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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.2066 of 2016
Date of decision:30.11.2016

Noble Resources Limited ...Petitioner

Versus

The Hon'ble Chief Justice, High Court for the
States of Punjab and Haryana at Chandigarh and others ...Respondents

CORAM: Hon'ble Mr. Justice Rakesh Kumar Jain

Present: Mr. Jafar Aalam, Advocate, and
Ms. Ramandeep Kaur, Advocate, for
Mr. Sumeet Goel, Advocate, for the petitioner.

Mr. Vikas Suri, Advocate,
for respondent No.3.

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Rakesh Kumar Jain, J.

This petition is directed against the order dated 14.12.2015, dismissing an application filed under Section 47 (Part II) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") for enforcement of the foreign arbitration award dated 27.10.2014 and foreign arbitration award on costs dated 15.12.2014 (hereinafter referred to as the "foreign arbitration awards").

Shorn of unnecessary details, the issue involved in this petition is as to whether the Court would mean the principal Civil Court of original jurisdiction in a District, for execution of the foreign arbitration awards in view of Section 47 of the Act or the High Court in view of Explanation in the Arbitration and Concilliation (Amendment) Ordinance, 2015 (hereinafter referred to as the "Amended Ordinance-2015") or whether the

District Court would cease to have jurisdiction to proceed with the execution of the foreign arbitration awards, after coming into force of the Explanation to Section 47 by way of the Amended Ordinance-2015 and the execution pending before the District Judge has to be filed in the High Court?

In brief, the petitioner filed an application before the District Judge, Gurgaon, under Section 47 (Part II) of the Act for enforcement and execution of the foreign arbitration awards passed by the Sole Arbitrator appointed by the Hong Kong International Arbitration Centre in Hong Kong under the terms of the repayment agreement dated 27.05.2013 executed between the petitioner and respondent No.2. During the pendency of the said execution application, Amended Ordinance-2015, promulgated by the President of India on 23.10.2015, came into force and hence, an application was filed by respondent No.2 for dismissal of the execution application for want of jurisdiction on the ground that the execution application is not maintainable in terms of the Explanation to Section 47 of the Amended Ordinance-2015, as per which the jurisdiction for enforcement of the foreign arbitration awards has been exclusively conferred upon the High Court. The learned Additional District Judge, Gurgaon, while relying upon a decision of the Supreme Court, rendered in the case of **Sudhir G. Angur and others vs. M. Sanjeev and others,** (2006) 1 Supreme Court Cases 141, allowed the application of respondent No.2 and dismissed the execution application of the petitioner for want of jurisdiction.

Counsel for the petitioner has submitted that when the application for execution was filed, Section 47 of the Act was in operation but during the pendency of the application, the Amended Ordinance-2015 was promulgated and an amendment was brought in the Explanation to Section 47 of the Act as per which jurisdiction has been conferred upon the High Court instead of the principal Civil Court of the District. It is submitted that the change in the forum does not affect the pending actions unless it is clearly intended and has relied upon a decision of the Supreme Court rendered in the case of **Commissioner of Income Tax, Orissa vs. Dhadi Sahu,** 1994 Supp (1) Supreme Court Cases 257 and has further submitted that the decision of the Supreme Court in **Sudhir G. Angur's case (supra)** is not applicable to the facts of the present case.

Respondent No.2 was proceeded against ex-parte on 31.05.2015 but assistance is provided by counsel for respondent No.3 who has submitted that the remedy available guaranteed to the petitioner under the Act can be changed by amendment and has, thus, supported the impugned order.

I have heard learned counsel for the parties and examined the available record with their able assistance.

In order to appreciate the rival contentions, it would be appropriate to refer to Section 47 of the Act and the amendment in Explanation to Section 47 of the Act brought by the Amended Ordinance-2015, which are reproduced as under:-

> **Section 47 of the Act**
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> "Evidence- (1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court:-
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> (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was

made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

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."

