or attaches a new disability, has to be treated as prospective, unless the legislative intent is clearly to give the enactment, a retrospective effect. In support of this submissions, learned Senior Counsel placed reliance on the judgment of Supreme Court in case of ***Commissioner of Income Tax (Central)-I, New Delhi v/s. Vatika Township Pvt. Ltd., (2015) 1 SCC 1*** and in particular paragraphs 27 to 31. Learned Senior Counsel also relied upon the judgment of Supreme Court in ***Videocon International Ltd. v/s. SEBI, (2015) 4 SCC 33*** and in particular paragraphs 4 to 7 and 36 to 43. Learned Senior Counsel for KIDC submits that the said 2019 Amendment to Section 34 is prospective in nature. There is no provision in the said 2019 Amendment making the same applicable retrospective, whether expressly or by necessary implication.

17. It is submitted that infact there is an indication in the 2019 Amendment, viz. Section 13 which inserts Section 87 to the Arbitration Act and thus the said 2019 Amendment to Section 34 would not apply to the present matter. Section 87 is expressly made retrospective and is deemed to have taken effect from 23rd October, 2015, the date on which the Arbitration and Conciliation (Amendment) Act, 2015 came into effect. He submits that under the said Section 87 inserted by the Arbitration and Conciliation (Amendment) Act, 2019, it is made clear that the 2015 Amendment would apply only to arbitration proceedings commenced on or after 23rd October, 2015. He submits that the Arbitration and Conciliation (Amendment) Act, 2015, thus would not apply to the present matter.

18. Learned Additional Government Pleader for the applicant-State of Maharashtra in Notice of Motion No. 2192 of 2019 submits that in paragraphs 33 and 47 of the affidavit filed by KIDC on 16th January, 2017 reference to FIR and charge-sheet was made. The said reply was filed by KIDC in response to the application filed by the respondent no.1 under Section 17 of the Arbitration Act. He submits that in the said affidavit filed by the KIDC, it had also referred to Anti Corruption Bureau investigation in various paragraphs of the said affidavit, which were already on record before the Arbitral Tribunal. She submits that even in the termination notice issued by the KIDC there was a reference to the investigation by SIT, FIR and charge-sheet. She submits that even in the Government Resolution issued by the State of Maharashtra, there was a reference to FIR and charge-sheet, which was on record before the Arbitral Tribunal. She submits that in the arbitration petition filed by the State of Maharashtra, a copy of the FIR is

also annexed for perusal and consideration of this Court. He submits that the charge-sheet and FIR are within the public domain and thus in the interest of justice, these documents which are already referred to by both the parties in various pleadings and documents produced before the Arbitral Tribunal shall be considered by this Court while hearing these arbitration petitions filed by the KIDC, State of Maharashtra and CIDCO. Learned Counsel adopts the other legal submissions made by Mr. Aney, learned Senior Counsel for the KIDC as part of her submission in the Notice of Motion No. 2192 of 2019 filed by the State of Maharashtra.

19. Mr. Anturkar, learned Senior Counsel for the respondent no.1 tendered a brief note of submission canvassed before this Court in response to the submission made by the Mr. Aney, learned Senior Counsel for the KIDC and Mrs. Geeta Shastri, learned Additional Government Pleader for State of Maharashtra. He also tendered a compilation of judgments relied upon by his client in response to the Notice of Motions filed by KIDC and the State of Maharashtra.

20. It is submitted by the learned Senior Counsel that the Notice of Motion itself is not maintainable in view of the Arbitration and Conciliation (Amendment) Act, 2019 by which the provisions of Section 34(2)(a) of the Arbitration Act are amended. It is submitted that the “liberty to furnish the proof” as contemplated by the provisions of Section 34(2)(a) of the Arbitration Act is neither a vested nor accrued right. The said provisions only provide a liberty and do not create any right to furnish the proof. He submits that the said liberty in any event is within the realm, not of substantive law but is merely a procedural law. No person has any vested right to any particular procedure.

21. Learned Senior Counsel placed reliance on Order XLI Rule 27 of the Code of Civil Procedure, 1908 and submits that the prayers in the notice of motion for allowing “to furnish the proof” at the stage of hearing of arbitration petition under Section 34(2)(a) of the Arbitration Act is analogous to the provisions of Order XLI Rule 27 of the Code of Civil Procedure, 1908. He submits that in view of the said provisions under Order XLI Rule 27, if the person making such prayer had in fact opportunity to produce the documents before the Arbitration Tribunal and has chosen not to produce those documents at that stage, such party cannot be granted leave to produce such documents at this stage.

22. In support of the aforesaid submission, learned Senior Counsel placed reliance on the judgment of Supreme Court in case of ***Emkay Global Financial Services Limited v/s. Girdhar Sondhi (2018) 9 SCC 49*** and in particular paragraph 21 and would submit that the effect of the Arbitration and Conciliation (Amendment) Act, 2019, which was proposed at that point of time has been already dealt with by the Supreme Court in paragraph 21 of the judgment in case of ***Emkay Global Financial Services Limited*** (supra). In support of his submission that the liberty to furnish the proof is not a substantive law but is in the realm of procedure of law, learned Senior Counsel placed reliance on the judgment of this Court in case of ***Pune Municipal Corporation v/s. Mr. Rajeev L. Sangtani and others*** delivered on 7th August, 2019 in ***Civil Revision Application No. 316 of 2016*** and in particular paragraphs 60, 81 and 82. He submits that the rights are vested in a party to the litigation on the date of filing original proceedings and not on the date of filing an arbitration petition, which is not the original proceeding.

Right of filing an appeal can be compared with an application under Section 34 of the Arbitration Act, which is a substantive provision.

23. Learned Senior Counsel placed reliance on the judgment of Supreme Court in case of ***Syndicate Bank v/s. Prabha D. Naik and Another, (2001) 4 SCC 713*** in particular paragraph 60 in support of the submission that there is distinction between the procedural right or substantive right. He submits that any provision which bars the remedy of a party is procedural and not substantive. Learned Senior Counsel placed reliance on the judgment of Supreme Court in case of ***M/s. Bharat Barrel and Drum Mfg. Co. v/s. The Employees State Insurance Corporation, 1971(2) SCC 860*** and in particular paragraphs 6 and 7 in support of the submission that right of a party to offer the proof is procedural and not substantive.

