

MANU/DE/4420/2018

IN THE HIGH COURT OF DELHI

Ex. P. 330/2015 and E.A. No. 387/2018

Decided On: 28.11.2018

Appellants: **Precious Sapphires Ltd.**

Vs.

Respondent: **Amira Pure Foods Private Ltd.**

Hon'ble Judges/Coram:

Navin Chawla, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Shyel Trehan, Akshita Sachdeva and Sugandha Batra, Advs.

For Respondents/Defendant: Akhil Sibal, Sr. Adv., Deepak Khurana, Tejasv and Pradeep Chhindra, Advs.

JUDGMENT

Navin Chawla, J.

1. This enforcement petition has been filed by the petitioner seeking enforcement of the Foreign Award dated 04.04.2014 passed by the Sole Arbitrator under the London Maritime Arbitrators Association Rules at London.

2. It is not disputed that when the present petition was filed, this Court had the pecuniary jurisdiction to entertain the same. Learned senior counsel for the respondent has urged that with the promulgation of the Delhi High Court (Amendment) Act, 2015 (hereinafter referred to as the 'Delhi High Court Act'), read with the Notification/Office Order dated 24.11.2015, this Court would lack pecuniary jurisdiction to further entertain the present petition and, therefore, the same should be transferred to the District Court.

3. On the other hand, the learned counsel for the petitioner submits that in terms of Explanation to Section 47 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') substituted by way of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the 'Amendment Act'), it is only the High Court having original jurisdiction which can hear petitions seeking executions of the Foreign Award.

4. The question before this Court, therefore, is whether this petition has to be transferred to the jurisdictional Subordinate Court or continue to be entertained by this Court.

5. Before advertng to the arguments of the learned counsels in detail, I would first quote the Explanation substituted in Section 47 of the Act by way of Amendment Act:

"Explanation.--In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of

courts subordinate to such High Court."

6. Before the substitution of the above Explanation to Section 47 of the Act, the enforcement of Foreign Award under Part-II of the Act was to be prayed before the "Court" as defined in the Explanation to Section 47 of the pre-amended Act, which is reproduced hereinbelow:

"Explanation- In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

7. A reading of the above two provisions would clearly show that while prior to the amendment to the Act, the petition seeking enforcement of a Foreign Award had to be filed before the Principal Civil Court of original jurisdiction, the same now necessarily has to be filed only before the High Court having original jurisdiction. The object and purpose of this amendment has been explained in the 246th Report of the Law Commission of India in the following words:

"26. It is recommended that in the case of international commercial arbitrations, where there is a significant foreign element to the transaction and at least one of the parties is foreign, the relevant "Court" which is competent to entertain proceedings arising out of the arbitration agreement, should be the High Court, even where such a High Court does not exercise ordinary original jurisdiction. It is expected that this would ensure that international commercial arbitrations, involving foreign parties, will be heard expeditiously and by commercially oriented judges at the High Court level. The amendments proposed to section 48 (as indicated above) are also intended to achieve the same object. This is important not just for providing confidence to foreign investors, but to mitigate the risk faced by the Government of India from claims by foreign investors under the relevant Investment Treaty negotiated by the Government of India with other countries. The award of the Arbitral Tribunal in *White Industries Australia Ltd. v. the Republic of India*, UNCITRAL, Final Award (November 30, 2011), serves as a reminder to the Government to urgently implement reforms to the judicial system in order to avoid substantial potential liabilities that might accrue from the delays presently inherent in the system."

8. The learned counsel for the petitioner, placing reliance on the judgments of the Supreme Court in *Board of Control for Cricket in India v. Kochi Cricket Pvt. and others* MANU/SC/0256/2018 and *Securities and Exchange Board of India v. Classic Credit Limited*, MANU/SC/1030/2017 and of the Gujarat High Court in *M/s. OC Corporation v. Kandla Export Corporation and Ors.* MANU/GJ/2796/2016, submits that a law which brings about the change in forum being procedural, is presumed to be retrospective in nature, unless the amending statute provides otherwise. She submits that Section 26 of the Amendment Act does not mitigate against this rule and therefore, even the pending proceedings have to continue only before the High Court. She submits that applying the above rule, the Gujarat High Court has in fact, directed that the Execution Petitions pending before the District Court be returned to be filed before the concerned Commercial Division under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 or the concerned High Court where the subject matter of an arbitration is a commercial

dispute but not of a specified value.

9. On the other hand, the learned senior counsel for the respondent, relying upon the judgments of the Supreme Court in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, MANU/SC/0329/2001 : (2001) 6 SCC 356, and *Videocon International Ltd. v. Securities and Exchange Board of India* MANU/SC/0023/2015 : (2015) 4 SCC 33, submits that Section 47 to Section 49 of the Act provide for a single proceeding for deciding enforceability of a Foreign Award. Alongwith substituting the Explanation to Section 47 of the Act, the Amendment Act has also made substantial changes in Section 48 of the Act, limiting the grounds of challenge to a Foreign Award. He submits that as there is a change in the forum coupled with the scope of challenge to a Foreign Award, the same constitutes a package and, therefore, is a vested substantive right of a litigant when a lis is initiated. He further submits that as the Amendment Act does not expressly provide for retrospective application of the amendment, the proceedings are to be governed by the pre-amended Act and therefore, the petition deserves to be transferred to the principal Civil Court of original jurisdiction in accordance with the pecuniary jurisdiction and in terms of the Delhi High Court Act. He submits that the judgment of the Supreme Court in *BCCI* (supra) shall have no application to a Foreign Award as a Foreign Award by itself cannot be enforced as a decree unless there is compliance with Section 47 and 48 of the Act; such is not a case in a domestic Award which was a matter of consideration before the Supreme Court in *BCCI* (supra). He places reliance on the judgment of the Bombay High Court in *Noy Vallesina Engineering Spa v. Jindal Drugs Limited*, MANU/MH/0296/2006.

