

NV International overruled, and limitation governing appeals under Section 37 ACA clarified

Update by Editor

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**Government of Maharashtra v. M/s Borse Brothers Engineers & Contractors Pvt. Ltd.
and connected matters**

Court: Supreme Court of India | **Case Number:** Civil Appeal No. 995 of 2021 and two other connected matters | **Citation:** 2021 SCC OnLine SC 233 | **Bench:** RF Nariman, BR Gavai and Hrishikesh Roy JJ | **Date:** 19 March 2021

Section 37 of the Arbitration and Conciliation Act, 1996 (“ACA”) gives the right to appeal against certain orders but does not prescribe a limitation period. In *Varindera Constructions v. Union of India*, a decision of September 2018 by a 2-judge bench of the Supreme Court (presided by RF Nariman J) but reported in (2020) 2 SCC 111, it was said that the limitation period was 120 days. The Commercial Courts Act, 2015 (“CCA”) came into force in October 2015. Section 13 CCA prescribes the limitation period for appeals under Section 37 ACA to be 60 days. In *NV International v. State of Assam*, (2020) 2 SCC 109, a case to which the CCA was attracted, another 2-judge bench (presided by RF Nariman J) nonetheless reiterated the 120 days limitation period.

Questions were later raised in some matters if *NV International* was rightly decided. Some of these cases, noted below, have now been decided by a common judgment of 19 March 2021 by a 3-judge bench presided by RF Nariman J himself:

- (a) *Government of Maharashtra v. M/s Borse Brothers Engineers & Contractors Pvt. Ltd.*¹
- (b) *M/s Swastik Wires v. MP Poorva Kshetra Vidyut Vitran Co. Ltd.*²
- (c) *Union of India v. M/s Associated Construction Co.*³

Overruling *NV International*, the 3-judge bench has decided that the limitation period for filing appeals under Section 37 ACA would be governed by:

- (a) Section 13 CCA.
- (b) But where CCA was not attracted, Article 116 or Article 117 of the Limitation Act, 1963 (also “LA”) as the case may be.

A. A summary of the decision, conclusions and reasoning

- (a) Speedy disposal of disputes through the arbitral process is one of the main objectives of the ACA. This can be seen from:

¹ From the decision of Bombay High Court in CA 41 of 2020 passed on 17 December 2020.

² From the order of the Madhya Pradesh High Court passed in AA 55 of 2019 and AA 75 of 2019 on 27 January 2020 by a 2-judge bench of Sujoy Paul and Fahim Anwar JJ.

³ From the order of a 2-judge bench of the Delhi High Court in FAO (OS) (Comm) 14 of 2018 by a 2-judge bench of GS Sistani and Sangita Dhingra Sehgal JJ.

- (i) The Statement of Objects and Reasons of the ACA, which says that the main objective is “to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration” and “minimise the supervisory role of courts in the arbitral process.”
 - (ii) Also, the “important” Section 5 ACA (which provides for the extent of judicial intervention).
 - (iii) Also, other relevant provisions (all of which fix time limits in some way or the other).⁴
- (b) What law governs the limitation period for filing appeals under Section 37 ACA?
- (i) If the CCA applies,⁵ then Section 13 CCA because it provides the forum for appeals as well as the limitation period to be followed. The limitation is 60 days across the board, whether the appeal is to a High Court or any other court.
 - (ii) If the CCA does not apply,⁶ then Article 116 or Article 117 of the LA. So, 90 days for an appeal to a High Court from an order of a subordinate court and 30 days to any other court (than the High Court), and 30 days from an order of the High Court to the same court.
- (c) The CCA applies to an appeal under Section 37 ACA because Section 13 CCA clearly says so. But why and how does the LA apply?
- (i) Because Section 37 ACA read with Section 43 ACA “makes it clear.”
 - (ii) [Ed.] Section 37 ACA does not talk anything about the limitation period. Section 43 ACA is titled “Limitations” and says that the LA “shall apply to arbitrations as it applies to proceedings in Court.” An argument that Section 43 ACA makes the LA applicable only to arbitrations was rejected in *Consolidated Engineering Enterprises v. Irrigation Deptt.*, (2008) 7 SCC 169.

⁴ Referring to Section 8(1) ACA that fixes a time limit to apply to refer the matter to arbitration (“not later than submitting his first statement on the substance of the dispute”). Section 9(2) ACA that provides that if an interim measure of protection has been made by a court, the arbitral proceedings shall be commenced within a period of 90 days from the date of such order or within such further time as the court may determine. Section 11 (4) (a) that requires the party to appoint an arbitrator within 30 days from the receipt of a request to do so from the other party. Also, Section 11(4)(b) ACA which requires the two appointed arbitrators to appoint the third arbitrator within 30 days from the date of their appointment. If either does not happen then a party is entitled to make an application under Section 11 ACA for appointment. Section 11(13) ACA which provides that an application for appointment shall be disposed as expeditiously as possible and an endeavour shall be made to dispose of the matter within 60 days. Section 16(2) ACA which requires that a plea that the arbitral tribunal does not have the jurisdiction shall be raised not later than the submission of the statement of defence. Section 29A ACA that fixes the time limit for arbitral award and disposal of applications filed before the court to extend the time limit. Section 29B ACA that provides for a fast-track procedure. Section 33 ACA that prescribes the time limit for correction and interpretation of award and also making an additional award. Section 34(3) ACA that sets the limitation period to challenge an award.