24. Learned Senior Counsel placed reliance on the judgment of this Court in case of ***Kekare Accident Hospital v/s. Abhyudaya Co-op. Bank Ltd., 2017 SCC OnLine Bom 9815*** and in particular paragraph 8 in support of the submission that while hearing an application under Section 34 of the Arbitration Act, Court cannot go into the merits or reappraise or re-examine the evidence or look into the inefficiency of the evidence. The Court can interfere only when the conditions enumerated in Section 34 of the Arbitration Act are satisfied and therefore so far as leading any oral evidence or relying upon certain documents is concerned, it is needless to state that there is no scope. The Court cannot permit liberally the production of any additional document, which was not led before the arbitrator.

25. Learned Senior Counsel placed reliance on the judgment of Supreme Court in case of ***M/s. Canara Nidhi Limited v/s. M. Shashikala and Others*** delivered on 23rd September, 2019 in ***Civil Appeal No. 7544-7545 of 2019*** and in particular paragraphs 18 and 19 and would submit that since the petitioners even after having sufficient opportunity to adduce oral and documentary evidence and to produce the FIR and charge-sheet failed to produce the said documents before the Arbitral Tribunal thus cannot be allowed to produce those documents at the stage of final hearing of the arbitration petitions under Section 34 of the Arbitration Act. He submits that in any event no case is made out for production of these additional documents at this stage. No attempts were made by the petitioners earlier, though various opportunities were available to bring these documents on record before the Arbitral Tribunal. In these circumstances, this Court cannot exercise any discretion in favour of the petitioners to permit production of these documents at this stage. He submits that though CIDCO had made attempt to produce those documents before the Arbitral Tribunal, no notice of motion has been filed by the CIDCO seeking permission to produce those documents before this Court at this stage.

26. Learned Senior Counsel invited my attention to the affidavit notarized on 23rd January, 2019 filed by CIDCO before the Arbitral Tribunal tendering an apology regarding email forwarded to few of the Arbitrators containing charge-sheet registered in criminal case. He submits that in the said affidavit filed by CIDCO, a request was made to the Arbitral Tribunal not to take cognizance of those documents. It is submitted that though FIR was lodged in the month of August, 2015 and charge-sheet was filed in the

month June, 2016, no attempt was made to produce those documents before the Arbitral Tribunal by KIDC or State of Maharashtra. Though, the parties had approached this Court during the pendency of the arbitral proceedings twice, no such application was made even before this Court to permit the petitioners to place reliance upon the said FIR and charge-sheet. The petitioners thus cannot be allowed to produce those documents at this stage, having failed to produce those documents in spite of various opportunities.

27. It is submitted by the learned Senior Counsel that though the petitioners could have raised an issue of jurisdiction in respect of the claims made by the respondent no.1 before the Arbitral Tribunal on the ground of alleged fraud or alleged serious allegations made in the FIR or charge-sheet by filing an application under Section 16 of the Arbitration Act before the Arbitral Tribunal, the petitioners not having raised an issue of jurisdiction under Section 16 within the time contemplated under the said provision, the petitioners cannot be allowed to raise the issue of jurisdiction at this stage in the ground of alleged fraud or that there were serious allegations of fraud allegedly committed by the respondent no.1 at this stage. The written statement by the petitioners were filed after the date of filing of charge-sheet. The petitioners had also filed additional written statement after filing of charge-sheet and FIR. However, no such documents were annexed even in the additional written statement filed by the petitioners. In support of this submission, learned Senior Counsel placed reliance on the judgment of Supreme Court in case of ***MSP Infrastructure Limited v/s. Madhya Pradesh Road Development Corporation Ltd., (2017) 13 SCC 713*** and in particular paragraphs 13 to 16.

28. It is submitted by the learned Senior Counsel that though liberty to produce the documents was expressly waived by CIDCO and by necessary implication by KIDC and State of Maharashtra, the petitioners have filed the notice of motion belatedly at this stage, which cannot be entertained by this Court.

29. It is submitted by the learned Senior Counsel that since there was no foundation laid about such alleged fraud alleged to have been committed by the respondent no.1 before the Arbitral Tribunal or even in these arbitration petitions, this Court cannot permit the petitioners to raise such arguments for the first time at this stage without any foundation in the pleadings or in the evidence but only by an oral argument at this stage of hearing of the arbitration petition under Section 34 of the Arbitration Act. He submits that the allegations and the charges in the charge-sheet are not proved till date and thus even on that ground, no reliefs for production of those documents can be pressed by the petitioners at this stage. Since, the petitioners are not relying upon the contents of those documents, the production of those documents is even otherwise not required.

30. Learned Senior Counsel invited my attention to the reply of KIDC to the application for amendment of claim filed by the respondent no.1 and in particular paragraph 33 in support of his submission that even in the said reply to the said application, there was no prayer before the Arbitral Tribunal to take those documents on record.

31. Learned Senior Counsel for the respondent no.1 invited my attention to paragraph 23 of the affidavit in lieu of examination-in-chief filed

by Mr. Dhananjay M. Godse, who was working as Executive Engineer with KIDC, before the Arbitral Tribunal and would submit that in the said affidavit of evidence only an allegation was made that the partners of respondent no.1 are facing the criminal prosecution. In cross-examination of the said witness also though an opportunity was available to the said witness, neither the said charge-sheet nor the FIR was confronted to the said witness in evidence before the Arbitral Tribunal.

32. It is submitted by the learned Senior Counsel that allegations of fraud have to be serious and complex in nature to fall under the category of “non-arbitrable”. He submits that the allegations made in the proceedings before the Arbitral Tribunal by each of the petitioners were totally vague and were not serious or complex in nature and thus were not non-arbitrable. In support of this submission, learned Senior Counsel placed reliance on the judgment of Supreme Court in case of ***Rashid Raza v/s. Sadaf Akhtar, 2019 SCC OnLine SC 1170*** and in particular paragraph 5. It is submitted that allegations of fraud touch upon the internal affairs of the parties *inter-se* having no implication in the public domain. The dispute raised between the parties even involving allegations of fraud are arbitrable.

33. Learned Senior Counsel placed reliance on the judgment of Delhi High Court in case of ***Union of India v/s. Delhi Paper Products Pvt. Ltd., 2018 SCC OnLine Del 12230*** and in particular paragraphs 31 to 35 of the said judgment and would submit that the Delhi High Court after adverting to the judgment of Supreme Court in case of ***A. Ayyasamy*** (supra) has held that allegations against the supplier which include allegations of fraud and forgery are held to be arbitrable in nature. The allegations were

not of such a nature, which involve or require a complex investigation. He submits that this judgment squarely applies to the facts of this case.