Explanation provided in the Amended Ordinance-2015

"21. In Section 47 of the Principal Act, for the Explanation, the following Explanation shall be substituted, namely:-

'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."

There is no dispute that in the execution application filed by the petitioner, the District Judge, Gurgaon had the jurisdiction in terms of the un-amended Explanation to Section 47 of the Act but during the pendency of the execution, with the amendment in the Explanation to Section 47 of the Act, the forum for the purpose of execution of the foreign arbitration award was changed from the principal Civil Court of original jurisdiction to the High Court.

Counsel for the petitioner has relied solely upon the decision of the Supreme Court in **Dhadi Sahu's case (supra)**.

In order to find out whether this judgment would be of any help or not to the petitioner, it would be relevant to refer to its facts. In the said case, the respondent Dhadi Sahu was the assessee on whom the penalty was imposed under Section 271(1)(c) read with Section 274(2) of the Income Tax Act, 1961 (hereinafter referred to as the "IT Act"), for the assessment year 1968-69 and 1969-70. On 28.02.1970, i.e. on the date of the assessment orders, Section 274(2) of the IT Act provided that if the minimum penalty imposable exceeds a sum of ₹1,000/-, the Income Tax Officer shall refer the case to the Inspecting Assistant Commissioner, who shall, for the purpose, have all the powers conferred under that chapter for the imposition of penalty. When the matter was pending with the Inspecting Assistant Commissioner, Section 274(2) of the IT Act was amended w.e.f. 01.04.1971 by the Taxation Laws (Amendment) Act, 1970 (hereinafter referred to as the "Amending IT Act") in which it was provided that if the amount of income in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees, the Income Tax Officer shall refer the case to the Inspecting Assistant Commissioner, who shall, for the purpose, have all the powers conferred under the said chapter for the imposition of penalty.

Thereafter, on 15.02.1973, the Inspecting Assistant Commissioner passed orders imposing penalties of ₹24,000/- and ₹12,500/- for the assessment years 1968-69 and 1969-70. The assessee's appeal was allowed by the Income Tax Appellate Tribunal and the penalties imposed were cancelled holding that in view of the amendment made to Section 274(2) of the IT Act with effect from 01.04.1971, the Inspecting Assistant Commissioner had lost his jurisdiction.

Thereafter, on the Revenue's application, the Appellate Tribunal referred the consolidated case to the Orissa High Court under Section 256(1) of the IT Act with the question of law that *"whether, on the facts and circumstances of the case, and on a true interpretation of Section 274, as amended by the Taxation Laws (Amendment) Act, 1970, the Inspecting Assistant Commissioner to whom the case was referred prior to April 1, 1971, had jurisdiction to impose penalty?"*

The Division Bench of the Orissa High Court answered the question in favour of the assessee and, thereafter, the matter reached to the Supreme Court. It was observed by the Supreme Court that till April 1, 1971 the Income Tax Officer had no jurisdiction to impose penalty under Section 271(1)(c) of the IT Act if the minimum penalty imposable exceeded ₹1,000/- and in such a case he was bound to make a reference to the Inspecting Assistant Commissioner, who, on such reference had the jurisdiction to exercise all the powers conferred under Chapter XXI for the imposition of penalty but from April 1, 1971. The Income Tax Officer could impose penalty under Section 271(1)(c) if the amount of income in respect of which the particulars were concealed or inaccurate particulars were furnished did not exceed ₹25,000/- and in case such income exceeded ₹25,000/-, the Income Tax Officer was required to refer the case to the Inspecting Assistant Commissioner who would then got the jurisdiction to impose penalty. It was found that in the case in hand, the minimum penalty imposable exceeded ₹1,000/- but the amount of income in respect of which the particulars were concealed did not exceed ₹25,000/- and the order of the Inspecting Assistant Commissioner was passed on February 15, 1973 i.e. after the coming into force of the amending Act which amended Section 274 (2) of the Act.