⁵ Two basic conditions must be met before the CCA applies. One, is the dispute commercial under the definition of ‘commercial dispute’ under Section 2(1)(c) the CCA? Two, is the dispute of a ‘specified value.’ The judgment indicates that the court was conscious of only the latter category. Nonetheless, the ruling will apply to both categories.

⁶ When the dispute is neither commercial nor of a specified value or both, only the LA will govern the limitation.

- (d) Does Section 5 LA apply where the CCA governs the limitation under Section 37 ACA?
- (i) Yes, it applies. The applicability of Section 5 LA is not excluded.⁷
 - (ii) Section 13(1A) LA does not contain any provision akin to Section 34(3) ACA (closing the time limit).⁸
 - (iii) Yes, the object behind Section 14 CCA is expeditious disposal of the appeals, but the provision is directory. This is unlike, say, Section 16 CCA that read with other provisions⁹ clarifies that the defendant in the suit has 30 days to file a written statement that cannot be extended beyond 120 days.
 - (iv) But even in that “rare situation,”¹⁰ the object of speedy resolution of disputes would be the governing principle to decide an application for condonation of delay under Section 5 LA.¹¹
 - (v) The judgement in *CIT v. Hongo India Private Limited and another*, (2009) 5 SCC 791 cited by the counsel is distinguishable.¹²
 - (vi) Section 21 CCA is a *non obstante* clause but does not override the LA. This aspect has been addressed in the context of the Insolvency and Bankruptcy Code, 2016 in

⁷ Why does the question---if Section 5 LA is excluded or not---arise? The answer may seem, if not convoluted, not so straightforward because it requires us to look at three provisions. The LA is the general law of limitation and it sets out (in the Schedule) the period of limitation for a variety of matters. If a case is filed beyond limitation, what is the consequence? The answer is in Section 3 LA that bars the court from considering the matter. However, Section 3 LA is “subject to” Sections 4 to 24 LA including, obviously, Section 5 LA. Now, how does the LA apply to any other statute. It is by virtue of Section 29 LA that says that if any special law prescribes a different period of limitation than set out in the LA, it will be assumed that Section 3 LA applies to that special law and for the purpose of computing the period of limitation Sections 4 to 24 LA will also apply insofar *as they are not expressly excluded by the special law*. To complete this answer, it should also be noted that the provisions Section 4 to 24 LA, by and large, set out the exceptions to Section 3 LA (and also how the limitation period is to be calculated). For instance, Section 4 LA says that if the limitation expires on a day on which the court is closed, the matter can be filed on the day the court re-opens. Section 5 LA provides that the court can extend the prescribed period if the applicant satisfies the court that he had sufficient cause for not filing the case within such period.

⁸ To challenge an award, Section 34 (3) ACA sets a time of three months and a further time, at the court’s discretion, of 30 days “but not thereafter.”

⁹ The schedule to the CCA and the amendment made to Order VIII Rule 1 of the Code of Civil Procedure, 1908.

¹⁰ Referring to the situation where an appeal under Section 37 ACA is governed by Article 116 and Article 117 LA because according to the court the bulk of the cases would be commercial disputes falling under the Commercial Courts Act.

¹¹ Referring to the scheme of the ACA as well as some judgments of the Supreme Court, viz., *Union of India v. Popular Construction Co.* (2001) 8 SCC 470; *State of Goa v. Western Builders* (2006) 6 SCC 239; *Kandla Export Corporation, ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board* (2019) 4 SCC 401.

¹² Nariman J said that in *Hongo* the court considered the Central Excise Act. It had provisions providing for limitation coupled with a condonation of delay provision which were either open-ended or capped. Also, he notes that the period of 180 days provided in one of the provisions was one indicia which led the court in *Hongo* to exclude the application of Section 5 LA, as it was double and triple the period provided for appeals under the other provisions of the same enactment. Section 13(1A) CCA by way of contrast, he further notes, applies an intermediate period of 60 days for filing an appeal, that is, a period that is halfway between 30 days and 90 days provided by Articles 116 and 117 of the Limitation Act.

BK Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633.¹³

- (e) Does Section 5 LA apply when the limitation period for an appeal under Section 37 ACA is governed by Article 116/117 of the Schedule to the LA?
- (i) Yes. There can be no doubt that Section 5 LA will apply both because of Section 43 ACA and Section 29 LA.
 - (ii) This aspect has been set out in the concurring judgment of Raveendran J in *Consolidated Engineering*.
- (f) Was *NV International* correctly decided?
- (i) No. Firstly, it does not notice the provisions of the CCA at all and can be said to be *per incuriam* on this count.
 - (ii) Secondly, the limitation period for filing of appeals under Section 13 CCA is 60 days, and therefore the period set out under Section 34 (3) ACA cannot apply.
 - (iii) Thirdly, since Section 13 CCA does not curtail the period beyond which delay could not be condoned, bodily lifting the last part of Section 34(3) ACA into Section 37 ACA would also be unwarranted. A cap cannot be judicially engrafted.¹⁴
- (g) How is the expression ‘sufficient cause’ to be treated or interpreted in deciding an application for condonation of delay under Section 5 of LA?
- (i) At one extreme is the *NV International* (overruled by this decision) and at the other an open-ended provision (Section 5 LA). It is between these two extremes that we have to steer a middle course.

