

# Dispute Resolution Hotline

April 14, 2021

## THE CASE OF LONG AND SHORT DELAYS: SUPREME COURT ON LIMITATION PERIOD FOR FILING APPEALS UNDER THE A&C ACT

- Appeal under Section 37 of the A&C Act must be filed within 60 days from the date of order, if the suit value is greater than INR 300,000.
- Appellate court can condone delay in filing the appeal, provided the delay is 'short' and supported by a 'sufficient cause'.
- Recent decision of the Division Bench of Supreme Court in *N.V. International* is over-turned.

### INTRODUCTION

Recently, the Supreme Court of India ("Supreme Court") in the matter of *Government of Maharashtra v. M/s Borse Brothers Engineers & Contractors Pvt. Ltd. ("Borse Brothers")* overturned one of its earlier verdict in the matter of *NV International v. State of Assam ("NV International")*.<sup>1</sup> The Supreme Court clarified that an aggrieved party must file an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ("A&C Act") within 60 days from date of order. The Supreme Court further held that a delay in filing appeals under Section 37 of the A&C Act can be condoned by the appellate court. However, such condonation must be granted only by way of exception and is permissible if the delay is 'short'.

### FACTUAL BACKGROUND

In two appeals before the Supreme Court,<sup>2</sup> the High Courts of Bombay and Delhi had refused to condone delay in filing appeals under Section 37 of the A&C Act beyond 120 days. There was another appeal against a judgment of the High Court of Madhya Pradesh which had held that it was open for a High Court to condone the delay in filing an appeal under Section 37 by virtue of Section 5 of the Limitation Act, 1963 ("Limitation Act"). Appeals were filed against decisions of three different High Courts. The Supreme Court clubbed and disposed three appeals by a common judgment dated March 19, 2020.<sup>3</sup>

### ISSUES

In light of absence of a provision in the A&C Act regarding time limit for filing an appeal under Section 37, the issues before the Court were as follows:

1. Whether the judgment of a Division Bench of the Court in *N.V. International v. State of Assam ("N.V. International")* lays down the law correctly, in as much as it held that the limitation period for filing a petition to challenge an award under Section 34(3) of the A&C Act can be construed to be the limitation period for filing an appeal against the order, under Section 37 of the A&C Act.
2. Whether the appellate court can condone delay in filing the appeal under Section 37 of the A&C Act.

For an understanding of the ruling of the Supreme Court, it is pertinent to discuss the relevant statutory provisions relating to limitation period for filing of appeals under the A&C Act, the Limitation Act and the Commercial Courts Act, 2015 ("CC Act").

### RELEVANT PROVISIONS

#### i. A&C Act

Under the A&C Act, a party to an arbitration can file an application under Section 34 of the A&C Act for setting aside an arbitral award ("Section 34 application"), within a period of three months from the date of the receipt of the award. An extension of 30 days, but not thereafter, can be granted if the applicant establishes sufficient cause for delay in filing the application. The Supreme Court has held that the combined period of 120 days acts as a hard stop beyond which a party cannot file a Section 34 application.<sup>4</sup>

The A&C Act provides for an appeal against an order in a Section 34 application under Section 37. Besides, a party can file an appeal under Section 37 against the following orders:

1. of the court refusing to refer the disputing parties to arbitration under Section 8;
2. of the court granting or refusing to grant any measure under Section 9;
3. of the tribunal accepting the plea that the tribunal does not have jurisdiction under Section 16;
4. of the tribunal granting or refusing to grant an interim measure under Section 17.

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However, the A&C Act does not prescribe a time limit within which an appeal can be filed under Section 37 of the A&C Act.

Section 43 of the A&C Act provides that the Limitation Act applies to arbitrations as it applies to court proceedings.<sup>5</sup>

**ii. Limitation Act**

The following provisions of Limitation Act deal with filing of appeals:

**Table I - LIMITATION ACT**

Appeal	Article	Period	From
Appeals under the Code of Civil Procedure, 1908 ("CPC") to a High Court from any decree or order.	116 (a)	90 Days	Date of the decree or order
Appeals under the CPC to any other court from any decree or order.	116 (b)	30 Days	Date of the decree or order
Appeals under the CPC from a decree or order of any High Court to the same Court	117	30 Days	Date of the decree or order

Section 5 of the Limitation Act provides for extension of prescribed limitation period in certain cases. Accordingly, any appeal or any application can be admitted by a court after the prescribed period if the appellant / applicant establishes sufficient cause for not preferring the appeal or making the application within such period.

Section 29(2) of the Limitation Act states that where any special law prescribes a period of limitation for any suit, appeal or application which is different from the period prescribed under the Limitation Act, such suit, appeal or application would be equally barred under the Limitation Act as if such period under the special law were the period prescribed under the Limitation Act.

**iii. CC Act, 2015**

Under the CC Act, 'Specified Value' of a commercial dispute refers to the value of the subject-matter in the suit / arbitration.<sup>6</sup> Section 10 of the CC Act provides that where the subject-matter of an arbitration is a commercial dispute of a Specified Value, all applications and appeals arising out of such arbitration would be heard and disposed of by the commercial court or the commercial division of a High Court, as the case may be.

