



ELP ARBITRATION UPDATE



SUPREME COURT: REFUSAL TO SET ASIDE AN ARBITRAL AWARD SINCE DELAY HAS NOT BEEN CONDONED UNDER SECTION 34 (3) WOULD FALL WITHIN SECTION 37(1)(C) OF THE ARBITRATION AND CONCILIATION ACT, 1996

*Chintels India Ltd. v. Bhayana Builders Pvt. Ltd.*¹

FACTS

- In *Chintels India Ltd.*², the Supreme Court determined whether an appeal was maintainable under section 37 (1)[c] of the Arbitration and Conciliation Act, 1996 (“**Act**”) from an order refusing to condone the appellant’s delay in filing an application under section 34 of the Act for setting aside the arbitral award.
- By an Order dated 4 June 2020 (“**Order**”), the Ld. Single Judge dismissed the application for condonation of delay in an application filed under section 34 of Act (“**Section 34 Application**”) to set aside an award dated 3 May 2019 (“**Award**”) and consequently dismissed the Section 34 Application itself.

SUBMISSIONS

- The Appellant contended that an appeal against the Order was maintainable under section 37 of the Act. Relying upon *Essar Constructions*³, the Appellant submitted that section 39 of the Arbitration Act, 1940 (“**1940 Act**”) is *in pari materia* with section 37 of the Act, and in that an appeal lies where a single Judge refuses to condone delay, resulting in an order refusing to set aside an arbitral award. Referring to the language of section 37(1)(c) of the Act, the Appellant submitted that there must be refusal to set aside an arbitral award “*under section 34*”, which

¹ *Chintels India Ltd. v. Bhayana Builders Pvt. Ltd.* 2021 SCC Online SC 80

² 2021 SCC Online SC 80

³ *Essar Constructions v. N.P. Rama Krishna Reddy* (2000) 6 SCC 94

includes section 34(3), under which a court may refuse to condone delay in filing an application under section 34. It differentiated an order refusing to condone delay from an order which condones delay, as the latter order cannot be said to impart any finality to the proceeding.

- On the other hand, the Respondent submitted that section 39 of the 1940 Act is materially different, and concerns itself with grounds that were made out under section 30 of the 1940 Act, which grounds were completely different from the grounds that could be made out under section 34(2) and (2A) of the Act. Therefore, section 37 needs to be interpreted on its own terms, and that consequently, this Court's judgment in *Essar Constructions* would not be applicable. Further, the Respondent contended as follows:
 - a. Section 5 of the Act and the Statement of Objects and Reasons for enacting the Act made clear that judicial intervention is to be minimal in the arbitration process. Section 37 of the Act carries out this object.
 - b. The non-obstante clause contained in section 37(1); and the grounds of appeal contained in section 37 are exhaustive, and makes explicit that an appeal shall lie only from the following orders “*and from no others*”.
 - c. An appeal, being a creature of statute, has to be read as the statute provides without expanding any of the words used. Section 37(1)(c) is clear and without any ambiguity - the expression “*under Section 34*” has to be read with the preceding words “*setting aside or refusing to set aside an arbitral award*”, and when so read, it is clear that the refusal to set aside the award can only be on merits and not on some preliminary ground which would then lead to a refusal to set aside the award.

FINDINGS AND OBSERVATIONS

Any delay beyond 120 days cannot be condoned under section 34 of the Act

1. The Supreme Court observed that an application under section 34 of the Act has to be in accordance with both Section 34 (2) and Section 34 (3) i.e. within the limitation period prescribed by Section 34 (3) and as per the grounds under Section 34 (2) and/or (2A) for setting aside such award. Hence, the application itself must be within time, and if not within a period of three months, must be accompanied with an application for condonation of delay, provided it is within a further period of 30 days. Referring to *Himachal Techno Engineers*⁴, the Supreme Court noted that it has made it clear that section 5 of the Limitation Act, 1963 does not apply and that any delay beyond 120 days cannot be condoned.

