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Order refusing Application for Condonation of Delay under Section 34(3) is an Appealable Order under Section 37 Chintels India Ltd. v. Bhayana Builders Pvt. Ltd.

Case No.	Case No. Civil Appeal No. 4028 of 2020
Citation	2021 SCC OnLine SC 80
Date	11th February, 2021
Court	Supreme Court of India
Coram	R. F. Nariman J., Navin Sinha J and K.M Joseph J

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1. FACTS

- a. The present appeal arose out of a certificate issued by the Division bench of Hon'ble Delhi High Court under Art. 133 read with Art. 134A of the Constitution of India. The Hon'ble Court was hearing an appeal under sec. 37 of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act, 1996**') read with sec. 13 of the Commercial Courts Act, 2015 ('**Commercial Act, 2015**') for condonation of delay in the non-est filing of an application under sec. 34 of the Arbitration Act, 1996, and hence consequently dismissed the sec. 34 application itself, being bound by the ratio of the judgements in *BGS SGS Soma*¹, *Ramdas Construction Co.*² and *Radha Krishna Seth*³.
- b. The Hon'ble Court was of the view that sec. 34(3) of the Arbitration Act, 1996 by use of the words "*but not thereafter*", as interpreted in *Popular Construction Co.*⁴ judgement, restricts the power otherwise vested in Court to condone the delay beyond 30 days and the same also creates a ground of time bar for refusing to set aside the award and is part of the self-contained code for setting aside of the award. Thus, refusal to set aside an award on the ground of the said time bar would be a refusal within the meaning of sec. 37 and appealable under sec. 37.
- c. Considering another aspect of this, the Hon'ble Court observed that any Commercial Court in the country refusing to condone the delay in applying for setting aside of the award, and where delay can be for varying reasons as diverse as the social, geographical and economic conditions prevalent in this country, and not providing any opportunity to the High Courts to have a look therein, would be a very harsh outcome.
- d. Considering the importance of the substantial question of law involved in this case, the Hon'ble Court granted a certificate under Art. 133 read with Art. 134A to the appellant. Hence, the present appeal was preferred before the Hon'ble Supreme Court.

2. CONTENTIONS ON BEHALF OF APPELLANT

- a. Appellant argued refusal of condonation in delay results in the refusal to set aside an award, and an appeal against such order being maintainable under sec. 37 of the Arbitration Act, 1996 as per the jurisprudence laid down in *Essar Constructions*⁵ judgement. Appellant contended, sec. 39 of the erstwhile Arbitration and Conciliation Act, 1940 ('**Arbitration Act, 1940**') is *pari materia* provision to sec. 37 of the current Arbitration Act, 1996. Appellant then relied on precedents in *Scoot Wilson Kirpatrick*⁶ and *Jindal Exports Ltd.*⁷ to strengthen his argument that such an order is appealable in nature.

¹ BGS SGS Soma JV v. NHPC Limited (2020) 4 SCC 234 ('BGS SGS Soma').

² State of Maharashtra v. Ramdas Construction Co. 2006 (6) Mah L.J. 678 ('Ramdas Construction Co').

³ Union of India v. Radha Krishna Seth and Anr., 2005 SCC OnLine All 8400 ('Radha Krishna Seth').

⁴ Union of India v. Popular Construction Co. (2001) 8 SCC 470 ('Popular Construction Co.').

⁵ Essar Constructions v. N.P. Rama Krishna Reddy (2000) 6 SCC 94 ('Essar Constructions').

⁶ Chief Engineer of BPDP/REO Ranchi v. Scoot Wilson Kirpatrick India (P.) Ltd. (2006) 13 SCC 622 ('Scoot Wilson Kirpatrick').

⁷ Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. (2011) 8 SCC 333 ('Jindal Exports Ltd.').

- b. It was the case of the Appellant that an order refusing condonation of delay stands on a completely different footing from an order which condones delay, as the latter order cannot be said to impart any finality to the proceeding, as, when an order condones delay, it cannot be said that the court has refused to set aside an award as it may ultimately set aside the aforesaid award on the specific grounds mentioned in sec. 34(2) of the Arbitration Act, 1996.
- c. Appellant argued that when a right of appeal is granted by statute, a dismissal of the same on a preliminary ground is nevertheless a dismissal of the appeal, since it cannot be heard thereafter. Appellant maintained, that once a right of appeal is granted, it should not be limited by statutory interpretation, where the words used are capable of a wider construction.
- d. The Appellant submitted, that in the case of BGS SGS Soma⁸, the Hon'ble Supreme Court was dealing with a completely different question of law, namely, as to whether an application to set aside an award under sec. 34 Arbitration Act, 1996. should be returned to the proper court depending upon where the seat of arbitration was located. It was further argued that while approving certain observation, the Division Bench held that an appeal against such an order was not maintainable under sec. 37 of the Arbitration Act, 1996.

