

**THE INDIAN JUDGE AND INTERNATIONAL COMMERCIAL LAW, A
PRACTICAL APPROACH**

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"The net result is that the Courts in India are now at liberty to lay down and follow their own rules with regard to Private International Law; and in this respect we are in a very fortunate position since we can adopt the rules laid down in various countries as accord best with our sense of justice, equity and good conscience. We can profit by their experience and errors."¹

Since the opening up of India's economy, membership of the WTO coupled with near double digit GDP growth and consequent rapid integration of its economy with the global order, Indian Judiciary has increasingly come to deal with diverse commercial issues of transnational dimension. India being a signatory of GATT, GATS, TRIPs, UNCITRAL, New York Convention, Paris Convention etc., appropriate amendments have been/are being made in India's domestic laws to harmonize them with such International standards, keeping, of course, domestic interest as a prime concern. In the midst of such rapid changes, Indian Judiciary, more often than not, finds itself at the cross-road of diverse interests, faced with the daunting task of interpreting India's domestic laws in the light of the fast evolving International Legal Standards.

International Commercial Law per se does not automatically become a law in India on its own force without any domestic law legislated by the Indian Parliament. In Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey & Ors,² the Supreme Court of India held that National Law will prevail over International Law in case of any conflict between

¹ I & G Investment Trust Vs. Raja of Khalikote, A.I .R. 1952 Calcutta, 508.

² (1984), 2 SCC 534

the two and in Novartis AG & Anor. Vs. Union of India & Ors.³, the Chennai High Court held that courts in India have no jurisdiction to set aside a domestic law on ground of violation of an International Law or treaty, unless the same is reflected in a domestic Indian Law; based on this premise, it was held that Article 27 of TRIPs cannot be banked upon as a basis for challenging Section 3(d) of the Indian Patent Act, 1970. In coming to the said conclusion, the Chennai High Court referred to Salomn Vs. Commissioner of Customs⁴, where the Court of Appeal in England observed as under:-

“If the terms of the legislation are clear and unambiguous, they must be given effect to whether or not they carry our Her Majesty’s treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties and any remedy for such a breach of an international obligation lies in a forum other than Her Majestic own Courts.”

Nevertheless, there is no bar, express or implied, disabling Indian Courts from declaring domestic laws as violative of an International Law or Treaty. Indeed, International Laws have always had persuasive value on Indian Courts. For the purpose of this paper, I will deal with the subject from three different perspectives – (a) International Commercial Litigation, (b) International Commercial Arbitration and (c) Enforcement of Foreign Judgments.

International Commercial Litigation

India’s Civil Procedure Code allows courts in India to take up and decide International Commercial Disputes, provided the cause of action partly or wholly arises in India or the Respondent/Defendant resides/carries on business in India or where the Parties to a Contract agree on India as the chosen Jurisdiction. Right from anti-dumping, letters of credit to

³ Judgment dated August 6, 2007 in W.P. Nos.24759/2006 & 24750/2005

⁴ 1966-3, All England Law Reports, Page 871

well known International brand-names, courts in India have delivered Judgments with WTO & other International commercial laws well within their zone of consideration. Wherever established law or precedents are silent or not clear, Courts in India rely on relevant foreign laws, Judgments and International Covenant not only for purposes of interpretation but also for determination of legal rights. Five High Courts in India with original jurisdiction including Delhi and Mumbai High Courts have been more particularly active in disposing commercial matters of transnational dimension.

However, delay has been a concern for the Law Commission of India and the Govt. of India. Such a delay in Judicial proceedings has been discouraging foreign players from invoking Indian Jurisdiction so much so even where Indian jurisdiction as an alternative is possible, courts in other jurisdictions have assumed Jurisdiction with 'delay' furnished as an ostensible reason. Nothing could be clearer than the observation of the Law Commission of India in its Report submitted in 2003:-

“Indeed, there are serious anomalies in the approach of the US and UK Courts on the application of the principle of 'Forum non-conveniens'. A particular contrast in the approach of the foreign courts towards Indian Plaintiffs as distinguished from foreign plaintiff, needs to be referred to. Mostly, if the defendants are aliens, then these foreign Courts take up the cases immediately on the ground of delay of courts in the country of the alien. If the alien is the plaintiff, the same courts relegate the Plaintiff to the Courts in the country of the Alien”.

In its report, the Law Commission of India has come down harshly on Courts in foreign jurisdictions resorting to 'Forum Non-Conveniens' as a convenient excuse to assume jurisdiction in matters, which could have been tried in India. The Law Commission has referred to an unexpected praise for the Indian Judiciary by Judge Keenan of the US District Court, South District of New York, while dismissing claims of Indian

Plaintiffs and relegating the victims of the infamous Bhopal Gas Tragedy to Indian Courts in Re Union Carbide Corporation Gas Plant Disaster at Bhopal⁵, while in Bhatnagar Vs. Surendra Overseas Limited⁶, the 3rd Circuit Court of Appeal of US gave judicial delay in India which could go upto 'a quarter of a century' as its ostensible reason for assuming its jurisdiction in the matter. Nevertheless, the Law Commission of India has not lost sight of the proverbial 'No Smoke Without Fire' and has accordingly recommended 'Commercial Divisions' in the High Courts to avoid 'delay', so much associated with the Indian Judicial system.

