

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) NO. 205/2000**

Reserved on : April 02, 2009

Date of Decision : July 10, 2009

National Agricultural Marketing Federation of India Ltd.

...Appellant

Through : Mr. Shanti Bhushan, Sr. Advocate
and Mr. T.K. Ganju, Sr. Advocate,
with Mr. A.T. Patra, Mr. Ajay K.
Thacker, Ms. Roopa Dayal and
Ms. Aradhna Patra, Advocates.

Versus

Alimenta S.A.

.....Respondent

Through : Mr. S.K. Dholakia, Sr.
Advocate, with Mr. Shailendra
Swarup, Ms. Bindu Saxena, Ms.
Aparajita Swarup, Ms. Neha Khattar
ad Mr. Vyom Bansal, Advocates.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

JUDGMENT

: MUKUL MUDGAL,J.

1. This is an appeal against the order dated 28th January, 2000 passed in Suit No. 1885/1993 by the learned Single Judge pronouncing a judgment on applications no. 1540/1996 and 2562/1996 filed by the appellant under Section 5 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter referred to as 'the Foreign Awards Act') by which the objections preferred by the appellant to the award dated 15th November, 1989 by the Federation of Oil Seeds and Fats Association Ltd. (for short 'FOSFA') were dismissed and the petition was allowed.

2. Sh. S.K. Dholakia, the learned Senior Counsel for the respondent has raised a preliminary objection to the maintainability of the appeal in the present form. For this purpose, he has relied upon the provisions of Section 6 of the Foreign Awards Act to contend that the appeal can lie only on the issue that the decree consequent to the judgment of the learned Single Judge is in excess of or not in accordance with the award. He has submitted that save and except the above pleas, no other

grounds are available to the appellant. Section 6 of the said Act, reads as follows: -

“6. Enforcement of foreign award.—(1) Where the Court is satisfied that the foreign award is enforceable under this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

(emphasis supplied)”

3. Mr. Shanti Bhushan, the learned Senior counsel appearing on behalf of the appellant, in reply to the above preliminary objection has submitted that the appeal is under sub section 2 of Section 6 of the Foreign Awards Act read with Section 10 of the Delhi High Court Act, 1966 and is thus also under the Letters Patent jurisdiction of this Court. He has further submitted that while an appeal against a decree, subsequent to the pronouncement of the judgment by the learned Single Judge may be barred under Section 6 to the extent proscribed in sub-section (2), nevertheless, such a judgment is certainly appealable under the letters patent jurisdiction of this Court. He has, therefore, submitted that the Foreign Awards Act consciously makes a

difference between a ‘judgment’ and the ‘decree’ and the court must give a meaningful effect to the said legislative intent. His plea is based upon the premise that no party can be left remediless and if the judgment is flawed then it would be a travesty of justice if an error in such a judgment is not amenable to correction in appeal. He has, in particular, relied upon Section 17 and 39 of the Arbitration Act, 1940 (hereinafter referred to as to ‘the Arbitration Act, 1940’) which read as follows: -

“17. Judgment in terms of award.—Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award.

39. Appealable orders.—(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorized 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 a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

4. He has submitted that Section 17 of the Arbitration Act, 1940 is analogous and similar to Section 6 of the Foreign Awards Act in so much as it restricts the nature of the appeal against the decree to the issue of whether such a decree is in excess or not in accordance with the award. He has further relied on Section 39 of the Arbitration Act, 1940 to submit that inspite of the existence of Section 17 restricting the scope of the appeal against a decree to a limited extent under Section 39, the provision of appeal was specifically made available against the judgment of the learned Single Judge setting aside or refusing to set aside an award. It is submitted that in the present appeal, admittedly appeal to a Division Bench is not against the decree made under sub section 2 of Section 6 of the Foreign Awards Act but against the order/judgment made under sub section 1 of Section 6 and as such, it is not an appeal circumscribed by the provisions of said sub section 2 of Section 6.

5. He thus submitted that the analogy discernible from the Arbitration Act, 1940 makes it evident that since an appeal against the judgment of the learned Single Judge affirming the award and dismissing the objections was available in respect of such judgments affirming the award under the 1940 Arbitration Act, a similar appeal should also be inferred to be available under the Foreign Awards Act.