3. CONTENTIONS ON BEHALF OF THE RESPONDENT

- a. The Respondent maintained that sec. 37 of the Arbitration Act, 1996 is materially different from the sec. 39 of the Arbitration Act, 1940. According to the Respondent, sec. 39 of the Arbitration Act, 1940 concerns itself with grounds that were made out under sec. 30 of the said Act, and these grounds are completely different from the grounds that are made out under sec. 34(2) and sec. (2A) of the Arbitration Act, 1996.
- b. It was his case that the judicial intervention must be minimal in the arbitration process governed by Arbitration Act, 1996. Respondent then referred to the Statement of Objects and Reasons for enacting the Arbitration Act, 1996 as it contains a non-obstante clause in sec. 37(1) and that the grounds of appeal contained therein are exhaustive, making it explicit that an appeal shall lie only from the following orders "*and from no others*".
- c. The Respondent submitted that appeal being a creature of statute has to be read as what the statute provides, and without expanding any of the words used therein. The expression "*under Section 34*" under sec. 37 Arbitration Act, 1996 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 any preliminary ground which would then lead to a refusal to set aside the award.
- d. He relied on the case of *Simplex Infrastructures*⁹ judgement, to submit that it cannot be said that by condoning or refusing to condone delay, an arbitral award either gets or does not get set aside.

4. ISSUED INVOLVED

⁸ BGS SGS Soma, *Supra* Note 1.

⁹ Union of India v. Simplex Infrastructures Ltd. (2017) 14 SCC 225 ('Simplex Infrastructures').

- a. Whether the learned single Judge's order refusing to condone the delay in filing an application U/s 34 of the Arbitration Act, 1996 is an appealable order U/s 37(1)(c) of the said Act?

5. DECISION OF THE SUPREME COURT

- a. The Apex Court first delved into the issue of time period prescribed under sec. 34 of the Arbitration Act, 1996, that is, towards an application to set aside an award. The provision of sec. 34(1) has to be read in accordance with both sub-sections (2) and (3) i.e., it would not only have to be within the limitation period as prescribed by the law but also have to set out grounds under sub-sections (2) and/or (2A) for setting aside such an award.
- b. The Hon'ble Court held, in all procedural fairness, the sec. 34(1) application must be presented within a period of 3 months, and if not, then within a further period of 30 days accompanied with an application for condonation of delay. Further, sec. 5 of the Limitation Act 1963 does not apply to the arbitration proceedings, hence, any delay beyond 120 days cannot be condoned, as laid down in the Himachal Techno¹⁰ judgement.
- c. Then, the Hon'ble Court endeavoured to examine sec. 37(1)(c) of the Arbitration Act, 1996 and held that 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 "under section 34". It was further held -
 - i. *"Obviously, 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). The aforesaid reasoning is strengthened by the fact that under section 37(2)(a), an appeal lies when a plea referred to in sub-section (2) or (3) of section 16 is accepted. This would show that the Legislature, when it wished to refer to part of a section, as opposed to the entire section, 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) gets further strengthened."*
- d. In the Essar Construction¹¹ Judgement, rendered on the same question of law under sec. 39 of the Arbitration Act, 1940, an important 'effect test' was propounded by the Courts of law in India, -
 - i. " 12. The "effect test" was applied by the High Court of Andhra Pradesh in Babumiyani and Mastan v. K. Seethayamma [AIR 1985 AP 135] which said:
 - ii. *"In the light of the rulings in G. Gopalaswami v. G. Navalgaria [AIR 1967 Mad 403] and the decision of the Bench in CMA No. 612 of 1977 dated 3-4-1978, the legal position may be enunciated as follows: 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."*

¹⁰ State of Himachal Pradesh v. Himachal Techno Engineers and Anr. (2010) 12 SCC 210 ('Himachal Techno').

¹¹ Essar Constructions, *Supra* Note 5.

