REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4028 OF 2020

CHINTELS INDIA LTD. …Appellant

Versus

BHAYANA BUILDERS PVT. LTD. …Respondent

J U D G M E N T

R.F. Nariman, J.

1. This appeal arises out of a certificate issued under Article 133 read with Article 134A of the Constitution of India by the High Court of Delhi in the impugned judgment dated 04.12.2020. The question raised in this appeal is whether a learned single Judge's order refusing to condone the Appellant's delay in filing an application under section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act, 1996**") is an appealable order under section 37(1)(c) of the said Act. After considering, in particular, two judgments of this Court, the High Court held:

> "**18.** We have considered the rival contentions. Though, as observed by us in the hearing on 5th November, 2020, in view of *BGS SGS Soma JV* supra having referred to the grounds

under Section 34 in entirety and not confined to Section 34(2) only, we were inclined to differentiate between a case of return of an application under Section 34 on the ground of the Court to which it is presented not having territorial jurisdiction, on the one hand and rejection of an application under Section 34 on the ground of having not been filed within the prescribed time, on the other hand, but in view of the Supreme Court having been approached against *Ramdas Construction Co*. supra, expressly holding an appeal as the one before us, to be not maintainable under Section 37, and having dismissed the appeal with a speaking order, though not expressing any opinion on the maintainability of the appeal, we consider ourselves bound thereby and hold this appeal to be not maintainable.

19. We may however observe that Section 37(1)(b) also, while providing for the appealable orders, refers to Section 34 in entirety and not to Section 34(2); though *BGS SGS Soma JV* supra has held that the order which is appealable thereunder is an order testing 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). We are of the view that sub-section (3) of Section 34, by use of the words 'but not thereafter', as interpreted in *Union of India Vs. Popular Construction Co.* (2001) 8 SCC 470, restricts the power otherwise vested in Court to condone the delay beyond thirty days, 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 Section 37 and appealable under Section 37. There is also merit in the contention of Mr. Rajshekhar Rao, Advocate for the appellant that refusal to condone the delay also entails affirmation of the underlying order. Mention in this regard may be made of Section 27 of the Limitation Act, 1963 which, though in the context of suit for possession of any property, extinguishes the right to property at the determination of the period prescribed for instituting the suit for possession thereof. However we need not discuss further since, as aforesaid, we are bound by the dicta in *BGS SGS Soma JV* and *Ramdas Construction Co.* supra.

> **20.** We may also consider another aspect. By reading Section 37 as not permitting an appeal against refusal to condone the delay in applying for setting aside of the award, 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. The refusal to set aside the award may not necessarily be by the Commercial Division of the High Court but may also be by the Commercial Courts of the country. No other remedy would be available to the persons aggrieved by the award, against the decision of any Commercial Court in the country refusing to condone the delay in applying for setting aside of the award, leaving such persons either with the option of accepting / remaining bound by the award even if having excellent grounds for setting aside of the same or of approaching the Supreme Court under Article 136 of the Constitution of India, thereby putting an avoidable burden on the Supreme Court which, as per the scheme of the Constitution of India, was envisaged to hear limited number of matters entailing constitutional issues and not to hear matters of condonation of delay. Though undoubtedly the scheme of expediency and limited judicial intervention is ingrained in the Arbitration Act but at the same time it cannot be forgotten that the Act nevertheless provides remedies against the arbitral award and it is felt that to vest the order, of any Commercial Court in the country refusing to condone the delay in applying for setting aside of the award, and which delay can be for varying reasons as diverse as the social, geographical and economic conditions prevalent in this country, and not even providing any opportunity to the High Courts to have a look therein, would be a very harsh outcome.
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> 21. Thus, while dismissing the appeal as not maintainable, being bound by the dicta of the Supreme Court in *BGS SGS Soma JV* and in *Ramdas Construction Co.* supra, we grant certificate under Article 133 read with Article 134A of the Constitution of India to the appellant."

2. It may be noted that the learned single Judge of the High Court dismissed the application for condonation of delay in an application filed under section 34 of the Arbitration Act, 1996 to set aside an award dated

03.05.2019 *vide* its judgment dated 04.06.2020, and consequently dismissed the section 34 application itself.

3. Shri Rajshekhar Rao, learned Advocate appearing on behalf of the Appellant, has relied strongly upon the judgment of this Court in **Essar Constructions v. N.P. Rama Krishna Reddy** (2000) 6 SCC 94, which was a judgment delivered under section 39 of the Arbitration Act, 1940. His argument is that since section 39 of the 1940 Act is in *pari materia* with section 37 of the Arbitration Act, 1996, in that an appeal lies where a single Judge refuses to condone delay, resulting in an order refusing to set aside an arbitral award, the ratio of **Essar Constructions** (supra) would apply on all fours to the same provision contained in section 37. This being so, he argued that it is clear that refusal to condone delay would result in a refusal to set aside an award, an appeal against such order being maintainable under section 37 of the Arbitration Act, 1996. He also strongly relied upon the judgments of this Court in **Chief Engineer of BPDP/REO Ranchi v. Scoot Wilson Kirpatrick India (P.) Ltd.** (2006) 13 SCC 622 and **Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.** (2011) 8 SCC 333 to buttress his submission that section 39 of the 1940 Act was a *pari materia* provision to section 37 of the Arbitration Act, 1996. He then