6. Mr. Shanti Bhushan has also relied upon Section 9 of the Foreign Awards Act, which reads as follows: -

“9. Saving.—Nothing in this Act shall—

(a) prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Act had not been passed; or

(b) apply to any award made on an arbitration agreement governed by the law of India.”

7. He, therefore, submits that even if it is assumed that Section 6 of the Foreign Awards Act is construed according to the pleas of the learned counsel for the respondent, nevertheless, in view of the provisions of Section 9 of the Foreign Awards Act, an appeal would still be maintainable. He has submitted that the Foreign Awards Act, as per the mandate of Section 9(b) will not apply to

an award made on an arbitration agreement governed by the law of India and for this purpose has relied upon the judgment of the Hon'ble Supreme Court in the case of *National Thermal Power Corporation vs. The Singer Company and others AIR 1993 SC 998*. He has pointed out various provisions of the Agreement between the parties to submit that the contract was signed in Delhi, shipment was to be from Saurashtra Port and letters of credit were to be released by a Bank in India and was to be received by the Bombay officer prior to the arrival of the loaded goods. He submitted that the contract clearly indicated that the contract was to be performed in India. He, therefore, submitted that since the contract was to be performed in India, the provisions of the contract, in so far as it pertained to the payment to be made outside India and the plea of the respondent that the English law applied, would make such an award contrary to the public policy of India and thus challengeable in this Court in appeal. His plea is based on the premise that the Foreign Awards Act does not apply to any award made on an Arbitration Agreement governed by the law of India and this was evident from a perusal of the various clauses of the Agreement between the parties.

8. Mr. Shanti Bhushan has also placed reliance on paragraphs 14, 38 and 52 of the aforesaid judgment in the case of *NTPC* (supra) which read as under: -

“14. The expressed intention of the parties is generally decisive in determining the proper law of the contract. The only limitation on this rule is that the intention of the parties must be expressed bona fide and it should not be opposed to public policy. In the words of Lord Wright:

“...where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy....”

Vita Food Products Inc. v. Unus Shipping Co. Ltd., (1939) AC 277, 290(PC).

38. An award is 'foreign' not merely because it is made in the territory of a foreign State, but because it is made in such a territory on an arbitration agreement not governed by the law of India. An award made on an arbitration agreement governed by the law of India, though rendered outside India, is attracted by the saving clause in Section 9 of the Foreign Awards Act and is, therefore, not treated in India as a 'foreign award'.

52. All substantive rights arising under the agreement including that which is contained in the arbitration clause are, in our view, governed by the laws of India. In respect of the actual conduct of arbitration, the procedural law of England may be applicable to the extent that the ICC Rules are insufficient or repugnant to the public policy or other mandatory provisions of the laws in force in England. Nevertheless, the jurisdiction exercisable by the English courts and the applicability of the laws of that country in procedural matters must be viewed as concurrent and consistent with the jurisdiction of the competent Indian courts and

the operation of Indian laws in all matters concerning arbitration in so far as the main contract as well as that which is contained in the arbitration clause are governed by the laws of India.”

9. In particular, emphasis has been placed on paragraph 52 of the said judgment by Sh. Shanti Bhushan to contend that the principle laid down in the above paragraphs applied squarely to the facts of the present case and consequently, the agreement was clearly governed by the law of India, thereby making the Foreign Awards Act inapplicable. He, thus, said that once the Foreign Awards Act was inapplicable, the bar under Section 6 of the Foreign Awards Act was not applicable in appeal, certainly maintainable under Section 10 of the Delhi High Court Act.

10. The learned senior counsel submitted that the appeal is maintainable, de hors and inspite of the provisions of sub section 2 of Section 6 of the Foreign Awards Act. Provisions of Section 6 of the Foreign Awards Act are pari-materia with Section 17 of the Arbitration Act, 1940. In spite of such provision in Section 17 of the Arbitration Act, 1940, that “no appeal shall lie from such decree, except on the ground that it is in excess or not otherwise in accordance with the Award”; a judgment and order rejecting the