¹³ In June 2018, Section 238A was introduced in the IBC, 2016 and it applied the LA to proceedings or appeals before several forums. The question in *BK Educational* (a decision of the 2-judge bench of RF Nariman and Navin Sinha JJ) was on the applicability of LA when the IBC was enacted in December 2016 until the introduction of Section 238A. One of the points urged was that the IBC is a complete code and the application of the Limitation Act “must be shut out.” This was rejected saying that where the period of limitation is prescribed in the IBC they will apply the IBC period rather than prescribed period in the LA (“the baby”) but that does not mean that the application of the whole of LA (“the bathwater”) must be excluded. This distinction was drawn relying on Section 60 IBC which excludes the period of moratorium to compute limitation specified for any suit or application by or against a corporate debtor. Nariman J said this provision would have been wholly unnecessary if the LA was excluded in the first place.

¹⁴ Referring to *Eera v. State* (NCT of Delhi), (2017) 15 SCC 133, a 2-judge bench decision of Dipak Misra and RF Nariman JJ, where “this Court was faced with the interpretation of Section 2(1)(d) of the Protection of Children from Sexual Offences Act, 2012.” “The argument made before the court was that the age of 18 years did not only refer to physical age, but could also refer to the mental age of a “child” as defined.” Much of the discussion focused around interpreting a statute versus the judges making the law. Nariman J had authored a concurring judgment and said that at times the “Judge crosses the Lakshman Rekha becomes a legislator, stating what the law ought to be instead of what the law is.”

- (ii) The judicial tool to steer this course is contained in the Latin maxim *ut res magis valeat quam pereat*.¹⁵
- (iii) The expression ‘sufficient cause’ is elastic enough.¹⁶ But given the object of speedy resolution of the disputes under the ACA and CCA, it is not elastic enough to cover long delays beyond the period described by the appeal provision themselves.
- (iv) Besides, the expression sufficient cause is not a loose panacea for the pressing of negligent and stale claims.¹⁷
- (v) Likewise, mainly because the government is involved, the court cannot lay down a different yardstick for condonation of delay.¹⁸
- (vi) Only because sufficient cause has been made out in the facts, there is no right in the appellant to have the delay condoned.¹⁹

(h) Conclusion

- (i) In cases governed by Article 116 LA, a delay beyond 90 days; in matters governed by Article 117 LA, a delay beyond 30 days; in cases governed by Section 13 CCA, a delay beyond 60 days is to be condoned by way of exception and not by way of rule.
- (ii) In a fit case in which a party has otherwise acted *bona fide* and not in a negligent manner, a short delay beyond such period can, in the discretion of the court, be condoned. The other side of the picture has to be always borne in mind that the opposite party may have acquired both equity and justice what may now be lost by the first party’s inaction, negligence or laches.

B. Disposition

The Civil Appeal 995 of 2021 was dismissed. The High Court had found that the conduct of the State of Maharashtra was not *bona fide*. Nariman J added that apart from that, there was a long delay of 131 days beyond the 60 days prescribed period. There was no explanation worth the name beyond the usual file pushing and administrative exigency argument.

The Civil Appeal 991 of 2021 was also dismissed. The High Court had condoned the delay saying that *NV International* did not apply. Nariman J said that *NV International* was a direct judgment on the point and was binding on that day on the High Court. Further, the delay was 75 days (beyond 60 days), and though the certified copy had been obtained in April 2019, the appeal was filed in September 2019. The explanation for the delay was the time taken for approval of the concerned authorities, bulky records of the case, the appellant being a public entity. This explanation, Nariman J said, “falls woefully short of making out any sufficient cause.”

¹⁵ Referring to *CIT v. Hindustan Bulk Carriers*, (2003) 3 SCC 57, a 3-judge bench decision of the Supreme Court, where the maxim was discussed. “A liberal construction should be put up on written instruments, so as to uphold them, if possible, and carried into effect the intention of the parties.”

¹⁶ Citing *Ajmer Kaur v. State of Punjab*, (2004) 7 SCC 381 and *Brahampal v. National Insurance Company*, 2020 SCC OnLine SC 1053.

¹⁷ Citing *Basawaraj v. Land Acquisition Officer*, (2013) 14 SCC 81.

¹⁸ Citing *Postmaster General v. Living Media India Ltd.*, (2012) 3 SCC 563 and several recent cases that follow *Postmaster*.

¹⁹ Citing *Ramlal v. Rewa Coafields Ltd.*, (1962) 2 SCR 762.

The Civil Appeal 996-998 of 2021 was also dismissed, saying that there was a huge delay of 227 days in filing the plea and a 200-day delay in re-filing, and there was “no sufficient cause whatsoever.”