

**THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

L.P.A. No.917 of 2017 (O&M)

Date of Decision : 12.1.18

Alpine Minmetals India Private Limited

....Appellant

Versus

Noble Resources Limited and another

..... Respondents

**CORAM : HON'BLE MR. JUSTICE MAHESH GROVER
HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI**

Present : Mr. Siddharth Yadav, Advocate and
Mr. Ankush Chowdhary, Advocates
for the appellant.

Mr. Sumeet Goel, Advocate
for respondent No.1.

Mr. Vikas Suri, Advocate
for respondent No.2.

RAJ SHEKHAR ATTRI, J.

The moot question which arises for determination is as to whether jurisdiction of the District Judge, being the Principal Civil Court, stands withdrawn with regard to the arbitral proceedings already commenced before coming into force the Arbitration and Conciliation (Amendment) Act, 2015 ?

One of the respondents before the writ court has knocked the door of this Court by assailing the impugned order dated 30.11.2016, passed by the learned Single Judge in CWP No.2066 of 2016, thereby setting aside the impugned order dated 14.12.2015 passed by the learned

Addl. District Judge, Gurgaon.

Undisputedly, writ respondent Noble Resources Limited (respondent herein) had obtained a foreign arbitral award. He sought the execution thereof under Section 47 of the Arbitration and Conciliation Act, 1996 (in short 'the Principal Act') by filing an application before the learned District Judge, Gurgaon on 13.04.2015 and the same was entrusted to learned Addl. District Judge, for disposal.

At the time of filing execution application i.e. 13.04.2015, the jurisdiction was conferred upon principal civil court i.e. the District Judge under the provisions of Section 47 of the Principal Act. Subsequently, various amendments were made in the said Act by inserting in section 2 (e) and explanation to section 47 thereof by promulgation the Arbitration and Conciliation (Amendment) Act Ordinance w.e.f. 23.10.2015. However, the Arbitration & Conciliation (Amendment) Act, 2015 (in short' the Amending Act') i.e. Act No.3 of 2016 also came into force w.e.f. 23.10.2015. Thus, by way of the amendment in the explanation to Section 47 of the Act, the jurisdiction was conferred solely upon the High Court.

Learned Additional District Judge, Gurgaon vide impugned order dated 14.12.2015 has observed that after passing of the Amendment Ordinance 2015, the jurisdiction has been conferred upon the High Court, therefore, he ceased to exercise the jurisdiction. Consequently, execution application was dismissed. Said order dated 14.12.2015 has been impugned before the learned Single Judge by filing CWP No.2066 of 2016. Said petition was allowed and impugned order has been set aside.

We have heard learned counsel for the parties and have gone through the record.

Learned counsel for the appellant has vehemently contended

that after passing of the impugned Arbitration Ordinance as well as the Amending Act, the jurisdiction of the District Judge has been withdrawn retrospectively and the same has been conferred exclusively upon the High Court. Therefore, only the High Court can proceed with the execution application from the date when the arbitration ordinance has been promulgated. In support of the contention, he relied upon the judgment of Hon'ble Supreme Court in **Sudhir G.Angur and others versus M.Sanjeev and others (2006) 1 Supreme Court Cases 141.**

On the other hand, learned counsel for the respondents vehemently contended that when jurisdiction has been exercised on 13.04.2015, the same cannot be withdrawn by making amendment in the statute; that the executing court at Gurgaon under the unamended provisions of Section 47 of the Principal Act continues to exercise the jurisdiction. He placed reliance upon the precedents, in **Commissioner of Income Tax, Orissa Versus Dhadi Sahu 1994 Supp(I) SCC 257, Commissioner of Income Tax versus Raman Industries, Ludhiana 1980; Shiv Bhagwan Moti Ram Saraoji versus Onkarmal Ishar Dass and others AIR 1952 Bom 365;**

This Court has given its thoughtful consideration to the rival contentions. For the proper consideration of the aforesaid question, it is necessary to read the relevant provisions of the Principal Act as well as the Amending Act, (No.3 of 2016). First of all coming to the definition of the expression “court” Section 2(e) of the Principal Act.