Refusal to set aside an arbitral award as delay has not been condoned under Section 34 (3) would certainly fall within section 37(1)(c).

2. The Supreme Court observed that under section 37(1)(c), the expression “*setting aside or refusing to set aside an arbitral award*” does not stand by itself and has to be read with the expression that follows i.e. “*under section 34*”. Section 34 is not limited to grounds being made out under section 34(2). Therefore, “*a literal reading of the provision would show that a refusal to set aside an arbitral award as delay has not been condoned under sub-section (3) of section 34 would certainly fall within section 37(1)(c)*”.
3. The Supreme Court observed that under section 37(2)(a), an appeal lies when a plea referred to in Section 16 (2) or (3) is accepted. This would show that the Legislature, when it wished to refer to only a part of a section as opposed to the entire section, it expressly did so. Contrasted with the language of section 37(1)(c), “*where the expression “under section 34” refers to the entire section and not to section 34(2) only, the fact that an arbitral award can be refused to be set aside for refusal to condone delay under section 34(3)*” is reinforced.

An order rejecting an application to set aside an award on the ground that it is delayed – is an appealable order

⁴ *State of Himachal Pradesh v. Himachal Techno Engineers*, (2010) 12 SCC 210 At paragraph 5

4. The Supreme Court concurred with the Appellant's contention that in *Essar Constructions* the same question as the present case had arisen. Noting the senior civil judge's order, which refused to condone delay in filing an application for setting aside the award, the court therein held that "*Reading Section 39(1)(vi) and Section 17 together, it would therefore follow that an application to set aside an award which is rejected on the ground that it is delayed and that no sufficient cause has been made out under Section 5 of the Limitation Act would be an appealable order.*"

The Effect Doctrine is inbuilt in Section 37 of the Act

5. The Supreme Court noted that in *Essar Constructions*, the court relied upon the "effect test" and judicial precedents in relation to the said test. For instance, in *Babumiyan & Mastan*⁵, the apex court observed that "*The order refusing to condone the delay in filing the claim petition has the effect of finally disposing of the original petition. Such an order can, therefore, be treated as an award and hence it is appealable.*" The Supreme Court observed that the "effect doctrine" referred to in *Essar Constructions* is statutorily inbuilt in section 37 of the Act. It *inter alia* explained that under section 37(2)(a), where a preliminary ground of the arbitrator not having jurisdiction to continue with the proceedings is made out, an appeal lies under the said provision since such determination is final in nature. However, if the converse is held by the arbitrator, then as the proceedings before the arbitrator continue, and the decision is amenable to challenge under section 34 after the award is made, no appeal is provided till then.

Piecemeal reliance on observations in various judgments is incorrect

6. The Appellant submitted that *BGS SGS Soma*⁶, which was cited in the Order, determined a different question i.e. whether an application to set aside an award under section 34 should be returned to the proper court dependent upon where the seat of arbitration was located. Only in the course of discussion relating to this question, the apex court approved certain observations made in *Harmanprit Singh Sidhu*⁷, in which the Ld. Single Judge allowed an application for condonation of delay and the division bench then held that an appeal against such an order was not maintainable under section 37 of the Arbitration Act, 1996.
7. The Respondent submitted that *BGS SGS Soma* had approved of *Harmanprit Singh Sidhu*; and that in *Simplex Infrastructures*⁸, it was contended that whether delay is or is not condoned, the same result ensues - it cannot be said that by condoning or refusing to condone delay, an arbitral award either gets or does not get set aside.
8. With reference to *BGS Soma* and *Simplex Infrastructures Ltd.*, the apex court ruled out their applicability and cautioned that it is well settled that judgments are not to be construed like Euclid's theorems⁹, but all observations made therein must relate to the context in which they were made.

Ramdas Construction Co. and Radha Krishna Seth are overruled

9. The Appellant had submitted that *Radha Krishna Seth*¹⁰ and *Ramdas Construction Co.*¹¹ have adopted an incorrect view and ought to be overruled by this Court. It was contended that where a right of appeal is granted by statute, a dismissal on a preliminary ground is nevertheless a dismissal of the appeal since it cannot be heard thereafter.