relied upon judgments of the Madhya Pradesh[1], Bombay[2], Karnataka[3], Delhi[4] and Calcutta[5] High Courts to argue that an order refusing to condone 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 grounds mentioned in section 34(2) of the Arbitration Act, 1996. He further argued that the judgment of the Allahabad High Court in **Union of India v. Radha Krishna Seth and Anr.**, 2005 SCC OnLine All 8400 and that of the Bombay High Court in **State of Maharashtra v. Ramdas Construction Co.** 2006 (6) Mah. L.J. 678 did not state the law correctly and ought to be overruled by this Court. He argued 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. He also argued that a right of appeal, once

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[1] **Bisleri International Pvt. Ltd. and Ors. v. Sun Petpack Jabalpur Pvt. Ltd. and Anr.** 2009 (4) M.P.L.J. 514.

[2] **E-Square Leisure Pvt. Ltd., Pune v. K.K. Dani Consultants and Engineers Pvt. Ltd.** 2013 (3) Mh.L.J. 24; **Jayshri Ginning & Spinning Pvt. Ltd. v. C.A. Galiakotwala & Company Pvt. Ltd.** 2016 SCC OnLine Bom 5067.

[3] **M/s Crompton Greaves Ltd. v. M/s Annapurna Electronics and Ors.** ILR 2015 KAR 4199.

[4] **Harmanprit Singh Sidhu v. Arcadia Shares & Stock Brokers Pvt. Ltd.** (2016) 234 DLT 30.

[5] **Damodar Valley Corporation v. Sanjay Singh Rathor** 2018 SCC OnLine Cal 4014.

granted, ought not to be limited by statutory interpretation where the words used are capable of a wider construction. In particular, referring to the language of section 37(1)(c) of the Arbitration Act, 1996, he argued that there must be refusal to set aside an arbitral award "under section 34", which includes section 34(3), under which a court may refuse to condone delay in filing an application under section 34. Coming to the two Supreme Court judgments referred to in the impugned judgment, it was his contention that the focus of this Court in **BGS SGS Soma JV. v. NHPC Limited** (2020) 4 SCC 234, was on a completely different question, namely, as to 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. It was only in the course of discussion relatable to this question that this Court approved certain observations made in the decision of the Delhi High Court in **Harmanprit Singh Sidhu v. Arcadia Shares and Stock Brokers Pvt. Ltd.** 2016 SCC OnLine Del 5383, in which a learned single Judge of the Delhi High Court allowed an application for condonation of delay, a Division Bench then holding that an appeal against such an order was not maintainable under section 37 of the Arbitration Act, 1996. He contended that it is only in this context that paragraph 17 of **BGS SGS Soma** (supra) approved of the observations made in **Harmanprit Singh Sidhu** (supra), inasmuch as it cannot be said that the Court has refused to set aside the award under section 34, as it

may yet do so if any of the grounds contained in section 34(2) are made out. So far as this Court's order dated 12.04.2017 in **State of Maharashtra and Anr. v. M/s Ramdas Construction Co. and Anr.** [C.A. Nos. 5247-5248 of 2007] is concerned, he argued that this Court did not go into the maintainability aspect at all, but ultimately dismissed the Civil Appeals on the ground that the District Judge, Nagpur had held that the period of delay being beyond four months, the court had no jurisdiction to entertain the application for condonation of delay or the application on merits under section 34 of the Arbitration Act, 1996.

4. Shri Mukul Rohatgi, learned Senior Advocate appearing on behalf of the Respondent, strongly refuted the fact that section 37 of the Arbitration Act, 1996 is in *pari materia* with section 39 of the 1940 Act. According to him, section 39 of the 1940 Act is materially different, and concerns itself with grounds that were made out under section 30 of the said Act, which grounds were completely different from the grounds that could be made out under section 34(2) and (2A) of the 1996 Act. Therefore, Shri Rohatgi argued that section 37 needs to be interpreted on its own terms, and that consequently, this Court's judgment in **Essar Constructions** (supra) would not be applicable. He relied strongly upon section 5 of the Arbitration Act, 1996, by which it was statutorily made clear that judicial intervention is to be minimal in the arbitration process. For this purpose he also relied upon the Statement of Objects and Reasons for enacting the Arbitration

Act, 1996. He then went on to state that section 37 of the Arbitration Act, 1996 in fact carries out this object. He stressed that this object was reinforced first, by the *non-obstante* clause contained in section 37(1); and second, by the fact that 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". He also stressed the fact that the word "namely" makes it clear that it is only from the orders set out in section 37 that an appeal can be filed. He went on to argue that an appeal, being a creature of statute, has to be read as the statute provides without expanding any of the words used. According to him, 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. He relied strongly upon the fact that this Court in **BGS SGS Soma** (supra) had approved of **Harmanprit Singh Sidhu** (supra), and stated exactly this in paragraph 17 thereof. He then strongly relied upon the judgment in **Union of India v. Simplex Infrastructures Ltd.** (2017) 14 SCC 225 for the proposition 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. He ended by saying that in point of

fact the Bombay High Court Division Bench judgment in **Ramdas Construction Co.** (supra) was the correct enunciation of the law, and that we should accept this enunciation and overrule the judgments of the other High Courts.