"(e) "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 to decide the questions forming the subject-matter

of the arbitration 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;"

Thus from the bare perusal of the above, the Court means the principal civil court of original jurisdiction in a district and also includes the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject-matter of the arbitration. Let us now examine the amended provisions which have been inserted in the statute by way of The Arbitration and Conciliation (Amendment) Act, 2015 (No.3 of 2016). Section 2(e) re-defines the expression "court" as under:-

'(e) "Court" means-

(i) in the case of an arbitration other than international commercial arbitration, 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 to decide the questions forming the subject-matter of the arbitration 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;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High

Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court"

In sub-section (2), the following proviso has been inserted, namely :-

"Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of subsection (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."

Now coming to the explanation attached to Section 47 of the Principal Act:

"47. Evidence.-

(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court-
(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 subsection (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."

The explanation attached to Section 47 of the Principal Act has also been amended by the Amending Act and the following explanation has been 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.'

The Amendment Act was made applicable w.e.f. 23.10.2015, the date when amending ordinance came into force. Section 26 of the Amending Act is the saving clause. It bars the operation of the amended provisions on the pending matters. It 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."

From the close study of above said saving clause, it is very much clear that the provisions of the Amending Act shall not apply to arbitral proceedings already commenced in accordance with section 21 of the Principal Act, which contains four Parts. The first Part relates to the arbitral proceedings conducted in India which includes section 21 thereof. Part II relates to the enforcement of certain foreign awards. Under section 26 of the Amending Act, there is no special reference to the arbitral proceedings that commenced other than under Part I of the Principal Act. The language of this provision appears to be ambiguous with regard to the retrospective applicability of the amended provisions. However, the words used under Section 26 of the amending Act ***"but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*** connotes the universal applicability to all the proceedings including the foreign awards. In other words, it can easily be inferred that the bar on exercising the jurisdiction by the executing court does not apply on those proceedings i.e. arbitral proceedings commenced on or before 23.10.2015.

The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law

applicable to a claim in litigation at the time when the Act was passed

(Garikapati Versus N. Subbiah Choudhry, AIR 1957 SC 540).

It is also well settled that a statute which takes away vested rights retrospectively, is generally presumed to be unjust and oppressive unless retrospective effect is provided in the statute expressly or impliedly. In **Mithilesh kumari versus Prem Behari Khare, 1989** it was held that :

“We read in Maxwell that it is a fundamental rule of English Law that no statute shall be construed to have retrospective operation unless such a construction appears very clearly at the time of the Act, or arises by necessary and distinct implication. A retrospective operation is, therefore, not to be given to a statute so as to impair existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. Before applying a statute retrospectively the Court has to be satisfied that the statute is in fact retrospective. The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively would prejudicially affect vested rights or the illegality of the past transactions, or impair contracts, or impose new duty or attach new disability in respect of past transactions or consideration already passed. However, a statute is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing. We must look at the general scope and purview of the statute and at the remedy sought to be

applied, and consider what was the former State of Law and what the legislation contemplated. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive. But laws made justly and for the benefit of individuals and the community as a whole, as in this case, may relate to a time antecedent to their commencement. The presumption against retrospectivity may in such cases be rebutted by necessary implications from the language employed in the statute. It cannot be said to be an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed. The question is whether on a proper construction the legislature may be said to have so expressed its intention. Craies on Statute Law, 7th Ed. writes that the general rule of law that statutes are not operated retrospectively may be departed from (a) by express enactment and (b) by necessary implication from the language employed, and the author goes on to say :

*"If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation. "Baron Parke", said Lord Hatherley in **Pardo v. Bingham, 1869 LR 4 Ch App 735** did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be, construed, and said that the question in each case was whether*

*the legislature had sufficiently expressed that intention. In fact, we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, what it was that the legislature contemplated." But a statute is not to be read retrospectively except of necessity. In **Main v. Stark, 1890(15) AC 384** Lord Selborne said : "Their Lordships, of course, do not say that there might not be something in the context of an Act of Parliament, or to be, collected from its language, which might give towards prima facie prospective a larger operation, but they ought not to receive a larger operation unless you find some reason for giving it In all cases it is desirable to ascertain the intention of the legislature."*

Whenever the legislature intends to oust the jurisdiction of a court, it must provide expressly and in the absence thereof it shall be construed otherwise. This view of ours stands fortified by pronouncement of Hon'ble Supreme Court (three judges bench) in case **Dewaji Versus Ganpat Lal AIR 1969 SC 560** wherein the jurisdiction of civil court was ousted by making amendment in the Berar Regulation Agricultural Leases Act, 1951. The following was observed :