⁵ *Babumiyan & Mastan v. K. Seethayamma*, Air 1985 AP 135

⁶ *BGS SGS Soma JV. v. NHPC Limited*, (2020) 4 SCC 234

⁷ *Harmanprit Singh Sidhu v. Arcadia Shares and Stock Brokers Pvt. Ltd.* 2016 SCC ONLINE DEL 5383

⁸ *Union of India v. Simplex Infrastructures Ltd.*, (2017) 14 SCC 225

⁹ *Amar Nath Om Prakash v. State of Punjab*, (1985) 1 SCC 345

A right of appeal, once granted, ought not to be limited by statutory interpretation where the words used are capable of a wider construction. Further, it was submitted that in *Ramdas Construction Co.* the apex court did not go into the issue of maintainability. On the other hand, the Respondent contended that *Ramdas Construction Co.*¹² was correct law and therefore, judgments of the other High Courts ought to be overruled.

10. The apex court held that *Ramdas Construction Co.* (supra) does not consider *Essar Constructions* and is against the interpretation of section 37(1)(c) of the Act given in the present case. Likewise, the reasoning contained in *Radha Krishna Seth* is not correct. The Supreme Court therefore held that both the said judgments incorrectly state the law and stand overruled.

Section 39(1)(vi) of the 1940 Act is in pari materia to section 37(1)(c) of the Arbitration Act, 1996

11. In light of the above, the Supreme Court concurred with *Essar Constructions* and *Fuerst Day Lawson Ltd* on section 39 (1) (vi) of the 1940 Act being *pari materia* to section 37(1)(c) of the Act.

Section 5 does not exclude the subject appeal from the ambit of section 37 of the Act

12. The Supreme Court noted that in Section 5, after the non-obstante clause, the section states that no judicial authority shall intervene “except where so provided in this Part”. What is “provided in this part” is section 37. While noting that a limited right of appeal is given under section 37 of the Arbitration Act, 1996, the Supreme Court noted that it is not its duty to further limit such right by excluding appeals which are in fact provided for, given the language of the provision as interpreted by it.

CONCLUSION

- In view of the above findings, the Supreme Court has held that an appeal under section 37(1)(c) of the Arbitration Act, 1996 would be maintainable against an order refusing to condone delay in filing an application under section 34 of the Act.
- Thus, the appeal was accordingly allowed. The impugned order of the Division Bench under appeal was set aside, and the matter was remitted to a Division Bench of the High Court of Delhi to decide whether the Ld. Single Judge's refusal to condone delay was or not correct.
- In so far as the impact of the decision is concerned, the courts may now see a flurry of appeals under section 37 of the Act arising from orders refusing to set aside an arbitral award if delay has not been condoned under section 34(3). Interestingly, while the Supreme Court has strictly held that any delay beyond 120 days cannot be condoned under section 34 of the Act, it remains to be seen whether an appeal will be filed against such orders under section 37 and in such a situation, how will the Supreme Court now deal with the same.

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¹² *State of Maharashtra v. Ramdas Construction Co.* 2006 (6) Mah. L.J. 678

7. Section 37(1) clearly provides that an appeal shall lie from the orders passed either granting or refusing to grant any measure under section 9, or setting aside or refusing to set aside an arbitral award under section 34 of the Act. Undisputedly, therefore, whenever there is order passed either for setting aside of the award or refusing to set aside the arbitral award and such order is passed in exercise of powers under section 34, the same would be appealable under section 37(1)(b) of the Act. In the case in hand, since it is not in dispute nor it can be disputed that the impugned order does not deal with the issue as to whether the arbitral award should be set aside or not and it merely deals with the issue in relation to the delay in filing an application for setting aside of the award, evidently the impugned order cannot be said to be an appealable order within the meaning of the said expression under section 37(1)(b) of the Act.”