

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL APPEAL NO. 55 OF 2020
IN
CHAMBER SUMMONS (L) NO. 445 OF 2019
IN
COMMERCIAL ARBITRATION PETITION NO. 437 OF 2018

Oil & Natural Gas Corporation Ltd.

A public sector undertaking incorporated under
Companies Act, 1956 having its Registered
Office at 5, Nelson Mandela Marg, Vasant Kunj,
New Delhi- 110 070.

Mumbai Region – Civil Construction

Section- through CE(C) I/C, IEIT Building,

Ground Floor, ONGS Complex,

Phase-I, Panvel- 410 221.

... Appellant.

V/s.

A Consortium of Sime Darby Engineering
Sdn. Bhd., a company established and
registered under the Laws of Malaysia, having
its registered office at Mezzanine Floor,
Kompleks Sime Darby, Persiaran Kewajipan,
USJ 7,47600 Subang Jaya, Selangor
Darul Ehsan, Malaysia.

And

Swiber Offshore Construction Pte. Ltd.,
a company established and registered under
the Laws of Singapore having its principal
office at 12, International Business Park,
Cyberhub @ IBP, #04-01 to 04,
Singapore 609920.

... Respondent.

Mr.Zubin Behramkamdin with Mr.Rohit Gupta, Nishit Dhruva, Prakash Shinde, Khushbu Chhajed and Abhishek Bhavsar i/b. MDP & Partners for the Appellant.

Mr.Kevic Setalvad, Senior Advocate with Ms.Renu Gupta, Ms.Sushma Nagaraj, Ms.Kinjal Patel and Ms.Vibhuti Keny for the Respondent.

CORAM : NITIN JAMDAR AND
C. V. BHADANG, JJ.
(Through Video Conferencing)

DATE : 3 July 2021.

JUDGMENT : (Per Nitin Jamdar, J.)

The Appellant- Oil & Natural Gas Corporation Ltd. has filed a Commercial Arbitration Petition under Section 34 of the Arbitration and Conciliation Act, 1996 before the learned Single Judge challenging the arbitral award rendered against the Appellant. In this petition, the Appellant took out a chamber summon to amend the original petition. By the impugned order, the learned Single Judge granted some amendments and rejected the other amendments. The Appellant, by this appeal, has challenged the order of the learned Single Judge rejecting the amendments.

2. Preliminary objection is taken by the Respondent to the maintainability of the appeal. To consider the preliminary objection, a brief narration of facts is necessary, and it is as follows:

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3. The Appellant- ONGC issued a tender on 29 May 2009 for the work- 'The construction and commissioning for entire facilities of one well cum process platform with living quarters cum power generation cum water injection on an independent jacket.' On 19 May 2010, the tender was awarded to the Respondents for works amounting to USD 618376022/-. Pursuant to the same, an agreement was executed between the parties on 3 July 2010. A dispute arose between the parties regarding the said contract. The Respondents invoked an arbitration clause and issued notice on 1 June 2016 by appointing an arbitrator and called upon the Appellant to appoint its arbitrator. An arbitral tribunal was then constituted. The parties filed their pleadings. The Appellant filed counterclaims. The arbitral tribunal heard the parties and delivered the majority award on 22 March 2018. The Appellant was held liable to pay the Respondent a sum of USD 5127915.40 (INR 333724734/-) in full and final settlement of rival claims. Interest at 14% per annum from the award till payment was granted. Most of the counterclaims were rejected.

4. Being aggrieved by the Award, the Appellant filed Arbitration Petition No.437/2018 on 26 March 2018. On 25 March 2019, the Appellant took out Chamber Summons (L) No. 445/2019 to amend the Arbitration Petition and add grounds to challenge the Award. The schedule of amendments contained various grounds to be added. The Respondent filed its reply to the chamber summons and contested the chamber summons. The learned

Single Judge grouped the amendments into three categories. First, the grounds R to TT (except SS) pertaining to the challenge to the counterclaim of the Appellant being rejected by the Arbitrators. The second, grounds SS to WW and III, elaborated the existing grounds of challenge regarding the delay and liquidated damages. The third, pertaining to various individual claims not raised during the contract work but were claimed as additional work.