10. Learned senior counsel for the respondent has further placed reliance on the judgment dated 12.01.2018 passed by the Punjab and Haryana High Court in LPA No. 917/2017 titled *Alpine Minmetals India Pvt. Limited v. Noble Resources Limited & Anr.* and submits that the Punjab and Haryana High Court has held that the provisions of the Amendment Act will not have any retrospective effect and therefore, the enforcement proceedings initiated prior to the amendment would continue before the District Court which had the jurisdiction to entertain the same prior to the amendment. He submits that the judgment of the Punjab and Haryana High Court has been affirmed by the Supreme Court with the dismissal of the Special Leave Petition, being SLP (C) No. 7263/2018, on 08.05.2018.

11. I have considered the submissions made by the counsels for the parties. In the present case, the enforcement petition was rightly instituted before this Court under the pre-amended Act. Under the Delhi High Court Act, as amended with effect from 26.10.2015, read with the Notification/Office order dated 24.11.2015, based on the pecuniary value, the same has to be transferred to the District Court. The only question, therefore, is whether the Amendment Act, which came into effect on 23.10.2015, would have any effect on such transfer of the petition. In my opinion, with the coming into force of the Amendment Act, the present petition cannot be transferred to the District Court.

12. It is first to be noted that the Arbitration and Conciliation Act, 1996 is a special statute vis-à-vis the Delhi High Court Act, which would be a general statute dealing with the jurisdiction and procedure of the High Court. It is well established principle of law that a special provision made on a certain matter would exclude the general provision in its application, with the provision of the special Act prevailing over the provision of a general Act. This principle is expressed in the maxims *Generalia Specialibus Non Derogant* and *Specialia Generalibus Derogant*. Reference can be drawn to the judgment of the Supreme Court in *Jogendra Lal Saha v. State of Bihar and others*, MANU/SC/0282/1991 : AIR 1991 SC 1148 and *P.V. Hemalatha v.*

Kattamkandi Puthiya Maliackal Saheeda and others, MANU/SC/0501/2002 : AIR 2002 SC 2445.

13. The object and intent of the legislature in substituting the Explanation to Section 47 of the Act can be found in the 246th Report of the Law Commission, which has been reproduced hereinabove. The provision therefore, clearly intended to ensure that all challenges to a Foreign Award are made only before the High Court. Such intent cannot be defeated by applying a subsequent general law. In view of the above, the provisions of the Delhi High Court Act cannot be made applicable to the petitions seeking enforcement of the Foreign Awards.

14. In *Kandla Export Corporation and Anr. v. M/s. OCI Corporation and Anr.*, MANU/SC/0112/2018, the Supreme Court relying upon its earlier judgment in *Fuerst Day* (supra) held that Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 being a general provision vis-a-vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to the case of Section 50 of the Act. Applying the above ratio, it would be clear that the Delhi High Court Act would not apply to the petitions seeking enforcement of a Foreign Award under the Arbitration and Conciliation Act, 1996 as amended by the Amendment Act.

15. I may further add that the amendment in the Explanation to Section 47 merely affects the forum and therefore, as held by the Supreme Court in its judgments in *Classic Credit Limited* (supra), is merely procedural in nature and unless the Amending statute provides otherwise, would have a retrospective effect. Section 26 of the Amendment Act provides for the application of the Amendment Act and reads as under:

"26. Act not to apply to pending arbitral proceedings. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

16. Section 26 of the Amending Act does not exclude the application of the amended Explanation to Section 47 of the Act to proceedings pending in High Court on that date.

17. Reliance of the senior counsel for the respondent on the amendment carried out in Section 48 of the Act as also on the judgments of the Supreme Court in *Fuerst Day Lawson Ltd.* (supra) and of the Bombay High Court in *Noy Vallesine* (supra) cannot be accepted. It is first to be noted that though the provisions from Section 47 to 49 of the Act have been held to be a single proceeding for deciding enforceability and execution of a Foreign Award, Explanation to Section 47 of the Act merely and separately provides for the forum where applications seeking enforcement of the Foreign Award are to be filed. Section 48 separately lays down the conditions where the enforcement of a Foreign Award may be refused. The same has no effect on the forum, unlike in the case of *Videocon International Limited* (supra) where change in the forum and the power of the Appellate Court were intertwined and formed part of one single package. The question before this Court is not whether the provisions of the amended Section 48 of the Act would apply to the present proceeding which was pending as on the date of the amendment. Equally, the question whether the enforcement petitions pending before the District Court on the date of the amendment are to be transferred to this Court, is not a question to be decided in this

petition. I therefore refrain from making any observation in that regard. However, clearly applying the above principle laid down by the Supreme Court, the present petition must continue before this Court and cannot be transferred to the District Court by placing reliance on the Delhi High Court Act.

18. With the above observation, the objection of the respondent insofar as the issue of continuation of present proceedings before this Court, is rejected.

List on 10th December, 2018 before the Roster Bench for further proceedings/direction in the petition.

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