34. Learned Senior Counsel placed reliance on the judgment of Supreme Court in case of ***Ameet Lalchand Shah and others v/s. Rishabh Enterprises and another, (2018) 15 SCC 678*** and would submit that mere allegations of fraud were not sufficient for not referring the dispute to arbitration. The same principles would apply even while considering an application under Section 34 of the Arbitration Act. Learned Senior Counsel placed reliance on the judgment of Supreme Court in case of ***State of Bihar v/s. Divesh Kumar Chaudhary and another, (2018) 16 SCC 817*** and in particular paragraph 2 and would submit that similar allegations were rejected by the Supreme Court in the said judgment. He also placed reliance on the order passed by the Supreme Court in case of ***Bihar State Food and Civil Supplies Corporation Ltd. and Ors. v/s. Sadhna Kumar*** passed on 29th January, 2018 in ***Special Leave Appeal (C) No. 450 of 2018*** and would submit that in the said judgment, the Supreme Court had made it clear that pendency of arbitral proceedings would not affect the criminal proceedings, including the investigation. He submits that any finding rendered by the Arbitral Tribunal even on the serious allegations of fraud and forgery would not hamper the ongoing criminal proceedings and *vice-versa*.

35. Learned Senior Counsel placed reliance on the judgment of Supreme Court in case of ***A. Ayyasamy v/s. A. Paramasivam, (2016) 10 SCC 386*** and in particular paragraphs 15, 16, 18, 21, 26, 31 to 33, 45.1, 45.2 and 55 in support of the submission that even if there are allegations of fraud, Arbitral Tribunal does not cease to have jurisdiction to decide such

allegations of fraud. The petitioners had not made out a case that the allegations made by the petitioners of alleged fraud against the respondent no.1 were of such a nature that the same would not be arbitrable and could not be decided by the Arbitral Tribunal. The petitioners did not point out any alleged seriousness of allegations in the pleadings before the Arbitral Tribunal or before this Court.

36. Learned Senior Counsel placed reliance on the judgment of Delhi High Court in case of ***Hindustan Construction Co. Ltd. v/s. Impex Infrastructure (P) Ltd., 2019 SCC OnLine Del 9981*** and particularly paragraphs 8 and 9 and would submit that the plea of fraud now sought to be raised in these notices of motion by the petitioners not having been raised before the Arbitral Tribunal cannot be allowed to be raised at this stage, in the petition filed under Section 34 of the Arbitration Act. He placed reliance on the judgment of this Court in case of ***Pushpa Purushottam Waghade v/s. Additional Commissioner, Amravati, 2008(5) Mh.L.J. 104*** wherein this Court has held that the practice of arguing the points without foundation needs to be deprecated. He submits that the allegations of fraud thus now made and production of documents in support of such allegations now sought to be produced at this stage, cannot be permitted by this Court.

37. Mr. Vikram Nankani, learned Senior Counsel for the respondent no.1 adopted the arguments made by Mr. A.V. Anturkar, learned Senior Counsel for the respondent no.1 and made additional submissions. It is submitted by the learned Senior Counsel that the FIR and charge-sheet were filed by the authority admittedly prior to the date of the petitioners filing amended written statement. There was a reference made to the FIR and

charge-sheet in the amended written statement, however copies thereof were not annexed nor those documents were produced at any stage before the Arbitral Tribunal, though sufficient opportunities were available to the petitioners to produce those documents. Those documents were also available with the petitioners when the Arbitral Tribunal had framed issues. Learned Senior Counsel also laid emphasis on the principles laid down by the Supreme Court in case of **Fiza Developers and Inter-Trade Private Limited** (supra), in case of **Emkay Global Financial Services Limited** (supra) and in case of **M/s. Canara Nidhi Limited** (supra) and would submit that none of these judgments permitted the production of any new documents by the petitioners at the stage of the Court hearing and application under Section 34 of the Arbitration Act.

38. Learned Senior Counsel relied upon the judgment of Delhi High Court in case of **Girdhar Sondhi v/s. Emkay Global Financial Services Limited, 2017 SCC OnLine Del 12758** and would submit that in the said matter before the Delhi High Court, there were no allegations of fraud, which were sought to be raised by the petitioners in these notices of motion. The issues involved before the Delhi High Court were totally different. In the matter before the Supreme Court in the Special Leave Petition arising out of the said judgment delivered by the Delhi High Court and reported in (2018) 9 SCC 49 were totally different. The said judgment would not even remotely apply to the facts of this case. It is submitted that the said judgment of the Supreme Court is not an authority on the proposition that though those documents were in position of the petitioners, they did not produce before the Arbitral Tribunal but can still be allowed to be produced at the stage of arguing an application under Section 34 of the Arbitration Act. He

submits that in the said judgment delivered by the Supreme Court, the judgment of Delhi High Court came to be set aside.

39. It is submitted by the learned Senior Counsel that the notice of motion filed by the KIDC is not even maintainable. In support of this submission, learned Senior Counsel placed reliance on paragraph 4 of the affidavit in support of the notice of motion and would submit that the applicant has falsely alleged that the Arbitral Tribunal was aware of the charge-sheet and the FIR, alleging that the charge-sheet was the document which had always been to the knowledge of all the parties and also the Arbitral Tribunal during the course of the proceedings and the same were specifically disclosed and placed before the Arbitral Tribunal. He submits that this allegation of the KIDC in the affidavit in support is *ex-facie* false and factually incorrect. He submits that even if in the letter of termination of contract a reference to the charge-sheet was made, the charge-sheet as a document would not come on record automatically. If the petitioners wanted to rely upon the said charge-sheet and the FIR and the contents thereof, they were required to prove the contents thereof by leading appropriate evidence before the Arbitral Tribunal.

40. It is submitted by the learned Senior Counsel that though an application was made before this Court for replacement of one of the arbitrator by one of the parties, after the date of filing FIR by the authority, even at that stage, no liberty was sought to produce the said FIR before the Arbitral Tribunal. No application under Section 16 of the Arbitration Act was made, even thereafter, before the Arbitral Tribunal. Learned Senior Counsel invited my attention to the paragraph 7 of the affidavit in support of

the notice of motion and would submit that the KIDC has failed to show, which part of Section 34(2)(a) of the Arbitration Act was sought to be invoked and was attracted to the facts of this case by the KIDC. The reference to Section 34(2)(b)(i) made by the KIDC was only in the written argument and not in affidavit. The said charge-sheet or FIR were not even the subject matter of evidence and thus could not be relied upon at the stage of arguing an application under Section 34 of the Arbitration Act.