5. Having heard learned counsel for the parties, it is important to first set out section 37 of the Arbitration Act, 1996 which is as follows:

> "**37. Appealable orders.**—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—
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> (a) refusing to refer the parties to arbitration under section 8;
> (b) granting or refusing to grant any measure under section 9;
> (c) setting aside or refusing to set aside an arbitral award under section 34.
>
> (2) Appeal shall also lie to a court from an order of the arbitral tribunal—
> (a) accepting the plea referred to in sub-section (2) or sub-section
> (3) of section 16; or
> (b) granting or refusing to grant an interim measure under section 17.
>
> (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or takeaway any right to appeal to the Supreme Court."

6. Since we are directly concerned with section 37(1)(c), it is important to advert to the language of section 34 as well. Section 34(1) reads as follows:

> "**34. Application for setting aside arbitral award.**— (1) Recourse to a Court against an arbitral award may be made

> only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).”

7. Section 34(2) and (2A) then sets out the grounds on which an arbitral award may be set aside. Section 34(3), which again is material for decision of the question raised in this appeal, reads as follows:

> “(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:
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> Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.”

8. A reading of section 34(1) would make it clear that an application made to set aside an award has to be in accordance with both sub-sections (2) and (3). This would mean that such application would not only have to be within the limitation period prescribed by sub-section (3), but would then have to set out grounds under sub-sections (2) and/or (2A) for setting aside such award. What follows from this is that 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, this Court having made it clear that section 5 of the Limitation Act, 1963 does not apply and that any delay beyond 120 days cannot be condoned – see **State of Himachal Pradesh v. Himachal Techno Engineers and Anr.** (2010) 12 SCC 210 at paragraph 5.

9. We now come to section 37(1)(c). It is important to note that the expression "setting aside or refusing to set aside an arbitral award" does not stand by itself. The expression has to be read with the expression that follows - "under section 34". Section 34 is not limited to grounds being made out under section 34(2). 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.

10. In **Essar Constructions** (supra), a judgment rendered under section 39 of the 1940 Act, this Court was faced with the same question as is raised in the appeal before us. In order to appreciate the ratio of this judgment, it is necessary to first set out section 39 of 1940 Act, which reads as under:

> "**39. Appealable orders:-** (1) An appeal shall lie from the following orders passed under this Act (and from no others) to

> the Court authorised by law to hear appeals from original decrees of the Court passing the order:
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> An order **–**
>
> (i) superseding an arbitration;
> (ii) on an award stated in the form of a special case;
> (iii) modifying or correcting an award;
> (iv) filing or refusing to file an arbitration agreement;
> (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
> (vi) setting aside or refusing to set aside an award;
>
> Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court**.**
>
> (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

11. The question which the Court was required to answer was set out as follows:

> "**5.** But was the Civil Judge's order dismissing the respondent's application under Section 5 at all revisable under Section 115 of the Code or did an appeal lie from it under Section 39 of the Arbitration Act, 1940? The answer is of moment as the powers of an appellate court are wider than those available under Section 115. Section 39(1)(*vi*) of the Arbitration Act, 1940 says that an appeal shall lie inter alia from an order "refusing to set aside an award".
>
> **6.** To arrive at a conclusion as to whether the order passed by the Senior Civil Judge, Kakinada was an order "refusing to set aside the award", we have to consider the facts."

12. After setting out the order of the Senior Civil Judge, who refused to condone delay in filing an application for setting aside the award, the Court then held:

"**11.** The outcome of the order *in effect* was that the prayer for setting aside the award was refused on the ground of delay.

12. The "effect test" was applied by the High Court of Andhra Pradesh in *Babumiyan & Mastan* v. *K. Seethayamma* [AIR 1985 AP 135] which said:

"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."

13. Again a Division Bench of the Assam High Court in *Mafizuddin Bhuyan* v. *Alimuddin Bhuyan* [AIR 1950 Ass 191] has said:

"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."

14. In some High Courts, no separate application is filed under Section 5 of the Limitation Act and the prayer for condonation of delay is included along with the prayers made for substantive relief. Courts have entertained appeals from an order dismissing an application on the ground of limitation. Thus, in *State of W.B.* v. *A. Mondal* [AIR 1985 Cal 12 (DB)] where an application under Section 30 of the Arbitration Act was dismissed on the ground of limitation, an appeal was entertained. (See also *Damodaran* v. *Bhaskaran* [(1988) 2 KLT 753].)

15. The procedure appears to have been approved by the Supreme Court in the case of *Union of India* v. *Union Builders* [AIR 1985 Cal 337 (DB)] where on an appeal to the Supreme Court from an order dismissing an application under Section 30 on the ground of delay, the appeal was remanded to the High Court to be disposed of.

