



Reserved

AFR

HIGH COURT OF JUDICATURE AT ALLAHABAD

**APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION
ACT 1996 DEFECTIVE No. - 112 of 2025**

Jaiprakash Associates Limited

.....Appellant(s)

Versus

High Tech Tyre Retreaders Pvt. Ltd. and another

.....Respondent(s)

Counsel for Appellant(s)	: Rohan Gupta, Pranay Kumar
Counsel for Respondent(s)	: H.N. Singh (Sr. Advocate), Sumit Daga

Chief Justice's Court

**HON'BLE ARUN BHANSALI, CHIEF JUSTICE
HON'BLE KSHITIJ SHAILENDRA, J.**

(Per: Arun Bhansali, CJ)

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') is directed against orders dated 13.09.2024, 19.10.2024 and 07.03.2025 passed by Commercial Court, Kanpur Nagar whereby the application filed by the appellant under Section 34 of the Act, has been closed for lack of jurisdiction and the application has been ordered to be returned, on account of passing of order dated 13.09.2024, the bank guarantee produced by the respondents has been ordered to be released and application filed by the appellant seeking correction in the order dated 13.09.2024 and restoration of the application as filed, has been rejected respectively.

2. The application was filed under Section 34 of the Act by the appellant against award dated 04.10.2017 passed by the U.P. State Micro & Small Enterprises Facilitation Council, Kanpur ('the Council'). During pendency of the proceedings under Section 34, an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short 'the Code') was filed by the ICICI Bank before the NCLT seeking initiation of Corporate Insolvency Resolution Process ('CIRP') against the appellant.

The NCLT by its order dated 03.06.2024 admitted the application in terms of Section 7(5) of the Code against the appellant and passed certain directions including imposing a moratorium under Sections 13 and 14 of the Code.

3. The appellant filed Application 107Ga before the Commercial Court bringing on record the order dated 03.06.2024 passed by the NCLT. In the application, an assertion was made that no proceedings could be continued in the case against the appellant company and a prayer was made to take the order dated 03.06.2024 on record and pass consequential necessary directions.

4. Before the Commercial Court, on behalf of the respondents, submission was made that on account of the order passed by the NCLT, the matter cannot proceed and therefore, the same be returned.

5. The Commercial Court, after hearing the parties, referred to provisions of Section 14 of the Code and order passed by the NCLT under Sections 13 and 14 of the Code. The Commercial Court also took notice of provisions of Section 33 of the Code providing for bar of instituting suit or legal proceedings by or against the corporate debtor when a liquidation order has been passed and that the proviso to Section 33(5) provides that proceedings can be instituted with the prior approval of the Adjudicating Authority and that no such approval has been produced. The Commercial Court further noticed the bar under Section 63 of the Code barring the jurisdiction of the civil court and came to the conclusion that on account of the order passed by the NCLT and for lack of any approval from the Authorised Authority and the bar created by Section 63, the Commercial Court now has no jurisdiction to hear and decide the said application under Section 34 of the Act and purportedly accepting the application filed by the appellant *qua* lack of jurisdiction, closed the proceedings. It further ordered that the application be returned and the case be consigned to record.

6. Subsequent to passing of the order, on an application made by the respondents, the bank guarantee furnished during pendency of the proceedings was ordered to be released on 19.10.2024. Whereafter, the

appellant moved an application seeking correction in the order dated 13.09.2024 and restoration of the application which was dismissed on 07.03.2025.

7. At the outset, learned counsel for the respondents raised preliminary objection pertaining to maintainability of the present appeal under Section 37 of the Act. Submissions were made that under Section 37(1)(c) of the Act, appeal can lie only against an order passed by Commercial Court setting aside or refusing to set aside an arbitral award under Section 34 and as by the order impugned dated 13.09.2024, only for lack of jurisdiction the proceedings have been closed and application has been ordered to be returned, the order cannot be said to be 'refusing to set aside an arbitral award' and therefore, the appeal under Section 37 of the Act is not maintainable. Reliance was placed on **BGS SGS SOMA JV Vs. NHPC LIMITED : (2020) 4 SCC 234**.

8. Learned counsel for the appellant vehemently contested the submissions made. It was submitted that only the letter of the order impugned is not relevant, it is the effect of the order which is relevant for the purpose of determining maintainability of the appeal. It was submitted that the order passed is *ex facie* illegal, contrary to the law and essentially dismisses the application filed by the appellant under Section 34 of the Act and therefore, the appeal is maintainable. Submissions were made that the directions issued by the NCLT and purport of Section 14 of the Code have been totally misconstrued and reference has been made to Section 33 which has no application as the same applies during the liquidation process which is not the case. The direction ordering return of the plaint, is meaningless as none has the jurisdiction under any provision of law against the award other than the Commercial Court at Kanpur Nagar under Section 34 of the Act and as such the effect of the order impugned is refusing to set aside the award and therefore, the appeal is maintainable. Reliance was placed on **ESSAR Constructions Vs. N.P. Rama Krishna Reddy : (2000) 6 SCC 94** and **Chintels India Limited Vs. Bhayana Builders Private Limited : (2021) 4 SCC 602**.