41. Learned Senior Counsel relied upon paragraph 18 of the judgment of the Supreme Court in case of ***M/s. Canara Nidhi Limited*** (supra) and would submit that since the condition precedent for producing a document or evidence is not complied with by the petitioners, no reliefs can be granted by this Court even otherwise in the notices of motion filed by the petitioners. He submits that none of the petitioners produced those documents in the arbitral proceedings and waited till the outcome of the arbitral proceedings and thus cannot be allowed to now raise a new plea or to produce new documents.

42. Learned Senior Counsel invited my attention to allegations made in paragraphs in 2 and 3 of the affidavit in support of Notice of Motion No. 2192 of 2019 filed by the State of Maharashtra and would submit that even in the said affidavit, an incorrect allegation is made that the FIR and the charge-sheet were on record before the Arbitral Tribunal. The allegations now made in paragraph 6 of the affidavit in support of said notice of motion were not even pleaded in the written statement filed by any of the petitioners. Learned Senior Counsel placed reliance on Section 34(2)(a) of the Arbitration Act and would submit that the question of furnishing any

proof arises only in respect of matter falling under the said provision. The petitioners have to satisfy under which part of Section 34(2)(a)(i) to (vi), the case of the petitioners would fall for production of documents at this stage under Section 34 of the Arbitration Act.

43. It is submitted by the learned Senior Counsel that in any event, the findings rendered by the Arbitral Tribunal even if would have been rendered on the alleged fraud, the same would not have been binding on the criminal courts. Learned Senior Counsel for the respondent no.1 invited my attention to the statement of defence filed by the KIDC to the amended statement of claim before the Arbitral Tribunal and would submit that the said statement of defence was admittedly filed after issuance of charge-sheet by the authority. He submits that even in the written statement to the amended statement of claim, though there was a reference of FIR and charge-sheet at pages 353, 363 and 367 of Volume II, the petitioners did not bother to place on record the said FIR and charge-sheet at that stage or at the stage of leading of oral evidence by the petitioners.

44. Learned Senior Counsel also invited my attention to the averments made by the petitioners in paragraph 342 at page 371 of Volume II contending that the petitioners were unable to offer any comment about the criminal case, since the matter was subjudice. It was not the case of the petitioners at any stage before the Arbitral Tribunal that the petitioners were not able to proceed with the arbitral proceedings in view of any alleged serious charges of fraud against the respondent no.1 The second additional amended written statement was also filed by the petitioners after charge-sheet was filed by the Anti Corruption Bureau. No stand was taken by the

petitioners even at that stage that in view of the alleged serious allegations of fraud, claims made by the respondent no.1 were not arbitrable.

45. Learned Senior Counsel invited my attention to the affidavit in lieu of examination-in-chief filed by Mr. Dhananjay M. Godase, notarized on 29th January, 2019, who was working as Executive Engineer, Raigad Irrigation Division, Kolad as one of the witness examined by the KIDC. My attention is invited to the paragraph 26 of the said affidavit in which a reference was made to filing of the cases with the Anti Corruption Bureau and also to the cross-examination of the said witness. It is submitted that even in the said affidavit in lieu of examination-in-chief filed by the witness, examined by the KIDC, said witness did not bother to produce the charge-sheet or FIR even at that stage in evidence.

46. Learned Senior Counsel invited my attention to the affidavit of evidence filed by the witness examined by the CIDCO and also to a portion of his cross-examination. He submits that even in the said affidavit of evidence filed by the said witness, there was no reference to either FIR or charge-sheet and did not produce the said charge-sheet or FIR in evidence. Learned Senior Counsel invited my attention to the written arguments filed by KIDC dated 1st February, 2019 before the Arbitral Tribunal and would submit that there was no issue of the arbitrability on the ground of alleged serious allegations in the FIR or charge-sheet raised by the KIDC even at that stage. The KIDC as well as the State of Maharashtra has introduced new case of arbitrability of the disputes raised by the respondent no.1 on the ground of alleged serious allegations of fraud referred in the said charge-sheet or FIR against the respondent no.1 only in the notice of motion which

cannot be permitted.

47. Learned Senior Counsel placed reliance on the Judgment of Supreme Court in case of ***Associate Builders v/s. Delhi Development Authority (2015) 3 SCC 49*** and in particular paragraph 17 in support of the submission that Section 34(2)(a) of the Arbitration Act does not talk about the merits of the award and it is only when the Court comes to the conclusion that the award being in conflict with the public policy of India, the merits of the arbitral award are to be looked into under certain specified circumstances by the Court. He submits that the rule of evidence is procedural in nature and not substantive. No case is made out by any of the petitioners that the provisions of the Arbitration and Conciliation (Amendment) Act, 2019 are attracted to the facts of this case.

48. Mr.S.G. Aney, learned Senior Counsel for the KIDC in rejoinder tendered a note of the brief submission. He invited my attention to the paragraph 21 of the judgment in case of ***Emkay Global Financial Services Ltd.*** (supra) and would submit that the Supreme Court in the said judgment has not commented upon the scope of Section 34 post amendment. Arbitration and Conciliation (Amendment) Bill 2018 was not even passed on the date of the said judgment delivered by the Supreme Court.

49. Learned Senior Counsel distinguished the judgment of Supreme Court in case of ***M/s. Bharat Barrels and Drum Mfg. Co.*** (supra) and invited my attention to paragraphs 6 and 7 of the said judgment and would submit that the procedural rules become substantive in certain circumstances. Under Section 34(2)(b) of the Arbitration Act, the power is

conferred upon the Court to set aside the award. Without reading Section 34(2)(b) of the Arbitration Act, Section 34(2)(a) cannot be read in context of Section 34(2)(a) of the Arbitration Act is also a substantive provision. The petitioner is entitled to rely upon the additional material under Section 34(2)(a) of the Arbitration Act. The said provision gives substantive right to the petitioner to rely upon additional material even at the stage of arguing an application under Section 34 of the Arbitration Act. There is no dispute that there was a reference made to FIR and charge-sheet in various pleadings and also in some of the documents including Government Resolution, Letter of Termination, etc.