> **16.** The position should be no different in courts where a separate application under Section 5 of the Limitation Act is required to be filed. If the various High Courts' decisions noted earlier are correct, then the application under Section 5 being dismissed, the application under Section 30 would consequently also have to be dismissed although this might be a mere formality. The end result would be the same.
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> *xxx xxx xxx*
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> **21.** Section 39(1)(*vi*) of the Arbitration Act, 1940 does not indicate the grounds on which the court may refuse to set aside the award. There is nothing in its language to exclude a refusal to set aside the award because the application to set aside the award is barred by limitation. By dismissing the application albeit under Section 5, the assailability of the award is concluded as far as the court rejecting the application is concerned. Ultimately therefore, it is an order passed under Section 30 of the Arbitration Act though by applying the provisions of the Limitation Act."

13. The Court ultimately concluded:

> "**25.** 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."

14. It will be noticed that so far as the present question is involved, section 39(1)(vi) of the 1940 Act is in *pari materia* to section 37(1)(c) of the Arbitration Act, 1996. This was in fact held in two of the judgments of this Court. In **Chief Engineer of BPDP/REO Ranchi** (supra), this Court when considering a similar question held as follows:

> "**5.** Section 37(1)(*b*) of the Act is in pari materia with Section 39(1)(*vi*) of the Arbitration Act, 1940 (in short "the old Act"). The provisions in the Acts read as follows:

1996 Act
"37. (1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order, namely—

***
(*b*) setting aside or refusing to set aside an arbitral award under Section 34."

1940 Act
"39. *Appealable orders.*—(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the court authorised by law to hear appeals from original decrees of the court passing the order:

An order—
***
(*vi*) setting aside or refusing to set aside an award:"

15. Having so held, this Court then referred to and followed the judgment in **Essar Constructions** (supra) and the judgment contained in **Union of India v. Manager, Jain and Associates** (2001) 3 SCC 277, ultimately holding:

"**8.** The decision in *Popular Construction case* [(2001) 8 SCC 470] did not deal with specific issues in this case. In that decision it was held that in respect of "sufficient cause cases" the provisions of Section 34(3) of the Act which are special provisions relating to condonation of delay override the general provisions of Section 5 of the Limitation Act, 1963 (in short "the Limitation Act"). The position was reiterated in the *Western Builders case* [(2006) 6 SCC 239] and also in *Fairgrowth Investments Ltd.* v. *Custodian* [(2004) 11 SCC 472] . There can be no quarrel with the proposition that Section 5 of the Limitation Act providing for condonation of delay is excluded by Section 34(3) of the Act.

9. But the question in the instant case is not about the applicability of Section 5 of the Limitation Act, and the question really is whether the appeal was maintainable. The High Court

did not consider this aspect. The appeal is clearly maintainable. Therefore, the order of the High Court is set aside. The High Court shall deal with the matter and examine the respective stand on merits treating the appeal to be maintainable."

16. Likewise, in **Fuerst Day Lawson Ltd.** (supra) this Court held:

"**37.** These general principles are culled out from the decisions of this Court rendered under Section 104 CPC and various other Acts, as noted above. But there is another set of decisions of this Court on the question under consideration rendered in the context of Section 39 of the 1940 Act. Section 39 of the erstwhile Act contained the provision of appeal and provided as follows:

"39.*Appealable orders*.—(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the court authorised by law to hear appeals from original decree of the court passing the orders:

An order—

(*i*) superseding an arbitration;

(*ii*) on an award stated in the form of a special case;

(*iii*) modifying or correcting an award;

(*iv*) filing or refusing to file an arbitration agreement;

(*v*) staying or refusing to stay legal proceedings where there is an arbitration agreement;

(*vi*) setting aside or refusing to set aside an award:

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

(Insofar as relevant for the present, Section 37 of the 1996 Act, is very similar to Section 39 of the previous Act as quoted above.)"

17. It then referred to an argument of counsel that there would be no material difference between the provisions of section 39 of Arbitration Act, 1940 and section 37 of the Arbitration Act, 1996 vis-à-vis section 50 of the 1996 Act, as follows:

> "**43.** Mr Dave, in reply submitted that the words "(and from no others)" occurring in Section 39 of the 1940 Act and Section 37 of the 1996 Act were actually superfluous and seen, thus, there would be no material difference between the provisions of Section 39 of the 1940 Act or Section 37 of the 1996 Act and Section 50 of the 1996 Act and all the decisions rendered on Section 39 of the 1940 Act will apply with full force to cases arising under Section 50 of the 1996 Act."