In this background, the Supreme Court has made the following observations:-

> "18. It may be stated at the outset that the general principle is that a law which brings about a change in the forum does not affect pending actions unless intention to the contrary is clearly shown. One of the modes by which such an intention is shown is by making a provision for change-over of proceedings, from the court or the tribunal where they are pending to the court or the tribunal which under the new law gets jurisdiction to try them."

It was further observed that *"it is also true that no litigant has any vested right in the matter of procedural law but where the question is of change of forum it ceases to be a question of procedure only. The forum of appeal or proceedings is a vested right as opposed to pure procedure to be followed before a particular forum. The right becomes vested when the proceedings are initiated in the tribunal or the court of first instance and unless the legislature has by express words or by necessary implication clearly so indicated, that vested right will continue in spite of the change of jurisdiction of the different tribunals or forums"*.

It was also observed therein that *"the amending Act did not make any provision that the references validly pending before the Inspecting Assistant Commissioner shall be returned without passing any* *final order if the amount of income in respect of which the particulars have been concealed did not exceed Rs.25,000/-".*

Finally, the following observations were also made by the Supreme Court:-

> "26. Surely the amending Act does not show that the pending proceedings before the court on reference abate.
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> 27. We are thus of the considered view that the advisory opinion given by the High Court to the question referred to it was wrong and the answer should be in favour of the appellant and it is held that the Inspecting Assistant Commissioner to whom the case was referred prior to April 1, 1971 had jurisdiction to impose the penalty. The view expressed by the Allahabad High Court in CIT v. Om Sons and the Karnataka High Court in CIT v. M.Y. Chandragi does not, therefore, lay down the correct law."

On the other hand, in **Sudhir G. Angur's case (supra)**, the facts were that respondents No.1 and 2 therein filed a suit under Section 92 of the Code of Civil Procedure, 1908 (hereinafter referred to as the "CPC"). The appellants opposed the grant of leave, which was allowed and the revision filed against that order was dismissed. While contesting the grant of leave, the appellants did not contend that the suit under Section 92 of the CPC was not maintainable in view of the provisions of the Mysore Religious and Charitable Institutions Act, 1927 (hereinafter referred to as the "Mysore Act"). After the revision was dismissed, the appellants filed an application for rejection of the plaint under Order 7 Rule 11 of the CPC on the ground that the suit was not maintainable by virtue of Section 40 of the Mysore Act and the revision was also dismissed by the High Court of Karnataka. The contention of the appellants was that in view of the provisions of the Mysore Act, all matters/issues raised could only have been raised in an enquiry under Section 17 and could have only been dealt with by an order under Section 18 of the Mysore Act by the Muzrai Officer and by virtue of Section 40 of the Mysore Act, the suit was barred.

In this background, the Supreme Court held as under:-

> "10. Even otherwise leave to file the suit was granted after hearing the parties. Once leave was granted, the question of rejecting the plaint under Order 7 Rule 11 did not arise. An application for rejection of the plaint should have been made prior to the leave having been granted or at the time when the appellants opposed grant of leave. Having lost in their opposition to the grant of leave it was not open to the appellants to then apply for rejection of the plaint under Order 7 Rule 11 CPC."

The learned Court below, however, referred only to para 11 of this judgment in order to dismiss the execution application filed by the petitioner, though the said observations are not applicable to the facts and circumstances of the present case.

Thus, in view of the decision of the Supreme Court in **Dhadi Sahu's case (supra)**, it can safely be held that the impugned order passed by the Additional District Judge, Gurgaon, is illegal.

Consequently, the present writ petition is hereby allowed and the impugned order dated 14.12.2015 passed by the Additional District Judge, Gurgaon, is set aside.

November 30, 2016 **(Rakesh Kumar Jain)**
vinod* **Judge**

Whether speaking / reasoned: Yes/No
Whether Reportable: Yes/No