50. It is submitted that if a procedural law affects substantive rights such as amendment to Section 34 by Arbitration and Conciliation (Amendment) Act, 2019, it must operate prospectively. Learned Senior Counsel gave another illustration that in a change in jurisdiction of any Court, cannot be said to be a procedural question. The issue of jurisdiction is necessarily a substantive issue, such as the jurisdiction to take on record the pleadings and material before the Arbitral Tribunal. It is submitted that this Court has thus ample power to take the documents sought to be produced by KIDC in the Notice of Motion under Section 34(2)(a) by exercising power under Section 34(2)(b) of the Arbitration Act. Learned Senior Counsel distinguishes the judgments relied by Mr. Anturkar, learned Senior Counsel for the respondent no.1 on the ground that none of those judgments would apply to the facts of this case. He submits that the arbitral award itself acknowledges the existence of the Government Resolution which admittedly referred to FIR and charge-sheet, however entertained the claims made by the respondent no.1 in spite of such admitted factual position on record.

51. Mr. Nankani, learned Senior Counsel for the respondent no.1 in rejoinder placed reliance on the judgment of this Court in case of ***Micro & Small Enterprises Facilitation Council (2016) SCC OnLine Bom 10039*** and in particular paragraphs 15 to 17 in support of the submission that since the petitioners did not even demonstrate before this Court that there were serious allegations of fraud, such issue cannot be allowed to be raised now. He submits that the principles of Order XLI, Rule 27 cannot be read into in Section 34 of the Arbitration Act. Section 34(2)(b) of the Arbitration Act has to be given a very narrow meaning.

52. Mr. Aney, learned Senior Counsel for the KIDC distinguished the judgment of this Court reported in (2016) SCC Bom 10039 on the ground that the said judgment was delivered by this Court under Section 11 of the Arbitration Act and the powers of Court under Sections 11 and 34 are totally different. Different consideration applies to applications filed under Sections 11 and 34 of the Arbitration Act.

REASONS AND CONCLUSION :

53. The first question that arises for consideration of this Court in these two Notices of Motion is whether Section 34 (2)(a) as amended by Act 33 of 2019 i.e. Arbitration and Conciliation (Amendment) Act, 2019 thereby substituting the words “furnishes proof that” by the words “establishes on the basis of the record of the arbitration tribunal that” apply to the facts of this case *inter-alia* praying for permission to produce additional documents in the petition filed under Section 34 of the Arbitration Act or not.

54. There is no dispute that the Arbitral Tribunal was constituted pursuant to an order dated 17th July, 2015 passed by the Division Bench of this Court in the writ petition filed by the respondent no.1. There is no dispute that Section 34 of the Arbitration Act, was amended by the said Arbitration and Conciliation (Amendment) Act, 2019, was notified on 30th August, 2019. Section 87 inserted by Act 33 of 2019 w.e.f. 23rd October, 2015 provides that unless the party otherwise agrees the amendment made to the Arbitration and Conciliation Act, 1996 by the Arbitration and Conciliation (Amendment) Act, 2015 shall not apply to arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and would not apply to the facts of this case. In view of the fact that the amendment to Section 34(2)(a), which is in question in this case came to be amended only by Arbitration and Conciliation (Amendment) Act, 2019, in my view, the parties will be governed by the provisions of the unamended Section 34(2)(a) for the Arbitration and Conciliation Act, 1996 in force prior to 30th August, 2019.

55. The petitioners in these two Notices of Motion thus would have to demonstrate before this Court whether the petitioners have furnished any proof that it would fall under Section 34(2)(a)(i) to (vi) of the Arbitration and Conciliation Act, 1996. Section 34(2)(b) of the Arbitration Act will have to be read with Section 34(2)(a) of the Arbitration Act.

56. The question that arises for consideration of this Court now is whether the petitioners in any of the Notices of Motion filed by the petitioners have produced any such proof that the arbitral award could be set

aside on any of the ground mentioned in Section 34(2)(a)(i) to (vi) or Section 32(2)(b).

57. The following facts which in my view are undisputed will be relevant for the purpose of deciding this two Notices of Motion:-

(a) There is no dispute that the FIR was admittedly lodged in the month of August, 2015 and the charge-sheet was filed in the month of June, 2016. Written statement was filed by the petitioners. No issues of jurisdiction was raised by the petitioners under Section 16 of the Arbitration Act contending that in view of there being alleged serious allegations of fraud, the claims made by the respondent no.1 were not arbitrable.

(b) In the additional written statement filed by the petitioners after filing of charge-sheet and FIR also, no such plea of jurisdiction was raised by the petitioners in the said written statement. Even at that stage, no application under Section 16 of the Arbitration Act was filed by the petitioners.

(c) The affidavit in lieu of examination-in-chief was filed by the witnesses examined by the respondent no.1 including one of the Officer of KIDC as one of the witness. Neither charge-sheet nor FIR was confronted to the said witness examined by the respondent no.1.

(d) The petitioners had also examined a witness after completion of the evidence of the respondent no.1. Even through the said witness, neither

charge-sheet nor FIR was sought to be produced before the Arbitral Tribunal by the petitioners.

(e) An Application was filed before this Court for substitution of one of the member of the Arbitral Tribunal at later stage. Even at that stage, which was much after filing of FIR and charge-sheet, the petitioners did not raise any issue of jurisdiction of the Arbitral Tribunal on the ground that there were alleged serious allegations of fraud in the FIR or charge-sheet alleged to have been committed by the respondent no.1 or some of the Officers of KIDC and thus no new arbitrator could be appointed in place of one of the arbitrator, who had recused.

(f) CIDCO had sent a copy of the charge-sheet in the criminal case to few of the arbitrators and not to all the members of the Arbitral Tribunal, the CIDCO filed an affidavit dated 23rd January, 2019. CIDCO, however apologized to the Arbitral Tribunal for sending such email containing charge-sheet with a request not to take cognizance of the said document. KIDC and State Government though were parties to the arbitral proceedings did not seek any permission to produce the documents, which are now sought to be produced in these two Notices of Motion, at this belated stage.

(g) No grounds are raised in the Arbitration Petition to the effect that the claims made by the respondent no.1 were not arbitrable, in view of there being any serious allegations of fraud allegedly committed by the respondent no.1 or by some of the Officers of KIDC.