18. So far as section 37 of the Arbitration Act, 1996 and section 39 of the Arbitration Act, 1940 were concerned, this Court agreed with counsel's argument, but disagreed with the submission insofar as section 50 of the 1996 Act was concerned, as follows:

> "**52.** Having regard to the grammatical use of brackets or parentheses, if the words "(and from no others)" occurring in Section 39 of the 1940 Act or Section 37 of the 1996 Act are viewed as "an explanation or afterthought" or extra information separate from the main context, then, there may be some substance in Mr Dave's submission that the words in parenthesis are surplusage and in essence the provisions of Section 39 of the 1940 Act or Section 37 of the 1996 Act are the same as Section 50 of the 1996 Act. Section 39 of the 1940 Act says no more and no less than what is stipulated in Section 50 of the 1996 Act. But there may be a different reason to contend that Section 39 of the 1940 Act or its equivalent Section 37 of the 1996 Act are fundamentally different from Section 50 of the 1996 Act and hence, the decisions rendered under Section 39 of the 1940 Act may not have any application to the facts arising under Section 50 of the 1996 Act. But for that we need to take a look at the basic scheme of the 1996 Act and its relevant provisions."

19. The reasoning in **Essar Constructions** (supra) commends itself to us, being on a *pari materia* provision to that contained in section 37(1)(c) of the Arbitration Act, 1996. We may only add that the reasoning of the aforesaid judgment is further strengthened by our analysis of the additional words "under section 34" which occur in section 37(1)(c), and which are absent in section 39(1)(vi) [the *pari materia* provision to section 34 of the Arbitration Act, 1996 being section 30 of the Arbitration Act, 1940].

20. In point of fact, the "effect doctrine" referred to in **Essar Constructions** (supra) is statutorily inbuilt in section 37 of the Arbitration Act, 1996 itself. For this purpose, it is necessary to refer to sections 37(1)(a) and 37(2)(a). So far as section 37(1)(a) is concerned, where a party is referred to arbitration under section 8, no appeal lies. This is for the reason that the effect of such order is that the parties must go to arbitration, 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) or the subject matter of grounds to set aside under section 34 an arbitral award ultimately made, depending upon whether the preliminary points are accepted or rejected by the arbitrator. It is also important to note that an order refusing to refer parties to arbitration under section 8 may be made on a *prima facie* finding that no valid arbitration agreement exists, or on the ground that the original arbitration agreement, or a duly certified

copy thereof is not annexed to the application under section 8. In either case, i.e. whether the preliminary ground for moving the court under section 8 is not made out either by not annexing the original arbitration agreement, or a duly certified copy, or on merits – the court finding that *prima facie* no valid agreement exists – an appeal lies under section 37(1)(a).

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. This is made clear by section 16(5) and (6) of the Arbitration Act, 1996 which read as follows:

> "**16. Competence of arbitral tribunal to rule on its jurisdiction.—**
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> ***xxx xxx xxx***
>
> (5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.
>
> (6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

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.

23. We now come to the judgment in **Simplex Infrastructures Ltd.** (supra). In this judgment, what was argued before this Court is set out with reference to the Division Bench judgment under appeal as follows:

> "**11.** The Division Bench of the High Court, however, made a fine distinction by holding that the judgment of the learned Single Judge of condoning delay in filing of the petition under Section 34 of the Act was without jurisdiction and not in terms of the provisions of the Act. It is not possible to countenance this approach. The Division Bench, in our opinion, was not right in observing that the decision in *Tanusree Art Printers* [*Tanusree Art Printers* v. *Rabindra Nath Pal*, 2000 SCC OnLine Cal 217] being of a Special Bench of three Judges of the same court, was binding, in spite of having noticed the decision of this Court in *Fuerst Day Lawson Ltd.* [*Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*, (2011) 8 SCC 333] — which is directly on the point and was pressed into service by the appellant. Neither the Division Bench of the High Court of Calcutta which dealt with *Modi Korea Telecommunication Ltd.* [*Modi Korea Telecommunication Ltd.* v. *Appcon Consultants (P) Ltd.*, 1999 SCC OnLine Cal 19] nor the three-Judge Bench which decided *Tanusree Art Printers*, had the benefit of the judgment of this Court in *Fuerst Day Lawson Ltd.*, which is later in time."

24. In stating that the Division Bench was wrong, as a judgment of a single Judge condoning delay in the filing of a petition under section 34 cannot be said to be without jurisdiction, the Court then held:

> "**12…** On a bare reading of this provision, it is noticed that the remedy of the appeal has been provided only against an order of setting aside or refusing to set aside an arbitral award under Section 34. No appeal is provided against an order passed by

> the court of competent jurisdiction condoning the delay in filing the petition under Section 34 of the Act as such. The Division Bench in the impugned judgment, therefore, rightly noted that remedy of appeal against the impugned order of the learned Single Judge was not otherwise available under Section 37 of the Act.
>
> **13.** In our opinion, the issue is squarely answered against the respondent by the decision of this Court in *Fuerst Day Lawson Ltd.* [*Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*, (2011) 8 SCC 333] In that, the judgment of the learned Single Judge dated 27-4-2016 [*Union of India* v. *Simplex Infrastructures Ltd.*, 2016 SCC OnLine Cal 12045], was passed on an application purported to be under Section 34(3) of the Act, for condoning delay in filing of the petition for setting aside the arbitral award. Hence, the remedy of letters patent appeal against that decision is unavailable. The question as to whether the learned Single Judge had rightly exercised the discretion or otherwise, could be assailed by the respondent before this Court by way of special leave petition. But, certainly not by way of a letters patent appeal under Clause 15. For, even if the learned Single Judge may have committed manifest error or wrongly decided the application for condonation of delay, that judgment is ascribable to exercise of jurisdiction under Section 34(3) of the Act. In other words, whether the prayer for condonation of delay can be accepted or whether the application deserves to be rejected, is a matter well within the jurisdiction of that court."