Section 13 of the CC Act provides that a person aggrieved by the judgment or order in a commercial dispute may appeal to the commercial appellate court or the commercial appellate division of the High Court, as the case may be, within a period of 60 days from the date of the judgment or order. Further, Section 21 of the CC Act provides the overriding effect of its provisions over any other law in force.<sup>7</sup>

**THE JUDGMENT**

At the outset, the Supreme Court stated that Section 37 of the A&C Act read with Section 43 of the A&C Act made it clear that provisions of the Limitation Act will apply to appeals that are filed under Section 37 of the A&C Act. This attracts Articles 116 and 117 of the Limitation Act, which provide for a limitation period of 90 days and 30 days, depending upon whether the appeal is from any other court to a High Court or an intra-High Court appeal. Resultantly, Section 5 of the Limitation Act will apply to the aforesaid appeals, both by virtue of Section 43 of the A&C Act and by virtue of Section 29(2) of the Limitation Act.

However, the Court analysed the application of the Limitation Act alongside the CC Act for appeals under Section 37 where the value of the subject-matter of the commercial dispute met the definition of 'Specified Value' under the CC Act. Accordingly, the Supreme Court held the following<sup>8</sup>:

1. If an appeal under Section 37 is preferred against an arbitral award in arbitration less than the Specified Value, the same would be governed by Article 116 / Article 117 of the Limitation Act. Under these provisions, the limitation period is computed in the manner recorded in Table I above.
2. If an appeal under Section 37 is preferred against an arbitral award in arbitration of a dispute of the Specified Value, the appeal will be governed by Section 13(1A) of the CC Act. The limitation period provided under the CC Act being a special law would apply as compared with the Limitation Act which is a general law, as per section 29(2) of the Limitation Act. Section 13(1A) of the CC Act lays down a period of limitation of 60 days for all appeals; this would therefore be the limitation period for filing an appeal under Section 37 of the A&C Act. The Supreme Court considered the judgment in *Kandla Export Corpn. v. OCI Corporation*<sup>9</sup>, to deal with the interplay between Section 13 of the CC Act and Section 37 of the A&C Act.

***Whether a delay in filing an appeal under Section 37 of the A&C Act can be condoned under Section 5 of the Limitation Act.***

With the aforesaid background, the Supreme Court proceeded to determine the issue of whether a delay in filing an appeal under Section 37 of the A&C Act can be condoned under Section 5 of the Limitation Act. Stated differently, the Supreme Court considered if the application of Section 5 of the Limitation Act was excluded by Section 13 of the CC Act.

The Supreme Court noted that Section 13 of the CC Act is distinct from Section 34(3) of the A&C Act. Where Section 34(3) provides a hard stop of the time period within which the Section 34 application can be filed, there is no such provision under Section 13 of the CC Act.

The Supreme Court also drew a comparison with Order VIII Rule 1 of the CPC, which provides a hard stop to the defendant of 120 days from the date of service of summons for filing a written statement, failing which the defendant's right to file the written statement is forfeited. The Court held that there is no such provision under Section 13 of the CC Act. Further, the Supreme Court held that the *non-obstante* clause contained in Section 21 of the CC Act cannot override the Limitation Act to exclude the applicability of Section 5 of the Limitation Act.

As a result, the Supreme Court held that application of Section 13 of the CC Act did not exclude the applicability of

However, the Supreme Court noted that a condonation of delay under Section 5 of the Limitation Act must be granted only upon a 'sufficient cause', and considering the object of speedy resolution of disputes under the A&C Act and the CC Act.<sup>10</sup> Given the object sought to be achieved under both the statutes, the scope of 'sufficient cause' under Section 5 of the Limitation Act cannot be expanded to cover long delays beyond the period provided under the provision.<sup>11</sup>

Accordingly, the Supreme Court emphasized that any delay must be condoned by the appellate court by way of exception and not that of a rule and only in cases (a) where a party has otherwise acted bona fide and not in a negligent manner, (b) there is a short delay beyond the statutory period, and (c) where the opposite party is not prejudiced of his rights in equity and justice arising out of the erring party's inaction and negligence.<sup>12</sup> Relying on one its earlier decisions, the Supreme Court also noted that merely because sufficient cause has been made out in the facts of a given case, there is no right in the appellant to have the delay condoned.<sup>13</sup>

#### **Whether NV International laid down the correct law on the issue?**

In *NV International*, the Supreme Court had held that in absence of a limitation period to prefer an appeal under Section 37 of the A&C Act, the limitation period for an appeal against an order under Section 34 would be governed by the period stipulated under Section 34 of the A&C Act, i.e., a period of three months, extendable by further thirty days.<sup>14</sup>

The Supreme Court premised its inference on the ground that an appeal is a continuation of the original proceedings. Hence, the thresholds for limitation period which apply to proceedings under Section 34 would also apply to an appeal under Section 37.