(h) Though the petitioners in all the three Arbitration Petitions had made lengthy arguments while arguing the petitions under Section 34 of the

Arbitration Act before this Court and concluded their arguments, till such stage no application was made for production of those documents before this Court. The respondent no.1 has already commenced the arguments in response to the arguments advanced by the petitioners through their respective counsel. Only during the course of arguments of the respondent no.1, these two Notices of Motion came to be filed by the petitioners *inter-alia* praying for permission to produce the additional documents.

(i) Though, the State Government has filed copy of charge-sheet along with arbitration petition, no such copy of the charge-sheet or FIR was sought to be produced before the Arbitral Tribunal at any stage, till the conclusion of arguments before the Arbitral Tribunal and upto the date of the Arbitral Tribunal rendering an arbitral award and thereafter till conclusion of arguments of all the petitioners.

58. A perusal of the aforesaid sequence of events and undisputed facts would clearly indicate that though there were several opportunities available to the petitioners to produce the copy of the FIR and charge-sheet on record of the arbitral proceedings, though CIDCO at one stage had provided the copies of the charge-sheet to two of the Arbitrators out of five Arbitrators and withdrawn those documents with a request not to consider those documents, the other petitioners did not take any steps to produce those documents. It is not in dispute that each of the petitioners had copies of the said charge-sheet and FIR in their possession.

59. Even during the course of arguments advanced before this Court at the stage of hearing of these two Notices of Motion, it is the case of the

petitioners that a copy of the FIR and charge-sheet are sought to be produced before this Court not to prove the contents thereof but only to show before this Court that there were serious allegations of fraud made in the said charge-sheet and FIR against the respondent no.1 and some of the Officers of KIDC and thus in view of those serious allegations, the Arbitral Tribunal ought not to have decided the claims made by the respondent no.1 and ought to have referred the parties to Civil Court for adjudication.

60. There is no dispute that even though the petitioners in these two Notices of Motion did not seek to rely upon the contents of the said charge-sheet and FIR but seek this Court to take cognizance of the allegations. It is the case of the petitioners that there were serious allegations of fraud in the said charge-sheet and FIR and if considered by this Court even for that limited purpose, this Court can take a view that in view of such serious allegations of fraud as can be reflected from the FIR and charge-sheet were sufficient to oust the jurisdiction of the Arbitral Tribunal to adjudicate upon the claims made by the respondent no.1. In my view, even if the said charge-sheet and FIR are simpliciter taken on record, neither parties nor this Court can rely upon the contents of the said charge-sheet and FIR, in view of the fact that the said charge-sheet and FIR were not tendered in evidence at any stage though various opportunities were available to the petitioners.

61. In my view, those documents cannot be considered at this stage as proof even for a limited purpose to render a finding that there were serious allegations of fraud in the said charge-sheet or FIR. It is made clear that this observation made by this Court will not affect the ongoing pending criminal investigation against the respondent no.1 and others who are sought

to be implicated in the said FIR and charge-sheet and those proceedings can be decided independently on its own merits.

62. Supreme Court in case of ***Emkay Global Financial Services Limited*** (supra) has held 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 the 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. The Supreme Court adverted to its earlier judgment in case of ***Fiza Developers and Inter-Trade Private Limited*** (supra). The Supreme Court in the said judgment in case of ***Emkay Global Financial Services Limited*** (supra) also considered the pending Bill No. 100 of 2018 and held that if the said Bill would be passed, then evidence at the stage of a Section 34 application will be dispensed with altogether.

63. Even if I accept the submission of Mr. Nankani, learned Senior Counsel for the respondent no.1 that there was no such issue in such proceedings before the Supreme Court and thus the said observation made by the Supreme Court in paragraph 21 of the said judgment would not be considered as a *ratio decidendi*, in my view even if the said observation is considered as *obiter dicta*, the same would be binding on this Court.

64. Supreme Court in case of ***Fiza Developers and Inter-Trade***

Private Limited (supra) has held that an application under Section 34 of the Arbitration Act is adversarial in nature. It is held that while hearing 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 also held in the said judgment that an application 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.

65. In a recent judgment delivered by Supreme Court in case of **M/s. Canara Nidhi Limited v/s. M. Shashikala and Others** delivered on 23rd September, 2019 in **Civil Appeal No. 7544-7545 of 2019** after adverting to the earlier judgment in case of **Fiza Developers and Inter-Trade Private Limited** (supra) and **Emkay Global Financial Services Limited** (supra), the Supreme Court has considered a situation where the respondents who had

filed an affidavit along with application filed under Section 151 of the Code of Civil Procedure, 1908 to adduce additional evidence had not pointed out or disclosed any specific documents for evidence required to be produced except stating that the said respondents intended to adduce additional evidence or otherwise the said respondents would be subjected to hardship in the arbitration suit filed under Section 34 of the Arbitration Act. There were no specific averments in the affidavit as to the necessity and relevance of the additional evidence sought to be adduced.

66. In that matter also it was one of the contention of the respondent no.1 that both the parties had adduced oral and documentary evidence and various documents were exhibited in the arbitral proceedings. The Supreme Court held that in the arbitral proceedings, the parties had sufficient opportunity to adduce oral and documentary evidence. The High Court had not kept in view that respondent nos.1 and 2 had not made out grounds that it was an exceptional case to permit them to adduce evidence in the application under Section 34 of the Arbitration Act. The directions issued by the High Court thus amounted to retrial on the merits of the issues decided by the arbitrator. The facts before the Supreme Court in case of *M/s. Canara Nidhi Limited* (supra) are identical to the facts of this case. The principles laid down by the Supreme Court in the said case would apply to the facts of this case.

67. In my view, the petitioners thus having sufficient opportunity to produce the charge-sheet and the FIR before the Arbitral Tribunal though there was a reference to those documents in the Government Resolution issued by the State of Maharashtra and in the letter of termination of the

agreement, cannot be allowed to produce the document at this stage. It is not the case of the petitioners that they did not possess the copies of FIR and charge-sheet earlier. The petitioners now cannot seek production of those documents even for a limited purpose before this Court to render a finding that there were serious allegations of fraud made in the said FIR or the charge-sheet to oust the jurisdiction of the Arbitral Tribunal to decide the claims made by the respondents.

68. Supreme Court in case of **A. Ayyasamy** (supra) has held that mere allegations of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement before the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues could be decided only by the Civil Court on the appreciation of the voluminous evidence that needs to be produced. The Court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement or arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself which contains the arbitration clause or the validity of the arbitration clause itself.