25. This judgment does not in any manner militate against what has been held by us. In answer to the question as to whether a single Judge's judgment condoning delay in filing an application under section 34 was without jurisdiction, this Court correctly held that such an order is in exercise of jurisdiction conferred by the statute. This judgment therefore cannot be said to be an authority for the proposition that, as the converse position to the facts contained in the present appeal before us has been held to be not appealable, it must follow that even where delay is *not* condoned, the

same position obtains. This would fly in the face of the reasoning contained in this judgment, as well as the reasoning contained in **Essar Constructions** (supra), which has commended itself to us.

26. We now come to this Court's judgment in **BGS SGS Soma** (supra). As correctly pointed out by Shri Rao, the question before this Court in **BGS SGS Soma** (supra) was a completely different one, being set out in paragraph 1 of the judgment as follows:

> "**1.** Leave granted. Three appeals before us raise questions as to maintainability of appeals under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act, 1996"), and, given the arbitration clause in these proceedings, whether the "seat" of the arbitration proceedings is New Delhi or Faridabad, consequent upon which a petition under Section 34 of the Arbitration Act, 1996 may be filed dependent on where the seat of arbitration is located."

27. In answering this question, the Court first went into the interplay between section 37 of the Arbitration Act, 1996 and section 13 of the Commercial Courts Act, 2015, holding that section 37 of the Arbitration Act alone provides grounds for appeal, section 13(1) of the Commercial Courts Act providing the procedure thereof. In the course of discussion, this Court then referred to a judgment of the Delhi High Court as follows:

> "**16.** Shri Chowdhury also referred to another Delhi High Court judgment reported as *Harmanprit Singh Sidhu* v. *Arcadia Shares & Stock Brokers (P) Ltd.* [(2016) 234 DLT 30], in which a learned Single Judge of the Delhi High Court allowed an application for condonation of delay in filing a Section 34 petition. The Division Bench, in holding that an appeal against such an order would not be maintainable under Section 37 of

the Arbitration Act, 1996, read with the Commercial Courts Act, 2015 held:

"*10*. Coming to Section 37(1), it is evident that an appeal can lie from only the orders specified in clauses (*a*), (*b*) or (*c*). In other words, an appeal under Section 37 would only be maintainable against (*a*) an order refusing to refer the parties to arbitration under Section 8 of the A&C Act; (*b*) an order granting or refusing to grant any measure under Section 9 of the A&C Act; or (*c*) an order setting aside or refusing to set aside an arbitral award under Section 34 of the A&C Act. The impugned order [*Arcadia Shares & Stock Brokers (P) Ltd.* v. *Harmanprit Singh Sidhu*, 2016 SCC OnLine Del 6625] is clearly not relatable to Section 8 or 9 of the A&C Act. It was sought to be contended by the learned counsel for the appellant that the present appeal would fall within Section 37(1)(*c*) which relates to an order "setting aside" or "refusing to set aside" an arbitral award under Section 34. We are unable to accept this proposition. By virtue of the impugned order, the arbitral award dated 10-9-2013 has not been set aside. Nor has the court, at this stage, refused to set aside the said arbitral award under Section 34 of the A&C Act. In fact, the appellant in whose favour the award has been made, would only be aggrieved if the award were to have been set aside in whole or in part. That has not happened. What the learned single Judge has done is to have condoned the delay in re-filing of the petition under Section 34. This has not, in any way, impacted the award."

17. The reasoning in this judgment in *Harmanprit Singh Sidhu* commends itself to us, as a distinction is made between judgments which either set aside, or refuse to set aside, an arbitral award after the court applies its mind to Section 34 of the Arbitration Act, 1996, as against preliminary orders of condonation of delay, which do not in any way impact the arbitral award that has been assailed."

28. It is well settled that judgments are not to be construed like Euclid's theorems (see **Amar Nath Om Prakash v. State of Punjab** (1985) 1 SCC 345), but all observations made therein must relate to the context in which they were made. In that case, the Court put it thus:

"**10.** There is one other significant sentence in *Sreenivasa General Traders* v. *State of A.P* [(1983) 4 SCC 353] with which we must express our agreement, it was said:

"With utmost respect, these observations of the learned Judge are not to be read as Euclid's theorems, nor as provisions of a statute. These observations must be read in the context in which they appear."

We consider it proper to say, as we have already said in other cases, that judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

In *London Graving Dock Co. Ltd.* v. *Horton* [1951 AC 737, 761] Lord MacDermott observed:

"The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge....

