

**(2013) 07 BOM CK 0111**

**In the Bombay High Court**

**Case No :** Appeal No. 195 of 2013 in Chamber Summons No. 1649 of 2006 in Arbitration Petition No. 66 of 1991 in Award No. 172 of 1990

Padamshi Khimji Chheda and Others and Ravji Khimji Chheda and Others APPELLANT

Vs

Kesarben Laxmichand Dedia and Others and Sunderben Keshavji Shah (Wife) and Others RESPONDENT

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**Date of Decision :** 22-07-2013

**Acts Referred:**

Arbitration Act, 1940 — Section 30, 39, 39(1), 41, 41(a)

**Citation :** (2013) 07 BOM CK 0111

**Hon'ble Judges :** S.C. Gupte, J;D.Y. Chandrachud, J

**Bench :** Division Bench

**Advocate :** Ravi Kadam, Mr. Chetan Kapadia and Ms. Yogini Gada instructed by M/s. Harakchand and Co, for the Appellant; Gaurav Joshi, Mrs. Heena Chheda, Avdhoot Prabhu and Mr. Anirod Hariani instructed by . M/s. Hariani and Co., for the Respondent

**Final Decision :** Dismissed

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**Judgement**

D.Y. Chandrachud, J.—A Petition was filed u/s 30 of the Arbitration Act, 1940 to challenge an arbitral award dated 25 April 1989. During the pendency of the proceedings, following the admission of the petition, the First Petitioner died on 10 December 1997, the Second Petitioner on 9 November 2004 and the Third Petitioner on 12 January 2002. The Second Respondent had, in the meantime, died on 12 June 1997. A Chamber Summons under Order 22 Rule 9 of the Code of Civil Procedure, 1908 was taken out for setting aside the abatement in 2005 but it was withdrawn on 21 December 2005 with liberty to file a fresh Chamber Summons. The fresh Chamber Summons was filed on 22 December 2006. According to the Appellants, there was a delay of 3200 days in applying for setting aside the abatement upon the death of the First Petitioner; a delay of 676 days following the death of the Second Petitioner; a delay of 1707 days following the death of the Third Petitioner and of 284 days upon knowledge of the death of

the Second Respondent. The Chamber Summons has been dismissed by the learned Single Judge by a judgment dated 15 February 2013.

2. At the hearing of the appeal against the order of the learned Single Judge, a preliminary objection has been raised to the maintainability of the appeal on the ground that no appeal would lie against an order of a learned Single Judge declining to set aside an abatement of an Arbitration Petition seeking to challenge an award in view of the provisions of Section 39 of the Arbitration Act, 1940.

3. Section 39 of the Act of 1940 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 decrees of the Court passing the order:-

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 Small Cause Court.

4. Section 39 essentially provides for two prohibitory mandates. The first is that an appeal shall lie from orders of the description set out in clauses (i) to (vi) and from no other orders. The Second is that no second appeal shall lie from an order passed in appeal under that provision.

5. These provisions were construed in the judgment of the Supreme Court in Union of India (UOI) Vs. Mohindra Supply Company, . The Supreme Court held that by Section 39, the jurisdiction of the Court under any other law for the time being in force is not saved. Hence, it was held that the right of appeal can be exercised only u/s 39 and no appeal (except an appeal to the Supreme Court) will lie from an appellate order. Section 41 of the Act of 1940 inter-alia provided that subject to the provisions of the Act and of the Rules made thereunder, the provision of the Civil Procedure Code, 1908 (CPC) shall apply to all proceedings before the Court, and to all appeals, under the Act. In a subsequent judgment of the Supreme Court in Union of India (UOI) and Others Vs. Aradhana Trading Co.

and Others, , the Supreme Court held that an order against which an appeal may lie must conform to the nature of those orders mentioned in Section 39(1) and if an order did not meet that description, recourse could not be taken to the provisions of Section 41, which were subject to the provisions of the Act.

6. In a recent judgment of a Division Bench of this Court in Jet Airways (India) Limited and Sahara Airlines Limited (now known as ) "Jet Lite (India) Limited" Vs. Mr. Subrata Roy Sahara, Indian Inhabitant and Others, , these decisions under the Act of 1940 were referred to, though the issue in that case pertained to the maintainability of an appeal against an order passed in execution proceedings pursuant to an arbitral award under the Act of 1996.

7. An order passed by a learned Single Judge declining to set aside an abatement of an arbitration petition u/s 30 of the Act of 1940 does not meet the description of those orders specified in Section 39(1) against which an appeal lies. The appeal would, therefore, not be maintainable. But, two submissions have been urged on behalf of the Appellants. The first submission is that, Section 41(a) makes the provisions of the CPC applicable to all proceedings before the Court, and to all appeals and hence an appeal would be maintainable under the CPC. This submission cannot be accepted since Section 41 is subject to the provisions of the Act. Hence an appeal can lie only against those orders that fall within the purview of Section 39(1) and meet the description in one of its clauses viz. Clauses (i) to (vi). Moreover, the point would be covered by the decision of the Supreme Court in Aradhana Trading Company (supra) which construes both the provisions of Section 39 and Section 41 in the context of the applicability of the provisions of the CPC. The Supreme Court has held that unless an order fits to the description of one of the clauses of Section 39(1), an appeal would not lie. The second submission is that an order of the learned Single Judge declining to set aside an abatement would be an order of the description set out in Clause (vi) of Section 39(1). Now Clause (vi) of Section 39(1) provides for an appeal against an order setting aside or refusing to set aside an award. When a proceeding abates, it abates as a consequence of law and not as a result of any order of the Court. Consequently, when a court declines to set aside the abatement of a petition which seeks to challenge an arbitral award, that order of the court is not an order refusing to set aside an award. An order refusing to set aside an award is an order passed by the court upon a consideration by the court of the challenges to the arbitral award. Abatement of a proceeding results as an operation of law. Where the proceeding has abated, this Court has no occasion to exercise the jurisdiction to set aside or to refuse to set aside the award. There is hence no merit in the submissions.

8. For these reasons, we hold that the Appeal in the present case is not maintainable.

9. The Appeal is accordingly dismissed. There shall be no order as to costs.

10. On 2 April 2013, the Division Bench had recorded a statement of learned

Counsel for Respondent Nos. 1(a) to 1(g) that they shall not take any steps for execution of the decree till the next date of hearing. Learned Counsel appearing on behalf of Respondent Nos. 1(a) to 1(g) states that steps for execution of the decree shall not be taken for a period of four weeks from today. In view of the dismissal of the appeal, Motion No. 576/2013 in the Appeal does not survive and is accordingly disposed of.