International Commercial Arbitration

As in other Jurisdictions, International Commercial Arbitration – ad-hoc as well as institutional is gaining popularity in India as well. Just as most domestic arbitrations in India are ad-hoc, most International Commercial Arbitrations in India are Institutional thanks to such Arbitration Bodies in India like Indian Council of Arbitration (ICA), Indian Council for Alternate Dispute Resolution (ICADR) etc

The present Indian Arbitration and Conciliation Act, 1996, based on the UNCITRAL model, has elaborate provisions on International Commercial Arbitration – ad-hoc as well as Institutional held in or outside India. Under the scheme of the Act, Arbitral Awards are enforceable as if such awards were the orders passed by the Courts in India. The almost '90% finality' of such Arbitral Awards is reflected in Section 34, which provides very limited technical grounds for challenging Arbitral Awards. Though the Supreme Court of India in ONGC Ltd. Vs. Saw Pipes Ltd.⁷ has enlarged the scope of 'Public Policy' as a ground for challenging

⁵ (1986) 634, F.Suppl 842 (S.D.N.Y.)

⁶ (1995) 52 F.2.d.1220 (3rd Cir.)

⁷ (2003) 5 SCC 705

Arbitral Awards, the previous Judgment of a larger Bench in Renusagar Power Co. Ltd. Vs. General Electric Co.⁸ would have a prevailing effect and hence, the position of very limited grounds for challenging International Commercial Arbitration Awards remains more or less unchanged.

Apart from minimum interference with Arbitral Awards, courts in India have also been passing interim orders to protect the interest of foreign parties in assets in India. In Bhatia International Ltd. Vs. Bulk Trading, S.A.⁹, the Supreme Court of India held that Part – I of the Arbitration and Conciliation Act, 1996, which gives effect to the UNCITRAL Model law and which confers power on the Court to grant interim measures, applied even to Arbitrations held outside India. This case pertains to an Arbitration held as per ICC Rules in Paris and it was during the pendency of such Arbitration proceedings that the foreign party applied to a court in India for interim measure for securing its interest in a property in India. Though the contention of the Indian Party was that New York Convention does not leave any scope for grant of interim measure/relief by a Court other than a court of the country in which Arbitration is being held, the Hon'ble High Court as well as the Supreme Court took a contrary view. This is one occasion where the Indian Judiciary has been confronted with interpretation of an International Convention as important as UNCITRAL and it goes to the credit of the Hon'ble Supreme that interim reliefs have been held to be permissible under the said Convention for securing properties in India, even though the place of Arbitration is outside India.

Even under the old Arbitration and Conciliation Act, 1940, the Supreme Court of India had an occasion to interpret "what is commercial?" in

⁸ 1994 Supp (I) SCC 644

⁹ (2002) 4 SCC 105

R.M. Investments V. Boeing Company¹⁰. In this Judgment, the Supreme Court took guidance from UNCITRAL in giving a wide meaning to the expression 'commercial' so as to include all relationships of a commercial nature, whether contractual or not, for the purpose of International Commercial Arbitration.

As regards enforcement, the enforcement procedure applicable to Foreign Judgments is more or less applicable to International Commercial Arbitration Awards, which takes us to the next issue of enforcement of Foreign Judgments in India.

Enforcement of Foreign Judgments and Arbitral Awards:-

Under Sections 13 and 44A of the Civil Procedure Code ("CPC"), Foreign Judgments can be enforced in two different ways, depending on whether the country in which the Foreign Judgment is passed is located is a 'Reciprocal Country' or not. While an order passed by a court in a so-called reciprocal country can be straightway enforced in India as if the same is a decree passed by a court in India, an Order passed by a Court in a non-reciprocating country can only be enforced by filing a fresh suit on the basis of such an Order. Government of India has notified some countries including Singapore and Hong Kong as 'Reciprocating Territories'. However, as per Section 13 of the CPC, all Foreign Judgments, to be enforceable, should have been pronounced by a court of competent jurisdiction on merit, should not be violative of Natural Justice, should not have been obtained by fraud, should not sustain a claim founded on a breach of a law in force in India and should not have been passed by refusing to recognize the law of India in cases such law is applicable. More importantly, a Foreign Judgment which is founded on an incorrect view of International Law is not enforceable in India.

