

Is dismissal of a set-aside petition on limitation appealable? Though answering no, the Delhi High Court granted a certificate for appeal to the Supreme Court

Update by Editor

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Chintels India Limited v. Bhayana Builders Pvt. Ltd. [SET ASIDE on 11 February 2021 by a 3-judge Supreme Court's bench in *Chintels India Limited v. Bhayana Builders Pvt. Ltd.*, 2021 SCC OnLine 80]

Court: Delhi High Court | **Case Number:** FAO (OS) Comm. No. 68 of 2020 CS | **Citation:** Not available currently | **Bench:** Rajiv Sahai Endlaw and Asha Menon JJ | **Date:** 04 December 2020

Is an order dismissing a set-aside petition filed under Section 34 ACA on the ground of limitation appealable under Section 37 (1) (c) ACA? Though answering no, in light of a precedent of the Supreme Court, a 2-judge bench of the Delhi High Court granted a certificate for an appeal to the Supreme Court.¹

A. The context

A1. Appeal under Section 37 ACA from an order setting aside or refusing to set aside an award

Section 34 ACA provides for recourse against the arbitral award. The so-called “grounds” for setting aside an award are set out in Section 34 (2) and Section 34 2A. Then, Section 34 (3) prescribes a limitation for making an application to set aside an award. This period three months, and a further period of thirty days if sufficient cause is shown to the court.

Section 37 ACA is “appealable orders” and it says that notwithstanding anything contained in any other law, an appeal shall lie only from the orders mentioned in the provision. One of the matters in which appeal lies is an order “setting aside or refusing to set aside an arbitral award under section 34” an arbitral award.

A2. The meaning of “setting aside or refusing to set aside an arbitral award under Section 34”

The expression was considered in *BGS SGS SOMA JV V. NHPC LTD.*, (2020) 4 SCC 234, a 3-judge bench decision of the Supreme Court.² A set-aside petition was presented in a civil court, which

¹ The provision for regular appeals to the Supreme Court from proceedings before the High Court are set out in Articles 132 to 134 of the Constitution. Cases under these provisions relate to constitutional interpretation, civil, or criminal proceedings. But, in each case, the High Court must, under Article 134A, give to the party aggrieved a certificate for appeal to the Supreme Court. A certificate for appeal is not a routine phenomenon.

Usually—some say, contrary to the intention of the constitution makers--the appeals to the Supreme Court is frequently made under Article 136. It provides for special leave to appeal by the Supreme Court itself against any judgment, decree, determination, sentence or order in any cause or matters passed or made by any Court or tribunal in the territory of India.

² A decision by RF Nairman, Aniruddha Bose and V Ramasubramanian JJ. The court ruled on many aspects. It sought to clarify the issue as to which court has jurisdiction over an arbitral process clarified. It concluded that the concurrent-jurisdiction theory is not the real ratio of the BALCO case ((2012) 9 SCC 552). It discussed in detail the debate between seat and venue. Read our Update of BGS case [here](#).

determined that it did not have territorial jurisdiction. It returned the petition for presentation in a court which had jurisdiction.

Was this order appealable under Section 37 ACA? No, said the court, because the expression “*refusing to set aside an award under Section 34*”³ connoted that the refusal to set aside must be after the grounds set out in Section 34 ACA have been applied to the arbitral award and turned down.⁴

The *BGS* court cited with approval the Delhi High Court’s judgment in *Hamanprit Singh Sidhu v. Arcadia Shares & Stock Brokers Pvt. Ltd.*⁵. The Delhi High Court had concluded that an appeal against an order condoning delay in filing the set-aside proceedings was not maintainable, because such an order is neither setting aside nor refusing to set aside. The court speaking through Badar Durrez Ahmad J said that neither the award has been set aside nor refused to be set aside. This reasoning of the High Court, the Supreme Court said in *BGS*, “commends itself to us.”⁶

There is another case that dealt with a fact situation where a petition under Section 34 ACA was dismissed for delay. In *State of Maharashtra v. Ramdas Construction Co. and another*, 2006 (6) Mh.L.J., a set-aside petition had been filed before a District Judge, but dismissed on limitation. An appeal was made before a 2-judge bench. The appellate court (RMS Khandeparkar and SR Dongaonkar JJ) concluded that an appeal under Section 37 ACA from an order dismissing the set-aside petition on limitation was not maintainable. The court reasoned that the question of limitation preceded an enquiry into the setting-aside, and the appellate power under Section 37 ACA was not for this preceding enquiry but in relation to the enquiry where the application for set aside is dealt on its merits.