"It cannot be disputed that if the Legislature intends to oust the jurisdiction of Civil Courts, it must say so expressly or by necessary implication. We cannot find any words in Sections 16, 16A and 16B which can lead to the necessary inference that these provisions were intended to apply to appeals pending when the 1953 Act came into force. It is true that the

word "whenever" is wide but Section 16A uses the words "suit or proceeding" and these words do not ordinarily indicate appellate proceedings. Further, Section 16B uses the word "entertain" and not the words "entertain or try any suit" as contained in Section 15(2) of the 1951 Act. If the intention was to affect pending proceedings, the word "try" along with the word "entertain" would have been used in Section 168 of the 1953 Act. It seems to us that the intention was not to apply the 1953 Act to pending appeals. Sections 16, 16A and 16B do not bar the jurisdiction of the Civil Courts in this case, the Letters Patent Bench was right in accepting the findings given by the Trial Court and the District Court in holding that the appellant was not a tenant for the year 1951-52."

Similar is the observation of the Supreme Court in **Manujendra Dutt v. Purnedu Prosad Roy Chowdhury, AIR 1967 SC 1419** One of the questions considered by Hon'ble Supreme Court was this : Whether the Controller under The Calcutta Thika Tenancy Act, 1949, after the deletion therefrom of Section 29 by the Amendment Act 6 of 1953, had the jurisdiction to proceed with the case. Hon'ble Supreme Court after taking note of the argument on this question has observed thus (Para 4) :-

"The contention of Mr. Agarwal was that since it was only by reason of Section 29 that the suit had been transferred to the Controller the deletion of that Section from the Act by Section 8 of the Amendment Act of 1953 had the effect of depriving the Controller of his jurisdiction to try the suit and therefore, the judgment and order passed by him

though confirmed by the learned Subordinate Judge and the High Court was without jurisdiction and therefore, bad. In our view, this contention has no force. Though Section 29 was deleted by the Amendment Act of 1953 the deletion would not affect pending proceedings and would not deprive the Controller of his jurisdiction to try such proceedings pending before him at the date when the Amendment Act came into force. Though the Amendment Act did not contain any saving clause under Section 8 of the Bengal General Clauses Act, 1899, the transfer of the suit having been lawfully made under Section 29 of the Act, its deletion would not have the effect of altering the law applicable to the claim in the litigation. There is nothing in Section 8 of the Amending Act of 1953 suggesting a different intention and therefore, the deletion would not affect the previous operation of Section 5 of the Calcutta Thika Tenancy Act or the transfer of the suit to the Controller or anything duly done under Section 29. That being the correct position in law the High Court was right in holding that inspite of the deletion of Section 29 the Controller still had the jurisdiction to proceed with the said suit transferred to him."

In the same strain is the decision of the larger bench of Hon'ble Supreme Court in ***Mohd. Idris v. Sat Narain, AIR 1966 Supreme Court 1499*** wherein the proceedings were pending before the Munsiff but by passing of the Amendment Act, 1953, the jurisdiction of Munsiff was ousted and conferred upon the Assistant Collector. It has been observed as

under:

“The addition of this section clearly shows that by the conferral of the jurisdiction upon the Assistant Collector it was not intended to upset litigation pending before appropriate authorities when the Abolition Act came into force. Section 23 in terms must apply to the present case, because if it had remained pending before the Munsif till 1956, it is clear, the jurisdiction of the Munsif would not have been ousted. Although it was not pending before the Munsif it was pending before the appellate Court when the 1956 amendment Act was passed. It follows, therefore, that to such a suit the provisions of Schedule II read with Section 200 of the Abolition Act cannot be applied because the Legislature has in 1956 said expressly what was implicit before, namely, that pending actions would be governed by the old law as if the new law had not been passed. In our judgment, therefore, the proceedings before the Munsif were with jurisdiction because they were not affected by the passing of the Abolition Act or the amending Act, 1953, regard being had to the provisions of Section 6 of the U.P. General Clauses Act in the first instance and more so in view of the provisions of Section 23 of the amending Act, 1956 which came before the proceedings between the parties had finally terminated.”

Admittedly, in the case in hand, the execution application to execute a foreign award has been filed on 13.04.2015 before the District Judge, Gurgaon. On that day, the District Judge had the jurisdiction in view of

the provisions of Section 47 of the Act. Subsequently, by promulgation of the ordinance, the jurisdiction was conferred upon the High Court, albeit, section 26 of the Amendment Act protects the pending proceedings which have already been commenced on the date of promulgation of the ordinance.