In *Home Office* v. *Dorset Yacht Co. Ltd.* [(1970) 2 All ER 294] Lord Reid said:

"Lord Atkin's speech [*Donoghue* v. *Stevension*, 1932 All ER Rep 1, 11] ... is not to be treated as if it was a statutory definition. It will require qualification in new circumstances."

Megarry, J. in (1971) 1 WLR 1062 observed:

"One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament."

And, in *Herrington* v. *British Railways Board* [1972 AC 877 (HL)] Lord Morris said:

> "There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."
>
> **11.** There are a few other observations in *Kewal Krishan Puri case* [(1980) 1 SCC 416] to which apply with the same force all that we have said above. It is needless to repeat the oft-quoted truism of Lord Halsbury that a case is only an authority for what it actually decides and not for what may seem to follow logically from it."

29. The context in which paragraph 17 of **BGS SGS Soma** (supra) was made, was a context in which an application under section 34 would have to be returned to the Court which had jurisdiction to decide a section 34 application, dependent upon where the seat of the arbitral tribunal was located. In this context, it was held that a mere preliminary step, which did not lead to the application being rejected finally, cannot be characterised as an order which would result in the application's fate being sealed once and for all. The Court's focus was not on the language of section 37(1)(c), nor were any arguments addressed as to its correct interpretation. As a matter of fact, **Harmanprit Singh Sidhu** (supra) itself went on to hold:

> "**13.** In sum, the impugned order does not fall within the category of appealable orders specified in Section 37(1) of the A&C Act. Therefore, even if the provisions of Section 37(1) are read with Section 13 of the Commercial Courts Act, the present appeal is not maintainable. This, however, does not mean that the appellant cannot take up the ground that is sought to be urged before us if the decision in OMP 294/2014 (under Section 34 of the A&C Act) goes against him. 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 A&C 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&C Act of not, in any way, stalling the proceedings thereunder. For example, under Section 13(4) of the A&C Act, if a challenge to an arbitrator is not successful, the arbitral tribunal is required to continue the arbitral proceedings and make an arbitral award and, in such an instance, as provided in Section 13(5) of the A&C Act, the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34. In other words, recourse to a remedy for an unsuccessful challenge to an arbitrator is deferred till the stage of the making of the award. Similarly, under Section 16, an arbitral tribunal may rule on its jurisdiction. In a case where the arbitral tribunal rejects a plea with regard to its jurisdiction, it is enjoined by Section 16(5) of the A&C Act to continue with the arbitral proceedings and to make the arbitral award. Section 16(6) stipulates that a party aggrieved by such an arbitral award may make an application for setting aside the award in accordance with Section 34. Here, too, the unsuccessful party, who challenges the jurisdiction of an arbitral tribunal, is asked to wait till the award is made. The remedy of questioning the decision of the arbitral tribunal with regard to the arbitrator's jurisdiction in such a case is not extinguished but is merely deferred till the making of the arbitral award. In similar vein, in the present case, the remedy of challenging the decision of condoning the delay in re-filing is not extinguished but is deferred till the final decision of the court on the pending Section 34 petition."

30. Obviously therefore, an observation of this Court torn out of its context cannot be said to conclude the issue that is now before us.

31. We now come to the sheet anchor of Shri Rohatgi's case, namely, **Ramdas Construction Co.** (supra). In this judgment, a Division Bench of the Bombay High Court held:

"**9.** Sub-section (3) of section 34 of the Act provides that an application for setting aside may be made after three months have elapsed from the date on which the party making such application had received the arbitral award or, if a request had been made under section 33, from the date on which that

request had been disposed of by the arbitral tribunal, provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months, it may entertain the application within a further period of thirty days, but not thereafter. This provision of law expressly reveals that the legislature has provided a specific period of limitation for filing an application for setting aside of the award and simultaneously the Court has been given discretion to extend such period only by thirty days, and not beyond the said period of thirty days. The provision is very clear in that regard. However, the scope of enquiry under sub-section (3) is restricted to the cause for delay in filing the application but it does not relate to the merits of the application for setting aside of the award. Being so, an order which is to be passed in exercise of powers under sub-section (3) of section 34 of the Act cannot extend to the subject matter of the application for setting aside of the award but has to restrict to the aspect of delay in filing such application only. Such an order is not contemplated to be an appealable order within the meaning of the said expression under section 37 of the Act. It is very clear from the fact that section 37 refers to the orders dealing with the aspect of setting aside or refusing to set aside an arbitral award. It does not refer to the proceedings preceding the enquiry in relation to the issue of setting aside or refusing to set aside an arbitral award. The subject-matter of delay in filing an application and the condonation thereof relates to the proceedings preceding the enquiry for setting aside or refusing to set aside an arbitral award. Once it is clear that section 37(1)(b) does not contemplate any order passed in such proceeding relating to the matter preceding the enquiry in relation to setting aside or refusing to set aside an arbitral award, such an order cannot be considered as an appealable order within the meaning of the said expression under section 37 of the Act.

10. Undoubtedly the impugned order while rejecting the application for condonation of delay, clearly observes:

“Consequently, application under section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the award is also rejected being barred by time.”