In the present case, the Supreme Court held that N.V. International did not consider the provisions of the CC Act for determination of the limitation period for an appeal under Section 37. It was therefore *per incuriam*<sup>15</sup> on this aspect. Further, the CC held that the hard stop provided in Section 34 *vis-a-vis* absence thereof in Section 13 of the CC Act did not allow for a 'bodily lifting' of limitation period under Section 34 of the A&C Act into Section 37 of the A&C Act. Therefore, the limitation period under Section 34 could not be continued into the appeal provision under Section 37 of the A&C Act.<sup>16</sup>

#### **ANALYSIS**

With this judgment, the Supreme Court has provided clarity for computing the limitation period for filing of appeals under Section 37 of the A&C Act. For ease of understanding, we have summarized the application of law by the Supreme Court with respect to appeals under Section 37 of the A&C Act in the table below:

**Table II - JUDGMENT**

In arbitration matters having Limitation Specified Value		Governing Provisions	Condonable
Less than INR 300,000	90 days	Article 116, The Schedule in Limitation Act	Yes – Provided the delays are short and subject to the thresholds for 'sufficient cause' laid down in <i>the present judgment</i> , viz.: (a) whether actions of the appellant were <i>bona fide</i> , and (b) no prejudice is caused to the opposite party.
Less than INR 300,000	30 days	Article 117, The Schedule in Limitation Act	
More than INR 300,000	60 days	Section 13(1A), CC Act	

The Court has also narrowly opened the scope for condoning delays in filing an appeal under Section 37 of the A&C Act, allowing only 'short delays'. This is in line with the object of expeditious resolution of disputes, reflected in the recent reforms under the A&C Act and the CC Act.

The judgment provides that condonation can only be granted in exceptional cases, and that courts must follow strict parameters in condoning such delay viz. (a) whether the actions of the appellant are *bona fide*, and (b) whether any prejudice will be caused to the opposite party. Doing so, the Supreme Court has tried to uphold

The Supreme Court has rightly noted that the bulk of appeals under Section 37 of the A&C Act are governed by Section 13(1A) of the CC Act. Resultantly, a uniform period of 60 days will apply for filing of all appeals under Section 37 of the A&C Act involving a commercial dispute of Specified Value under the CC Act. By arriving at a uniform period of 60 days for filing of all appeals under Section 37 of the A&C Act involving a commercial dispute of Specified Value, the Court has also solved the potential problem created by *N.V. International* of applying different, and continuing, periods of limitation for original proceedings into appeal proceedings under Section 37.

The Supreme Court greatly emphasized upon the object of both the A&C Act and the CC Act, being speedy resolution of disputes. In light of the same, and as held by the Court, provisions of the A&C Act and CC Act must be construed in accordance with the object of the act, and any construction that delays proceedings, instead of leading them to an expeditious disposal, must be eschewed.

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You can direct your queries or comments to the authors

<sup>1</sup> *NV International v. State of Assam* (2020) 2 SCC 109.

<sup>2</sup> Arising out of SLP (C) No. 665 of 2021 and Civil Appeal arising out of SLP (C) Diary No.18079 of 2020.

<sup>3</sup> Civil Appeal 995/2021; Civil Appeal 999/2021 and Civil Appeal 996-998/2021.

<sup>4</sup> Proviso to Section 34(3), Arbitration and Conciliation Act, 1996. *Simplex Infrastructure v. Union of India*, (2019) 2 SCC 455.

<sup>5</sup> Section 43 - Limitations – Arbitration and Conciliation act, 1996.

(1) *The Limitation Act, 1963* (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.

<sup>6</sup> Section 2(1)(i) – Definitions – Commercial Courts, Act, 2015.

“Specified Value”; in relation to a commercial dispute, shall mean the value of the subject-matter in respect of a suit as determined in accordance with section 12 1 [which shall not be less than three lakh rupees] or such higher value, as may be notified by the Central Government.

<sup>7</sup> Section 21 - Act to have overriding effect – Commercial Courts Act, 2015

Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act.

<sup>8</sup> ¶ 26, 32 in *Borse Brothers* (Judgment dated March 19, 2021).

<sup>9</sup> (2018) 14 SCC 715.

<sup>10</sup> ¶ 31, 53 in *Borse Brothers* (Judgment dated March 19, 2021).

<sup>11</sup> ¶ 56 in *Borse Brothers* (Judgment dated March 19, 2021).

<sup>12</sup> ¶ 61 in *Borse Brothers* (Judgment dated March 19, 2021).

<sup>13</sup> *Rantal v. Rewa Coalfields Ltd.*, (1962) 2 SCR 762.

<sup>14</sup> *NV International v. State of Assam* Civil Appeal No. 9244 of 2019 where SC relied on its judgment in *Union of India v. Varindera Constructions Ltd.*, (2020) 2 SCC 111.

<sup>15</sup> *Per Incuriam* is a Latin expression that means “through inadvertence”. A decision can be said to be given *per incuriam* when the court of record has acted in ignorance of any previous decision of its own, or a subordinate court has acted in ignorance of a decision of the court of record.

<sup>16</sup> ¶ 42 in *Borse Brothers* (Judgment dated March 19, 2021).

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