9. We have considered the submissions made by counsel for the parties and have perused the material available on record.

10. The provisions of Section 37 of the Act, insofar as relevant for the present appeal, read 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)

(b)

(c) setting aside or refusing to set aside an arbitral award under Section 34.”

11. A plain reading of the above provision reveals that only orders setting aside or refusing to set aside an arbitral award under Section 34 are appealable under Section 37(1)(c) of the Act.

12. Hon’ble Supreme Court in the case of **BGS SGS SOMA JV (supra)**, while dealing with a case wherein the Commercial Court, Gurugram had returned the Section 34 petition for presentation to the proper court having jurisdiction in New Delhi, came to the conclusion that such an order on a petition, for presentation before the proper court does not fall within Section 37 of the Act and appeal would not be maintainable.

13. The judgment in the case of **BGS SGS SOMA JV (supra)** was considered by Hon’ble Supreme Court in the case of **Chintels India Limited (supra)** wherein, in a case where the Commercial Court refused to condone the delay in filing application under Section 34 of the Act taking into consideration the ‘effect doctrine’, the Supreme Court came to the conclusion that the effect of the order refusing to condone the delay amounts to order refusing to set aside award, and held the appeal maintainable under Section 37(1)(c) of the Act.

14. While discussing the ‘effect doctrine’, the Hon’ble Supreme Court referred to the judgment in **ESSAR Constructions (supra)** and observed as under:

“22. The reasoning in *Essar Constructions* 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.

23. In point of fact, the “effect doctrine” referred to in *Essar Constructions* 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).

24. 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 Sections 16(5) and (6) of the Arbitration Act, 1996 which read as follows:

“16. Competence of Arbitral Tribunal to rule on its jurisdiction.— (1) – (4)

(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.”

25. 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.”

15. Further, the judgment in the case of **BGS SGS SOMA JV (supra)** was distinguished by observing as under:

“32. The context in which para 17 of *BGS SGS SOMA JV* 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...”

16. From the above observations, it would be seen that the effect of the order passed by the Court under Section 34 of the Act is required to be seen for the purpose of examining the maintainability of the appeal under Section 37(1)(c) of the Act as to whether the order passed leaves any other avenue for the applicant to seek redressal against the award or the order passed puts an end to the challenge laid to the award passed by the Arbitral Tribunal, which in the present case is the Council. In case, the order passed like dismissal of application under Section 5 of the Limitation Act, which puts an end to the challenge to the award, the same has been held to be amounting to refusing to set aside the award under Section 34 whereas in case the application has been ordered to be returned for being presented before an appropriate forum, such order has been held to be non-appealable under Section 37 of the Act for the simple reason that the avenue continues to remain available with the applicant to seek redressal against the award. As such, the effect of the order passed assumes significance while determining the aspect of maintainability and

the said aspect cannot be determined by mere reference to the fact as to whether the order has been set aside or not.

17. This Court in **Bharat Sanchar Nigam Limited Vs. M/s V.L.S. Diesel Engine Sales & Services : 2025:AHC:9344-DB**, wherein an application under Section 34 of the Act was dismissed for non-compliance of provisions of Section 19 of the MSMED Act, after referring to judgment in the case of **Chintels India Limited (supra)**, came to the following conclusion:

“15. So far as the plea raised pertaining to the non-maintainability of the appeal by relying on the judgment in the case of Hindustan Copper Ltd. (supra) is concerned, the Hon’ble Supreme Court in the case of Chintels India Ltd. (supra), while dealing with the said aspect in a case where the application under Section 34 of the Act was dismissed on the ground of limitation, referring to ‘effect doctrine’, came to the conclusion that the ‘effect doctrine’ is part and parcel of statutory provision for appeal under Section 37 of the Act and the express language of Section 37(1)(c) resulting in dismissal of application on ground of purported non-compliance of a provision, needs to be considered on par with dismissal on merits. The plea raised, apparently, has no substance as, in the case of Hindustan Copper Ltd. (supra), the dismissal was on account of lack of territorial jurisdiction.”

18. In the present case, it would be seen that the Commercial Court, based on the application made essentially for the purpose of placing on record the order passed by the NCLT has, by referring to certain provisions of the Code, come to the conclusion that the Court did not have the jurisdiction to hear and decide the matter, closed the proceedings for lack of jurisdiction and ordered for return of the application. The order passed returning the application without indicating alternative forum under the Code, which factually does not exist, seals the fate of the application once and for all, therefore, the same amounts to refusing to set aside the award impugned under Section 34 of the Act.

19. In view of the above discussion, based on the ‘effect doctrine’ as laid down in the case of **Chintels India Limited (supra)**, we do not find any substance in the preliminary objection raised by counsel for the respondents pertaining to the maintainability of the appeal under Section 37 of the Act.

20. Consequently, the objection is **overruled**.

21. List the appeal for further proceedings on 23.09.2025, as fresh.

(Kshitij Shailendra, J) (Arun Bhansali, CJ)

September 17, 2025
AHA