5. After noting the law on the subject regarding amendments, more particularly amendments to the arbitration petition filed under Section 34 of the Act of 1996, the learned Single Judge opined that the grounds in the elaboration of existing grounds, i.e. the second category of grounds need to be granted. As for the third category, the learned Single Judge observed that these grounds were additional grounds of challenge and could not have been taken up after the expiry of the period of limitation. So far as the first category of grounds, the learned Single Judge observed that in respect of the counterclaim, there are new grounds and would introduce a new claim or cause of action, and no circumstances exist why an exception should be made in an ordinary rule of not granting amendments after the period of limitation. The learned Single Judge, thus, by the impugned order dated 28 August 2019, granted some of the amendments and rejected the others as above.

6. This order is under challenge before us in the present appeal. According to the Appellant, the chamber summons ought to

have been allowed in entirety. A preliminary objection is taken by the Respondent to the maintainability of the appeal, contending that the appeal does not fall within the ambit of Section 37 of the Act of 1996

7. We have heard Mr.Zubin Behramkamdin learned Advocate for the Appellant and Mr.Kevic Setalvad learned Senior Advocate for the Respondent.

8. According to the Respondents, only those orders that fall within the ambit of Section 37 of the Act of 1996 can be challenged in appeal. On the other hand, it is the case of the Appellant that the rejection of chamber summons, in the present circumstances, falls within the ambit of Section 37(1)(c) of the Act.

9. Section 37 of the Act reads as under:

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:—

(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) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—

(a) accepting the plea referred 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 any 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.

(emphasis supplied)

10. The position of law that only those appeals challenging the orders specified under Section 37 of the Act can be filed under Section 37, is now settled. The Apex Court in the case of *Kandla Export Corporation v. OCI Corporation*¹ held that an appeal shall lie from such orders passed by the Commercial Division of the High Court that are specifically enumerated under Order 43 of the Code of Civil Procedure Code, 1908, and Section 37 of the Arbitration Act and appeals mentioned in Section 37 of the Arbitration Act alone are appeals that can be made to the Commercial Appellate Division of the High Court. The Division Bench of this Court in *Kakade Construction Company Ltd. v. Vistra ITCL (India) Ltd.*² has followed the decision in *Kandla Export Corporation* to hold that only those orders specified in Section 37 can be a subject matter of appeal under Section 37 of the Act.

11. The Respondent, in support of its preliminary objection, relies upon the decision of the Division Bench of this Court in the

¹ (2018) 14 SCC 715

² 2019 SCC Online Bom 1521 : (2019) 6 Bom CR 805

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case of *Raghuvir Cotton Ginning and Pressing Pvt.Ltd. v. Vijay Cotton and Fibre Co.*³ It is contended that the Division bench has categorically held that no appeal under Section 37 of the Act of 1996 is maintainable from the order rejecting the application for amendment. In this case, the Division Bench considered the appeal filed under Section 37 of the Act challenging the order dismissing the chamber summons for amendment of arbitration petition filed under Section 34 of the Act. An argument was advanced by the appellant therein, based on the Apex Court's decision in the case of *State of Maharashtra v. Hindustan Construction Company Ltd.*⁴ that the application for amendment of the arbitration petition to be treated as a new application and the rejection thereof would finally reject the ground under Section 34. The Division Bench, however, dismissed the appeal as not maintainable. According to the Appellant, the Division Bench has not addressed the arguments based on the Apex Court decision in *Hindustan Construction*.

12. The Respondent, in furtherance of the preliminary objection, has also relied upon the decision of the Supreme Court in the case of *BGS SGS Soma JV v. NHPC Ltd.*⁵ In this case, the Special Commercial Court, Gurugram, had returned the petition filed under Section 34 for presentation to a proper court. This order was challenged before the High Court of Punjab and Haryana at Chandigarh, which held that the appeal under Section 37 was maintainable and allowed the same and set aside the order passed by