¹⁰ AIR 1994 SC 1136

The most contested issue on Foreign Judgment in India is the issue of 'Jurisdiction'. The Supreme Court of India and High Courts have taken a pragmatic stand on this issue. In many cases, the defence against enforcement of Foreign Judgments in India is to question the Foreign Court's jurisdiction on the ground that the Party has not submitted itself to the jurisdiction of the Foreign Court. In *Andhra Bank Ltd. Vs. R. Srinivasan*¹¹, a Suit was filed against a guarantor in a foreign jurisdiction but during the pendency of the proceedings, the guarantor/defendant died and the legal representatives of the Guarantor were brought on record. After the decree was sought to be executed, the defence of the legal Representatives was that they had not submitted to the jurisdiction of the Foreign Court. However, the Supreme Court of India held that the material time when the test of the rule of Private International Law is to be applied is the time at which the Suit was instituted.

In *Shaling Ram Vs. Firm Daulatram Kundanmal*¹², the Supreme Court held that filing of an Application for leave to defend a suit in a foreign court amounts to voluntary submission to the jurisdiction of the Foreign Court. In fact, way back in 1914, in *Ramanathan Chettiar V. Kalimuthu Pillai*,¹³ the Madras High Court stipulated the circumstances in which a Party to a dispute can be said to have submitted himself to the jurisdiction of a Foreign Court Judgment:-

- (a). Where the Party is a subject of the Foreign Country in which Judgments have been obtained against him on prior occasions.
- (b). Where the Party is a resident of the foreign country at the time of the commencement of Court action.

¹¹ AIR, 1962 SC 232

¹² AIR 1967 SC 739

¹³ AIR 1914 Madras 556

(c). Where the Party has selected the Foreign Court/Jurisdiction as the forum for taking legal action in the capacity of a Plaintiff, in which forum he is sued later.

(d).Where the Party on summons has voluntarily appeared before the Foreign Court.

(e). Where by an Agreement a person has contracted to submit himself to the forum in which the Judgment is obtained.

The above principles are more or less still followed for determining jurisdiction of Foreign Courts.

Apart from the 'Jurisdiction' aspect, it is also required that a Foreign Judgment, to be enforceable, should have been passed on merit and after appreciating all the relevant facts and circumstances. In *Abdul Rahman v. Mohd. Ali Rowther*¹⁴, the full Bench of the Hon'ble Supreme Court observed as under:-

'A decision on the merits involves the application of the mind of the Court to the truth or falsity of the plaintiff's case and therefore though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed ex parte, a decision passed without evidence of any kind but passed only on his pleadings cannot be held to be a decision on the merits.'

This full Judgment still holds the field, followed later in *International Woollen Mills V. Standard Wool (U. K.) Limited*¹⁵ in which the Supreme Court of India did not accept the view that a decree passed in the absence of the defendant is a decree on merits or the proposition that the decree was on merits simply because all documents and particulars had been endorsed with the statement of claim.

¹⁴ 1928 AIR(Rang) 319 : ILR 6 Rang 552,

¹⁵ 2001 (5) SCC 265,

In *Y. Narsimha Rao Vs. Y. Venkata Lakshmi*¹⁶, the Supreme Court held that a Foreign Judgment to be enforceable in India should have been passed on merit, which means that the decision should be the result of a contest between the parties and this requirement is fulfilled when the Respondent is duly served and he voluntarily submits himself to the jurisdiction of the Foreign Court. Thus, for a Foreign Judgment to be enforceable in India, the Judgment should preferably be not ex-parte and the matter should have been heard on merit.

Section 13 of the Indian Civil Procedure Code also clearly stipulates that Foreign Judgment, to be enforceable, should not have been passed based on an incorrect reading or understanding of an applicable International Law or there should be any refusal to recognize the law of India in case in which such law is applicable. Way back in 1934, the High Court of Madras in *Panchapakesha Iyer & Ors. Vs. K.N. Hussain Muhammad Rowther & Ano.*¹⁷ refused to allow an Order passed by the Supreme Court of Penang on the ground that the Judgment is not in consonance with International Law:-

“In doing that I think it is clear that he has adopted an incorrect view of international law in regard to the jurisdiction of a court of one country over immovable property situate in another country and for this purpose the Crown colony of the Straits Settlements and British India must be regarded as separate countries. This mistake is patent on the face of the proceedings and in that regard there is in my opinion a clear defect in the judgment of the Supreme Court which makes it not one which the Plaintiff can sue in a Court in this country.”

In *I & G Investment Trust Vs. Raja of Khalikote* (Supra), the Hon'ble High Court rejected enforceability of a Judgment passed by an English Court by holding as under:-

¹⁶ (1991) 3 SCC 451

¹⁷ A.I.R. 1934 Madras 145

"In certain circumstances, the English Courts have by statutory provision, assumed jurisdiction over non-resident foreigners. In so far as such 'Assumed Jurisdiction' militates against the principles of Private International Law acceptable to India, she cannot be held bound by the same. Such Judgments are perfectly valid within the municipal jurisdiction where they are propounded but have no international validity."

Thus, though a International Commercial Law does not become a law in India on its own force without any domestic law legislated by the Govt. of India, the Civil Procedure Code of India provides 'incorrect reading of International Law' as a ground for non-enforcement of Foreign Awards in India. This speaks volumes of how important International Commercial Law has been for the Courts in India in evolving commercial law in India.