69. It is held by the Supreme Court that the reverse position thereof would be that where there are simple allegations of fraud touching upon the

internal affairs of the party *inter se* and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. It is held that while dealing with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not. In the facts of that case, the Supreme Court held that the only allegation of fraud that was levelled is that the appellant had signed and issued a cheque of Rs.10,00,050/- in favour of his son without the knowledge and consent of the other partners. It was mere a matter of accounts, which could be looked into and found out even by the arbitrator and does not involve any complex issue.

70. If according to the petitioners there were serious allegations of fraud against the respondent no.1 and Officers of KIDC or any other party, which had bearing on the execution of the contract between the parties including the arbitration agreement, the petitioner ought to have made such serious allegations in various pleadings filed by the petitioners from time to time and ought to have placed the FIR and the charge-sheet on record by producing those documents through their witness. Since, this Court cannot consider the contents of the said charge-sheet and the FIR even to ascertain at this stage whether there were any serious allegations of fraud or not in the said two documents, reliefs as prayed by the petitioners to give permission to produce those documents at this stage, cannot be granted. This Court is thus unable to make any comment on the seriousness of the allegations of fraud or otherwise in the said charge-sheet or FIR, at this stage. The investigation arising out of the said FIR and charge-sheet against the

respondent no.1 and few others is already pending and thus the seriousness of allegation of fraud, if any and the merits of those charges can be investigated in the said pending criminal investigation.

71. Supreme Court in case of ***Ameet Lalchand Shah and others*** (supra) after adverting to its earlier judgment in case of ***A. Ayyasamy*** (supra) has held that it is only where serious questions of fraud are involved, the arbitration can be refused. Supreme Court in the said judgment considered the pendency of a criminal petition arising out of the criminal case registered against the appellants in that matter in a FIR dated 5th March, 2015 before the Economic Offences Wing, Delhi. It was observed by the Supreme Court that the Court did not propose to express any views in that regard lest, it would prejudice the parties. Suffice to say that the allegations cannot be said to be so serious to refuse to refer the parties to the arbitration. In any event, the arbitrator appointed can very well examine the allegations regarding fraud. The Supreme Court accordingly was pleased to set aside the order passed by the High Court and appointed an Arbitral Tribunal in the said proceedings though a writ petition arising out of the FIR was pending in the High Court.

72. In my view, it is not the case of the petitioners that those documents came to the notice of the petitioners for the first time after the said arbitral award came to be rendered by the Arbitral Tribunal. It was not the case of the petitioners that if those documents would not come to the notice of the petitioners during the pendency of the arbitral proceedings, the petitioners could have produced those documents in support of their contention that there being serious allegations of fraud made in the FIR and

charge-sheet and thus the jurisdiction of the Arbitral Tribunal was ousted on that ground. In my view, the petitioners thus were not deprived of producing those documents at the stage of producing those documents before the Arbitral Tribunal though had opportunity to produce it. This Court thus cannot even look into those documents even to ascertain whether there were any serious allegations made in the FIR or charge-sheet.

73. Supreme Court in case of **MSP Infrastructure Limited** (supra) has held that a party is bound, by virtue of sub Section 2 of Section 16, to raise any objection as to the jurisdiction of the Tribunal only before or at the time of submission of its statement of defence, and at any time thereafter it is expressly prohibited. Suddenly, it cannot raise the question after it has submitted to the jurisdiction of the Tribunal and invite an unfavourable award. In my view, since the petitioners did not raise any issue of jurisdiction under Section 16 of the Arbitration Act on the ground that there were serious allegations of fraud in the charge-sheet or FIR against the respondent no.1 and others and that in view of those allegations, jurisdiction of the Arbitral Tribunal was ousted, this issue cannot be allowed to be raised in the Notices of Motion now filed and that also after conclusion of the arguments of the petitioners. The principles of law laid down by the Supreme Court in the case of **MSP Infrastructure Limited** (supra) apply to the facts of this case. I am respectfully bound by the said judgment.

74. In my view, Mr. Anturkar, learned Senior Counsel for the respondent no.1 is right in his submission that since there was no foundation laid about such alleged fraud alleged to have been committed by the respondent no.1 before the Arbitral Tribunal or even in these arbitration

petitions, this Court cannot permit the petitioners to raise such arguments for the first time at the stage of the final hearing of the arbitration petitions under Section 34 of the Arbitration Act.

75. Supreme Court in case of **Rashid Raza** (supra) has held that there is a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to “simple allegations”. It is held that if the allegations are simple allegations as there are no allegations of fraud, which would vitiate the contract and in particular the arbitration clause, such disputes raised between the parties are arbitrable. In my view, since the contents of the FIR and charge-sheet even otherwise cannot be looked into in view of those documents not having been produced in evidence, this Court cannot make any comment whether there are any serious allegations in the FIR or charge-sheet against the respondent no.1 and others.

76. Delhi High Court in case of **Union of India v/s. Delhi Paper Products Pvt. Ltd.** (supra) after adverting to judgment of Supreme Court in case of **A. Ayyasamy** (supra) has held that the allegations in that case before the Delhi High Court were not of such a nature, which involve or require a complex investigation. It was the conduct of the supplier, which was to be adjudged on the basis of the documents supplied by it or receiving payment, which has to be tested by the Arbitrator and thus the nature of allegations were not of such a nature, so as to render them as non-arbitrable.

77. Supreme Court in case of **Bihar State Food and Civil Supplies Corporation Ltd. and Ors.** (supra) had made it clear that pendency of arbitration proceedings will not affect criminal proceedings, including the

investigation. In my view, even if the petitioners are not able to demonstrate before this Court at this stage that there were serious allegations of fraud upon the respondent no.1 and others, any observation made by this Court in this judgment that petitioners have failed to demonstrate that there are serious allegations of fraud against the respondent no.1 and others would in any event not hamper the criminal investigation. Delhi High Court in case of ***Hindustan Construction Co. Ltd.*** (supra) has held that if a specific plea is not raised before the Arbitral Tribunal, such plea cannot be allowed to be raised in the petition under Section 34.