> In other words, the Court has not dealt with the application for setting aside of the award on merits and the same has been disposed of solely as a consequence of rejection of the application for condonation of delay and there has been no enquiry as regards the rights of the parties on the issue of setting aside of the award. The appealable order which is contemplated for the purpose of exercise of appellate jurisdiction is the one which deals with the merits of the case in relation to the claim for setting aside or refusing to set aside an arbitral award. As already stated above, the appellate powers under section 37 are not in relation to the proceedings which precedes the enquiry regarding setting aside or refusing to set aside an arbitral award. Being so, the consequence of the order of dismissal of the application for condonation of delay cannot itself amount to an appealable order under section 34(1) for the purpose of appeal under section 37(1) of the Act."

32. This judgment cannot be said to state the law correctly as it does not advert to the decision of this Court in **Essar Constructions** (supra), and is against the interpretation of section 37(1)(c) of the Arbitration Act, 1996 given by us above. We may also add that this Court, in dismissing the Civil Appeal against the aforesaid judgment, held:

> "1. The appellants before this Court, in the first instance, impugned the award rendered by the Chief Engineer on 30.06.2005, by preferring an appeal before the District Judge, Nagpur. The District Judge, Nagpur, declined to entertain the appeal on merits, as he found the same barred by limitation, and as such, the application for condonation of delay was dismissed. The District Judge, Nagpur in his order dated 23.12.2005 recorded as under:
>
> "17. In nut-shell, what emerges from the material placed on the record is that the applicants or in other words, party making application under Section 34 duly received the award on 4.7.2005, but approached this Court on 18.11.2005. Time in between 4.7.2005 and 18.11.2005 was consumed in taking administrative decision. Beyond statutory period of limitation of three months, further period of thirty days can be condoned, but

> not thereafter. On 4.11.2005, entire period of four months elapsed. In this view of the matter, this Court has no jurisdiction to entertain the application for condonation of delay and for that matter, application under Section 34 of the Act."
>
> 2. The order dated 23.12.2005 was assailed by the appellants before the High Court. Having remained unsuccessful, the appellants have approached this Court. The primary issue, that emerges for consideration is, whether the dismissal of the application filed by the appellants under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act'), by the District Judge, Nagpur, was justified in law.
>
> 3. So far as the issue in hand is concerned, having heard learned counsel for the rival parties, we are satisfied that on an earlier occasion, the same proposition came up for consideration before this Court, and stands declared by this Court in State of Himachal Pradesh vs. Himachal Techno Engineers (2010) 12 SCC 210. In view of the legal position declared by this Court, on the subject of limitation under Section 34 of the Arbitration Act, we are of the view, that the order passed by the District Judge, Nagpur, calls for no interference."

33. The order of this Court does not in any manner touch upon the reasoning of the Bombay High Court. On the contrary, this court refers to the judgment of this Court in **Himachal Pradesh Techno Engineers** (supra), which as has been held by us hereinabove, makes it clear that Section 5 of the Limitation Act is excluded by section 34(3) of the Arbitration Act, 1996 and that no condonation of delay can take place beyond the period of 120 days. It is on this ground, citing the learned District Judge's order, that this Court did not interfere. Consequently, it cannot be said that this Court approved of the judgment of the Division Bench of the Bombay High Court. Likewise, the reasoning contained in **Radha Krishna Seth** (supra),

does not commend itself to us. Both these judgments therefore do not state the law correctly and stand overruled.

34. Shri Rohatgi referred to the Statement of Objects and Reasons of the Arbitration Act, 1996 and in particular clause 4(v), which reads as follows:

> "4. Main objects of the Bill are as under:
>
> *xxx xxx xxx*
>
> (v) to minimise the supervisory role of courts in the arbitral process;"

35. Shri Rohatgi then read section 5 of the Arbitration Act, 1996 to us. According to him, in furtherance of this object, section 37 was enacted giving a limited right of appeal. He argued that an appeal, being a creature of statute should not, therefore, be enlarged beyond what is provided by the Legislature. Section 5 of the Arbitration and Conciliation Act reads as follows:

> "**5. Extent of judicial intervention.**—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

36. This section does not take Shri Rohatgi's argument much further, as 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, which therefore brings us back to square one. Undoubtedly, a limited right of appeal is given under section 37 of the Arbitration Act, 1996. But it is not the province or duty of this Court to

further limit such right by excluding appeals which are in fact provided for, given the language of the provision as interpreted by us hereinabove. Thus, this last argument also has no legs on which to stand.

37. Consequently, the question of law is answered by stating 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 Arbitration Act, 1996 to set aside an award.

38. The appeal is accordingly allowed. The impugned judgment of the Division Bench under appeal is set aside, and the matter is remitted to a Division Bench of the High Court of Delhi to decide whether the Single Judge's refusal to condone delay is or is not correct.

39. The appeal is allowed in the aforesaid terms. All pending applications are disposed of.

……J.
(R. F. Nariman)

……J.
(Navin Sinha)

……J.
(K.M. Joseph)

New Delhi,
11th February, 2021.