- iii. *13. Again a Division Bench of the Assam High Court in Mafizuddin Bhuyan v. Alimuddin Bhuyan [AIR 1950 Ass 191] has said:*
- iv. "Whether objections to an award are dismissed on the merits or they are dismissed on the ground that they are filed beyond time, the Court by dismissing them in effect refuses to set aside the award, and an order refusing to set aside an award is clearly appealable under Section 39."
- e. The Hon'ble Court clarified the dichotomy between the sec. 34 and sec. 37 of the Arbitration Act, 1996 and held that under sec. 37(1)(a), where a party is referred to arbitration under sec. 8, then no appeal lies. Reason being, the effect of such order is that the parties must go to arbitration, and it being left to the learned Arbitrator to decide preliminary points under section 16 of the Act, which then become the subject matter of appeal under section 37(2)(a). The Hon'ble Supreme Court further held -
 - i. " *21. Likewise, under section 37(2)(a), where a preliminary ground of the arbitrator not having the jurisdiction to continue with the proceedings is made out, an appeal lies under the said provision, as such determination is final in nature as it brings the arbitral proceedings to an end. However, if the converse is held by the learned arbitrator, then as the proceedings before the arbitrator are then to carry on, and the aforesaid decision on the preliminary ground is amenable to challenge under section 34 after the award is made, no appeal is provided.*
 - ii. ...
 - iii. *22. Given the fact that the "effect doctrine" is part and parcel of the statutory provision for appeal under section 37, and the express language of section 37(1)(c), it is difficult to accede to the argument of Shri Rohatgi."*
- f. The Hon'ble Supreme Court consequently held sec. 39(1)(vi) of the Arbitration Act, 1940 to be *pari materia* to sec. 37(1)(c) of the Arbitration Act, 1996 in light of the precedents in *Scot Wilson Kirpatrick*¹².
- g. On the aspect of *BGS SGS Soma*¹³ judgement, the Hon'ble Court remarked that the said judgment was in a totally different context, i.e. return of application under section 34 to the appropriate Court which had jurisdiction to decide such application, dependent upon where the seat of the arbitral tribunal was located. Important to understand, the judgements of the courts should not be construed like Euclid's theorems as discussed in *Amar Nath Om*¹⁴ judgement. As a matter of fact, the Hon'ble Court referred to *Harmanprit Singh Sidhu*¹⁵, which held -
 - i. " *13.... In other words, if the arbitral award is set aside in part or in whole and the appellant is aggrieved thereby, he may prefer an appeal under Section 37 of the AandC Act on merits as also on the ground that the delay in re-filing ought not to have been condoned. This is in line with the scheme of the A and C Act of not, in any way, stalling the proceedings thereunder."*

¹² *Scot Wilson Kirpatrick*, *Supra* Note 6.

¹³ *BGS SGS Soma*, *Supra* Note 1.

¹⁴ *Amar Nath Om Prakash v. State of Punjab* (1985) 1 SCC 345.

¹⁵ *Harmanprit Singh Sidhu v. Arcadia Shares and Stock Brokers Pvt. Ltd.* (2016) 234 DLT 30 ('Harmanprit Singh Sidhu').

- h. As a result, the Hon'ble Court decided that an appeal under sec. 37(1)(c) of the Arbitration Act, 1996 would be maintainable against an order refusing to condone delay in filing an application under sec. 34 of the Arbitration Act, 1996 to set aside an award. Consequently, Hon'ble Court overruled the Bombay High Court judgement in *Ramdas Construction*¹⁶, and Allahabad High Court in *Radha Krishna Seth*¹⁷.

6. PSL COMMENT

- a. This judgement has provided much needed clarity on the aspect of maintainability and limitation period for challenge to an arbitral award and has corrected the conundrum predicated on misinterpretation of statutory provision enumerated under 34(3) by various Hon'ble High Courts. The Hon'ble Supreme Court's pro-arbitration approach has been conspicuous in series of latest judgements highlighting the cardinal principal of minimum judicial interference, as provided under sec. 5. However, this judgement has provided a relief to award debtors to successfully utilise the statutory sword provided under sec. 34 and not be left remediless on account of an expansive interpretation running contrary to express statutory interpretation.
- b. Noteworthy, the decision may cause delays in the award attaining their finality. But at the same time, the judgements moots for checks and balances to ensure that a party has a right to appeal, if the court has shut it's doors on account of the appellant being a late comer.

¹⁶ Ramdas Construction Co, *Supra* Note 2.

¹⁷ Radha Krishna Seth, *Supra* Note 3.