3 2017 CC Online Bom 76 : (2017) 5 Mah LJ 352

4 (2010) 4 SCC 518 : AIR 2010 SC 1299

5 (2020) 4 SCC 234

the Commercial Court. The Bench of three learned judges of the Supreme Court considered a challenge to the order passed by the High Court. The Appellant before the Supreme Court argued that besides the merits of the matter, the appeal before the High Court was not maintainable. The Supreme Court observed that there is no independent right of appeal under Section 13(1) of the Commercial Courts Act, 2015, which merely provides the forum for filing appeals. The parameters of Section 37 of the Act, 1996 alone have to be looked into. Appeals shall lie under Section 37(1) only from the orders referred in sub-clauses (a), (b) and (c) and from no others. The Supreme Court held that where a Section 34 Petition is ordered to be returned to the appropriate Court, such order would not amount to an order refusing to set aside an arbitral award under Section 34. It was held that the refusal to set aside an arbitral award must be after the grounds set out in Section 34 have been applied to the arbitral award and after the Court has turned down such grounds. Though the Appellant has sought to distinguish this decision on facts, the Apex Court's observations in *BGS SGS Soma* cannot be restricted to the facts of the case alone. The Apex Court has clearly held that “the refusal to set aside an arbitral award” under Section 37(1) (c) of the Act must be after the grounds set out in Section 34 of the Act of 1996 have been applied to the arbitral award in question and after the Court has turned down such grounds, that an appeal under Section 37 of the Act of 1996 would be maintainable.

13. The Division Bench of the Delhi High Court in the case of

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*Harmanprit Singh Sidhu v. Arcadia Shares and Stock Brokers Pvt. Ltd.*⁶ considered the challenge to the order passed by the Single Judge of the Court allowing the application for condonation of delay and condoning the delay of 55 days in filing the petition under Section 34 of the Act. The Division Bench dismissed the appeal under Section 37 of the Act holding that the impugned order did not fall within the category of appealable orders specified in Section 37(1) of the Act of 1996.

14. The Appellant, in support of its contention that the present appeal is maintainable under Section 37(1)(c) of the Act of 1996, has relied upon the decision of the Supreme Court in the case of *Chintels India Ltd. v. Bhayana Builders Ltd.*⁷ Here a converse situation of the court refusing to condone the delay in filing the petition under Section 34 of the Act was under consideration. In this case, the Division Bench of Delhi High Court dismissed the appeal under Section 37 of the Act filed against the order passed by the learned Single Judge, refusing to condone the delay in filing a petition under Section 34 of the Act. The respondent before the Apex Court argued that Section 37(1)(c) is clear, and the refusal to set aside an award has to be only on merits and not on a preliminary ground. The Apex Court invoked the Effect test and observed that the Effect test is part and parcel of the statutory provision for appeal under Section 37 of the Act, and it is an express language of Section 37(1)(c). The Supreme Court observed that the effect of the order

6 2016 (159) DRJ 514

7 2021 SCC Online SC 80

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dismissing the application for condonation of delay is that the application under Section 34 comes to an end. Observing this, the Supreme Court allowed the appeal holding that the appeal under Section 37(1)(c) would be maintainable against the order refusing to condone the delay in filing a petition under 34 of the Act.

15. Based on the decision of the Supreme Court in *Chintels India*, the Appellant contended that Court must apply the Effect Test to ascertain whether the appeal is maintainable under Section 37(1)(c) of the Act. According to the Appellant, what needs to be seen is the effect of the order to decide whether an appeal under Section 37 is maintainable. It is contended that the effect of rejection of the amendment, more particularly regarding the challenge to the refusal of the counterclaim, is that case of the Appellant in that regard stands closed. The Appellant submits that by rejecting the amendment to challenge the Arbitrator's refusal to grant counterclaim, this challenge is now foreclosed. The Appellant contends that since this ground cannot be taken before the learned single judge, it is a refusal to set aside the award as per Section 37(1)(c) of the Act. The Petitioner contends that the Supreme Court in *Hindustan Construction* has held that since an application for amendment of a Petition under Section 34 beyond the period of limitation would amount to a new application, rejection of such 'new application' amounts refusing to set aside the award as per Section 37(1)(c) of the Act. It is submitted that Section 37 needs to be construed accordingly.

16. According to us, the dicta laid down in *Chintels India* will not assist the Appellant in the facts of this case. The effect of refusing to condone delay for filing a petition under Section 34 is that there is a refusal to set aside the award in its entirety, and as a consequence, the petition under Section 34 also gets dismissed. This position is entirely different from the rejection of an amendment.

17. The Appellant's argument that by rejecting the amendment to challenge the arbitrator's refusal to grant the counterclaim of the Appellant, this challenge is now foreclosed is based on a misconception. Even if these grounds are taken and accepted, it will not lead to the grant of counterclaim in the petition under Section 34 of the Act of 1996. The only consequence will be that the entire award will be set aside. The rejection of an amendment to challenge the finding regarding non-grant of counterclaim will only mean that the Single Judge will not permit this as a ground to challenge the award. If the amendment application for the ground to challenge the refusal of the counterclaim is dismissed, it is not that the petition filed to challenge the entire award comes to an end. The challenge on the other grounds would continue, and if the Appellant succeeds on those grounds, the award can be set aside.