For the true and proper construction of Section 26 of the Amending Act, we can take the aid of the provision under Section 6-A of the General Clauses Act, which reads as under:-

[6-A. Repeal of Act making textual amendment in Act or Regulation. *Where any [Central Act] or Regulation made after the commencement of this Act repeals any enactment by which the text of any [Central Act] or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal.]*

While discussing in detail in **Dhadi Sahu's case** (supra), Hon'ble Supreme Court squarely held that jurisdiction once conferred cannot be withdrawn retrospectively. It was observed in para Nos. 20 and 21 as under:

20. It will be noted 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.

25,000.00. This supports the inference that in pending references the Inspecting Assistant Commissioner continued to have jurisdiction to impose penalty. The previous operation of Section 274(2) as it stood before April 1, 1971 AND anything done thereunder continued to have effect under Section 6(b) of the General Clauses Act, 1897, enabling the Inspecting Assistant Commissioner to pass orders imposing penalty in pending references. In our opinion, therefore, what is material to be seen is as to when the references were initiated. If the reference was made before April 1, 1971, it would be governed by Section 274(2) as it stood before that date and Inspecting Assistant Commissioner would have jurisdiction to pass the order of penalty.

21. 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.

Hon'ble Supreme Court in **Rajinder Bansal and others versus**

Bhuru (D) Thr. Lrs. AIR 2016 SC 4919 has held in para No.16 as under:-

16. *From the aforesaid discussion in **Atma Ram Mittal, Vineet Kumar, Ram Saroop Rai, Ramesh Chandra and Shri Kishan alias Krishna Kumar** cases, the apparent principles which can be culled out, forming the ratio decidendi of those cases, are as under:*

i) Rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the law applicable on the date of filing of the suit will continue to apply until suit is disposed of or adjudicated.

ii) If during the pendency of the suit, Rent Act becomes applicable to the premises in question, that would be of no consequence and it would not take away the jurisdiction of civil court to dispose of a suit validly instituted.

iii) In order to oust the jurisdiction of civil court, there must be a specific provision in the Act taking away the jurisdiction of the civil court in respect of those cases also which were validly instituted before the date when protection of Rent Act became available in respect of the said area/premises/tenancy.

(iv) In case aforesaid position is not accepted and the protection of the Rent Act is extended even in respect of suit validly instituted prior in point of time when there was no such protection under the Act, it will have the consequence of making the decree, that is obtained prior to the Rent Act becoming applicable to the said

area/premises, inexecutable after the application of these Rent Act in respect of such premises. This would not be in consonance with the legislative intent.

In **Sudhir G. Angur and others' case** (supra) the facts were on different footings. In that case, the respondent Nos.1 and 2 filed a suit under Section 92 of the Code of Civil Procedure, 1908 (herein referred as 'the CPC'). An application was filed to seek the leave of the Court to institute the suit. Said application was contested by the respondents, however, the same was allowed and revision against the said order was dismissed. After dismissal of the revision, defendants/respondents filed another application under Order 7 Rule 11 CPC for rejection of the plaint on the ground that suit is not maintainable by virtue of Section 14 of the Mysore Religious and Charitable Institutions Act, 1927. This application was also dismissed by the trial Court on 06.08.2001. Against this order, the defendants filed revision before the High Court of Karnataka which has also been dismissed and this order has been impugned before the Hon'ble Supreme Court. Subsequently, the Mysore Act was repealed in the year 2003. Hon'ble Supreme Court has held that Section 40-A of the Mysore Act categorically provides that a suit under Section 92 CPC is not barred. Thus, the principle of law laid down in **Sudhir G's case** (supra) is quite distinguishable.

Thus, we are of the view that at the time of taking cognizance of the execution application on 13.04.2015, the District Judge, being the principal civil court was having jurisdiction and said jurisdiction cannot be withdrawn retrospectively while promulgation of the ordinance or by passing Amendment Act. Even otherwise also Section 26 of the Amending

Act saves the proceedings already commenced on. Thus, we do not find any perversity, illegality or irregularity in the impugned order, passed by the learned Single Judge. As such, the same does not seek any interference. Consequently, the instant petition stands dismissed.

(MAHESH GROVER)
JUDGE

12.1.18
mamta

(RAJ SHEKHAR ATTRI)
JUDGE