78. In so far as the submission of Mr. Nankani, learned Senior Counsel for the respondent no.1 that Notices of Motion filed by the petitioners are not maintainable in view of the allegations of the petitioners in the affidavit in support of notice of motion that the Arbitral Tribunal was aware of the charge-sheet and FIR or that the charge-sheet was the document which had always been in the knowledge of all the parties and also the Arbitral Tribunal is concerned, there is no dispute that there was a reference to FIR and charge-sheet in the pleadings as well as in the Government Resolution and the Letter of Termination issued by KIDC. However, at the same time, it is also an admitted position that a copy of the said charge-sheet or FIR was never produced on record in evidence by the petitioners. In my view, there is thus no substance in the submission of the learned Senior Counsel for the respondent no.1 that a Notice of Motion deserves to be dismissed on this ground.

79. In my view, Mr. Nankani, learned Senior Counsel for the respondent no.1 is right in his submission that the KIDC and State of

Maharashtra have failed to show, which part of Section 34(2)(a) of the Arbitration Act was sought to be invoked in the Notice of Motion filed by KIDC or by the State of Maharashtra. The reference of Section 34(2)(b)(i) made by the KIDC is only in the written argument filed before this Court in the Notice of Motion and no reference is made in the affidavit in support of the Notice of Motion. In my view, Ms. Geeta Shastri, Additional Government Pleader is not correct in her submission that the FIR and the charge-sheet were on record before the Arbitral Tribunal. Mr. Nankani, learned Senior Counsel for the respondent no.1 is right in his submission that the petitioners who seek to rely upon the additional documents have to satisfy under which part of Section 34(2)(a)(i) to (vi) of the Arbitration Act, the case of the petitioners would fall for production of documents even at this stage. The learned Senior Counsel for the petitioners could not point out as to which part of Section 34(2)(a)(i) to (vi) is attracted to the facts of this case for production of additional documents.

80. A perusal of the averments made in paragraph 342 at page 371 of Vol. II clearly indicates that it was the case of the petitioners that the petitioners were unable to offer after any comment about the criminal case, since the matter was subjudice. It was also not the case of the petitioners at any stage before the Arbitral Tribunal that in view of the alleged serious charges of fraud against respondent no.1 and others, the petitioners were unable to proceed with the arbitral proceedings. There is no dispute that the second additional written statement was filed by the petitioners after the date of filing of charge-sheet by the Anti Corruption Bureau. No such plea was however taken even in the second additional amended written statement.

81. A perusal of the written arguments filed by the KIDC before the Arbitral Tribunal on 1st February, 2019 also indicates that there was no such plea of arbitrability raised by the petitioners on the ground of alleged serious allegations in the FIR or charge-sheet raised by the KIDC even at that stage. In my view, the petitioners thus cannot be allowed to introduce a new case or produce additional documents at this stage, in the circumstances set out aforesaid.

82. In so far as the submission of Mr. S.G. Aney, learned Senior Counsel for KIDC that there were several serious allegations of fraud made in the charge-sheet, which are in public domain against the respondent no.1 and which are *ex-facie* of complex nature is concerned, in my view since the petitioners have not produced the FIR and charge-sheet in spite of several opportunities available to the petitioners, those documents thus cannot be allowed to be produced at this stage, in these Notices of Motion and thus no comments can be made by this Court about the alleged seriousness of the allegations of fraud made, if any, in the said charge-sheet. I am thus not inclined to accept the submission of the learned Senior Counsel for the KIDC that the entire arbitration agreement resulted from the order dated 17th July, 2015 passed by this Court referring all disputes in Writ Petition No. 11019 of 2013 to arbitration be rendered invalid for the aforesaid reasons. There is no substance in the submission of the learned Senior Counsel for the KIDC that the petitioners have already laid foundation in respect of the alleged serious allegations of fraud against the respondent no.1 and others in the arbitral proceedings.

83. In my view, mere reference to FIR or charge-sheet in the

Government Resolution or the Letter of Termination would not be conclusive to render any finding that the allegations made were serious allegations of fraud against the respondent no.1 and others in the charge-sheet or FIR, which would oust the jurisdiction of the Arbitral Tribunal. This Court having expressed its opinion that the parties to the case would be governed by the provisions of Section 34 prior to the date of the amendment inserted by Arbitration and Conciliation (Amendment) Act, 2019, this Court need not delve into the issue as to whether right of a party to offer the proof is procedural or substantive. Various judgments relied upon by the learned Senior Counsel for the petitioners and the respondent no.1 on this issue thus are not required to be dealt with specifically.

84. In my view though the petitioners are entitled to produce the proof under Section 34(2)(a) that arbitration award may be set aside on one of the grounds prescribed under Section 34(2)(a)(i) to (vi), the petitioners not having produced those additional documents such as FIR and charge-sheet in spite of various opportunities, no relief can be granted in favour of the petitioners in these Notices of Motion.

85. In so far as the submission of Mr. Anturkar, learned Senior Counsel for the respondent no.1 that the Notice of Motion itself is not maintainable in view of the Arbitration and Conciliation (Amendment) Act, 2019 by which the provisions of Section 34(2)(a) of the Arbitration Act are amended is concerned, in my view there is no merit in this submission of the learned Senior Counsel for the respondent no.1. Since, this Court of the view that this matter would be governed by unamended provision of Section 34 prior to the date of enactment of the Arbitration and Conciliation

(Amendment) Act, 2019, in my view, Notices of Motion filed by the petitioners cannot be dismissed on the ground of being not maintainable.

86. In my view, Mr. Anturkar, learned Senior Counsel for the respondent no.1 is right in his submission that since the petitioners did not produce the documents before the Arbitral Tribunal in spite of several opportunities, the petitioners cannot be allowed to produce those documents at this stage and that also after conclusion of the arguments of the petitioners at the stage of final hearing of the arbitration petition under Section 34 of the Arbitration Act and commencement of the arguments of the respondent no.1.

87. Since, the learned Additional Government Pleader had adopted most of the submissions advanced by Mr. S.G. Aney, learned Senior Counsel for the KIDC those arguments are not required to be dealt with by this Court again. In my view, Notices of Motion are devoid of merit.

88. For the reasons recorded aforesaid, I pass the following order:-

- a) Notice of Motion (L) No. 2007 of 2019 and Notice of Motion No. 2192 of 2019 are dismissed.
- b) It is made clear that this Court has not expressed any views on the issue as to whether there were any serious allegations of fraud against the respondent no.1 and others in the FIR or charge-sheet.

- c) It is made clear that the Investigating Authority shall not be influenced by the observations made by this Court in this order while rejecting the Notices of Motion, while carrying out the investigation pursuant to the charge-sheet or FIR and shall decide the same on its own merit.
- d) No order as to costs.

(R.D. DHANUKA, J.)