18. The learned counsel for the Respondents pointed out that the learned Single Judge has not rejected the amendment regarding

the challenge to the rejection of counterclaim on the ground of limitation alone but has observed that there will be no exceptional circumstances to deviate from the standard rule.

19. The argument of the Appellant on the maintainability of the appeal and on the merits of the challenge is contradictory. The Appellant's case on maintainability is that since the ground challenging refusal to grant counter-claim is not allowed to be taken, the challenge ends. However, when asked as to what is the challenge on merits, it was contended that denial of counterclaim and grant of claim against the Appellant is a composite award, and once the award is challenged in entirety, the amendment was only regarding a pre-existing challenge.

20. The legal position emerging from the plain language of Section 34 of the Act of 1996 is that there should be setting aside or refusal to set aside the award under Section 34 for the appeal to lie under Section 37(1)(c) of the Act. There is a difference between refusing an amendment to take a ground of challenge and rejecting the entire petition finally under Section 34. The Appellant is mixing up the concepts. The observation of the Apex Court in *Hindustan Construction* in the context of not allowing the new or fresh challenge after the period of limitation does not mean that under the Act, there are multiple petitions under Section 34. The petition under Section 34 is only one. Section 37(1)(c) makes it clear that when the Court finally allows or refuses to set aside the award under

Section 34 of the Act, that an appeal is maintainable under Section 37(1)(c).

21. The arbitration proceedings have to be concluded with expeditiousness and the challenges to be kept minimum. The disputes relating to arbitral awards have to be resolved speedily. If a view is taken that wherever an application for an amendment to the petition under Section 34 is rejected, an appeal would lie under Section 37 of the Act is, it will lead to an anomalous situation. A party intending to delay the proceedings would keep filing applications for amendment and, upon rejection, file an appeal praying for postponement of the petition under Section 34. According to the Respondent, this is the exact intention of the Appellant. The Respondent moved the amendment after one year. After the amendment application was rejected, the appeal filed on 6 December 2019 was kept pending at the stage of removing office objections and was moved on an urgent basis only when the Respondent took steps to attach the assets in the execution proceedings in April 2021.

22. The challenge in the present appeal does not fall under Section 37(1)(c) of the Act of 1996. It does not fall within any of the categories specified in Section 37. Since the challenge does not fall within the ambit of Section 37 of the Act, the appeal is not maintainable. Accordingly, the preliminary objection raised by the Respondent is upheld.

23. Another facet that was argued before us by the Respondent is that Appellant is not remediless if this appeal is not maintainable as the Act of 1996 has a scheme of deferring the challenges till final disposal of the proceedings. The Respondents pointed out that under Section 13, if a challenge under any procedure agreed upon by the parties or under the procedure under Sub-Section (2) is unsuccessful, the arbitral tribunal is to continue the arbitral proceedings and make an arbitral award. Under Section 16 of the Act, the arbitral tribunal can decide the pleas regarding its jurisdiction and where the arbitral tribunal rejects the plea, it has to continue with the arbitral proceedings and make an arbitral award. The aggrieved party then has to challenge such a finding when challenging the award under Section 34 of the Act. The Division Bench of the Delhi High Court in the case of *Harmanprit Singh* has held that even if the appeal challenging the order of condoning the delay in filing the Petition under Section 34 is not maintainable, it does not mean that there is no remedy. If the arbitral award is set aside in part or in whole and the Appellant is aggrieved, he may prefer an appeal under Section 37 both on merits and on the ground that the delay ought not to have been condoned. The Bench observed that the remedy of challenging the decision of condoning the delay is not extinguished but is deferred till the final decision of the court on the pending Section 34 petition. No contrary position of law is shown to us that challenge to the orders regarding the amendment to the Arbitration Petition cannot be taken up in an

appeal under Section 37 of the Act of 1996 from the final order under Section 34. However, having held that the present appeal is not maintainable, it is not necessary for us to conclude this issue in this appeal.

24. The appeal is dismissed as not maintainable.

25. It is clarified that the observations made in this judgment are in the context of deciding the maintainability of the appeal and not on the merits of the impugned order.

(C.V. BHADANG, J.)

(NITIN JAMDAR, J.)