This case went to the Supreme Court in a special leave petition under Article 136 of the Constitution.⁷ The court dismissed the special leave petition but did not address the question of maintainability. It focused on the basic issue of condonation of delay under Section 34 ACA, and said that the order of the District Judge called for no interference. Accordingly, it said that there was “no justification to interfere” with the order of the Bombay High Court.

B. What happened in *Chintels v. Bhayana*?

A set aside application filed under Section 34 ACA was dismissed by a single judge of the Delhi High Court for delay, applying Section 34 (3) ACA. Read a case comment on *Chintels* (single judge) here.

An appeal was filed under Section 37 ACA. After a few hearings before another bench, the case was listed before the bench comprising of Rajiv Sahai Endlaw and Asha Menon JJ, and the court nudged the parties to address on the maintainability of the appeal.⁸

³ The court was dealing with a situation where the award was not set aside. But presumably, the interpretation of “under section 34” will apply to both situations—set aside and refusal to set aside. See also fn. 9.

⁴ See para 14, *BGS*.

⁵ 2016 234 DLT 30 (DB); Badar Durrez Ahmed & Ashutosh Kumar, JJ.

⁶ *Harmanprit* appears to have been cited in *Chintels* on its own strength and not because its reasoning was explicitly approved in *BGS*.

⁷ Order of 12 April 2017 in Civil Appeal No. 5247-5248 by Chief Justice, and JS Khehar and DY Chandrachud JJ.

⁸ This happened in the proceedings on 05 November 2020. The court referred to its earlier judgment in *Raj Kumar Brothers v. Life Essential Products*, MANU/DE/1930/2020 available at India Kanoon’s site [here](#) (where an appeal was dismissed on maintainability). The court was of the tentative view on this day of hearing (as noted later in the final order) that “a case of return of an application under Section 34 on the ground of territorial jurisdiction (as happened in *BGS*) was different than rejecting a set-aside application on the ground of limitation.”

Later, speaking for the court, Endlaw J dismissed the appeal in a judgment written in his inimitable style. However, he granted Chintels a certificate for appeal to the Supreme Court. He reasoned as follows: -

- (a) The order in *State of Maharashtra v. Ramdas Construction Co.* and another is binding even though it did not express any opinion on the maintainability of an appeal under Section 37 ACA.
- (b) *BGS SGS Soma JV* held that the order appealable under Section 37 ACA must be one that tests the arbitral award on the grounds set out in Section 34. But, “in our humble opinion if the intention of the legislature was to confine the appeals only to grounds under Section 34(2), nothing prevented them from, instead of referring to Section 34 generally in Section 37(1)(c), referring only to Section 34(2)”⁹.
- (c) Section 34 (3) restricts the power otherwise vested in Court to condone the delay beyond thirty days, and this 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 Section 37 and appealable.
- (d) There is also merit in the contention that refusal to condone the delay also entails affirmation of the underlying order.
- (e) By reading Section 37 as not permitting an appeal against refusal to condone the delay, the persons aggrieved by the award are left with no remedy but to approach the Supreme Court by way of a petition under Article 136 of the Constitution of India.
- (f) Delay can be for varying reasons as diverse as the social, geographical and economic conditions prevalent in this country. Though the scheme of expediency and limited judicial intervention is ingrained in the ACA, not allowing an appeal against an order refusing to condone the delay would be a very harsh outcome.

⁹ *BGS* says that an appeal under Section 37 ACA is maintainable only if the grounds set out in Section 34 is applied to the petition and then court either set the award aside or refuses to set it aside. It ruled that an order returning the petition to be presented before a court of competent jurisdiction does not qualify. The *BGS* court did not say that Section 34 (3) are not grounds under which a set-aside petition can or cannot be dismissed. However, it did approve the reasoning in *Harmanprit* case.