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MAINTAINABILITY OF AN APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT, 1996

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INTRODUCTION

A three-judge bench of the Supreme Court of India (Supreme Court), comprising Justices R.F. Nariman, Navin Sinha, and K.M. Joseph, vide a judgment dated 11 February 2021 in the case of *Chintels India Limited v Bhayana Builders Private Limited* held that an appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (1996 Act) is maintainable against an order refusing to condone delay in filing a setting aside application under Section 34 of the 1996 Act.

FACTUAL BACKGROUND

The Appellant filed a petition before the High Court of Delhi (High Court) to set aside an award passed by the Arbitral Tribunal accompanied by an application seeking condonation of delay of 28 days in filing and 16 days in re-filing the petition. However, vide order and judgment dated 4 June 2020, the learned single judge of the High Court dismissed the application for condonation of delay, and consequently the setting aside petition, as the same was beyond the statutory period provided by Section 34 of the 1996 Act.

Thereafter, the Appellant filed an appeal before a Division Bench of the High Court which held that an appeal is not maintainable from such an order. However, the Division Bench issued a certificate under Article 133 read with Article 134A of the Constitution of India, 1950 to the Appellant granting liberty to approach the Supreme Court, which was availed of by the Appellant.

ISSUE

The issue before the Supreme Court was whether an order refusing to condone delay in filing a setting aside application is an appealable order under the 1996 Act.

ARGUMENTS BY THE APPELLANT

- The Appellant submitted that Section 39 of the 1940 Act is in *pari materia* with Section 37 of the 1996 Act. The Appellant relied on *Essar Constructions v NP Rama Krishna Reddy* [(2000) 6 SCC 94] to argue that an order dismissing an application to condone delay in filing a setting aside application is appealable under Section 37 of the 1996 Act.

- The Appellant submitted that an order refusing to condone delay and order condoning the delay are entirely different. The former imparts finality to the proceedings, while the latter does not.
- It was also submitted that a right of appeal ought not to be limited by statutory interpretation, where the words used are capable of more comprehensive construction. While referring to the language of Section 37(1)(c) of the 1996 Act, the Appellant further argued that a refusal to set aside an arbitral award "under Section 34", includes Section 34(3), whereby a court may refuse to condone delay in filing a setting aside application.

ARGUMENTS BY THE RESPONDENT

- The Respondent submitted that Section 39 of the 1940 Act is materially different from Section 37 of the 1996 Act.
- The Respondent submitted that Section 5 of the 1996 Act limits judicial intervention in arbitration processes. It was submitted that Section 37 is in furtherance of this and an appeal can only be preferred in relation to the specific matters provided for therein. The Respondent also argued that an appeal, being a creature of statute, has to be acted upon as provided in the statute and without any expansion thereof.
- The Respondent placed reliance on *Union of India v Simplex Infrastructures Limited [(2017) 14 SCC 225]* to submit that whether the delay is condoned or not, the same result would ensue, as it cannot be said that by condoning or refusing to condone delay, an arbitral award either is or is not set aside.

JUDGMENT

- The Court held that the expression 'setting aside or refusing to set aside an arbitral award' in Section 37(1)(c) has to be read with the expression 'under Section 34'. The Court observed that Section 34 is not limited to grounds set-out in Section 34(2) and that a literal reading of the provision would demonstrate that a refusal to set aside an arbitral award since the delay was not condoned would certainly fall within Section 37(1)(c). In other words, the expression 'under Section 34' refers to the entire section and not merely to Section 34(2).
- The Court reiterated that Section 39(1)(vi) of the 1940 Act is in *pari materia* to Section 37(1)(c) of the 1996 Act, relying upon *Chief Engineer [(2006)13 SCC 622]* and *Essar Constructions*.
- The Court further held that the principle of minimal intervention by the Courts as enshrined in Section 5 of the 1996 Act cannot be interpreted in a manner so as to limit the statutory provisions themselves, such as the right of appeal provided in Section 37.
- The Court, thus, held that an appeal under Section 37(1)(c) of the 1996 Act would be maintainable against an order refusing to condone delay in filing a setting aside application. Accordingly, the Court remanded the matter back to the High Court for consideration on the issue of condonation of delay in the filing of the setting aside application.

COMMENTS

Through the present judgment, the Supreme Court has reiterated the principle of *Essar Constructions*, and overruled contrary views adopted by some High Courts. While reiterating the scope of Section 37 of the 1996 Act and its *pari materia* relationship with Section 39 of the 1940 Act, the Supreme Court has also reemphasised that the principle of minimalistic intervention is not absolute but limited by the exceptions carved out by the 1996 Act itself, thereby holding that refusal to condone delay in filing a setting aside application is appealable.

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