objections to enforce and award occasioning such decree is appealable even if there is no separate order refusing to set aside the Award and the order is a composite one. In that view of the matter, there is no reason why an order under sub section 1 of Section 6 ordering the Award to be filed and proceeding to pronounce judgment according to the Award cannot be appealed against merely because a decree has followed upon such judgment. In fact, sub-section 2 of Section 6 of the Foreign Awards Act is no different from the provisions of Section 17 of the Arbitration Act, 1940. It is no doubt true that the Arbitration Act, 1940 itself in Section 39(1) (vi) provides for an appeal against the order refusing to set aside an Award. This however, does not bring in any material difference. It is only when there is no express provision of appeal in the relevant statute that the provision of Letters Patent/ High Court Act are resorted to. The learned Senior counsel further submitted that even in the absence of any provision like Section 39(1) (vi) of the Arbitration Act, 1940, appeal from an order under sub section 1 of Section 6 of the Foreign Awards Act passed by learned Single Judge of the High Court shall lie to a Division Bench under Letters Patent and/or

under Section 10 of the Delhi High Court Act. The Hon'ble Supreme Court has in fact, in the case of *Vanita M Khanolkar 1998 (1) SCC 500* gone to the extent of holding that an appeal under Letters Patent Appeal or an Act, establishing a High Court, unless expressly excluded by the Statute will lie, even if the Statute otherwise bars an appeal; thus mere barring of an appeal in a Statute without expressly excluding Letters Patent Appeal will not necessarily exclude a Letters Patent Appeal. It is held therein that "it is well settled that any statutory provision barring an appeal or revision cannot cut across the constitutional power of the High Court. Even the power flowing from the paramount charter under which the High functions would not get excluded unless the statutory enactment concerned expressly excludes appeals under the Letters Patent". The said judgment has been approved by a Constitution Bench of 5 Hon'ble Judges of the Hon'ble Supreme Court in the case of *P.S. Sathappan vs. Andhra Bank Ltd.* reported in *AIR 2004 SC 5152*. Even in 1953, a bench of 3 Hon'ble Judges in *National Sewing Thread Co. Ltd.*, reported in *AIR 1953 SC 357* held that when a question is stated to be referred to an established Court, without more than ordinary

incidents of procedure of that Court including the right to appeal from its decision will get attracted. Accordingly, Clause 15 of the Letters Patent was held applicable to decisions of the Single Judge of the High Court exercising jurisdiction under the Trade Marks Act, even though under the said Act, no such appeal was provided. In fact, even in the case of *Shah Babulal Khimji* reported in *AIR 1981 SC 1786* a judgment of the bench of three Hon'ble Judges also supports the view that right of appeal under Letters Patent is not affected by other statutory provisions relating to appeal. Parliament is conscious of such legal position and accordingly while providing for a bar of an appeal against an order passed in second appeal, Section 100A CPC expressly stipulates as under:

“Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being inforce.....”

In the absence of such express bar even against a Letters Patent Appeal, Appeal would have been maintainable under Letters Patent even against a second Appellate Order.

11. In reply to the pleas of Mr. Shanti Bhushan as to the maintainability of the appeal, Sh. S.K. Dholakia, the learned

Senior counsel for the respondent submitted in rejoinder that it is necessary to peruse Section 2(2) i.e. the definition of ‘decree’; Section 2(9) i.e. the definition of ‘judgment and Order 20 of the Code of Civil Procedure, providing for judgments and decree. He first dealt with the plea of Mr. Shanti Bhushan about the Agreement being governed by the laws of India and has pointed out clause 11 of the Agreement between the parties which reads as follows: -

“11 Other terms/conditions as per FOSFA 20 contract terms.”

12. He has consequently relied upon clauses 18 and 20 of the FOSFA contract terms which read as follows: -

“18. DOMICILE: This contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respects by English law. Any dispute arising out of or in connection therewith shall be submitted to arbitration in accordance with the Rules of the Federation. The serving of proceedings upon any party by sending same to their last known address together with leaving a copy of such proceedings at the offices of the Federation shall be deemed good service, rule of law or equity to the contrary notwithstanding.

19. U.L.I.S. The Uniform Law on Sales and the Uniform Law on Formation to which effect is given by the Uniform Laws on International Sales Act, 1967 shall not apply to this contract.

20. ARBITRATION: Any dispute arising out of this contract, including any question of law arising in

connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Association Limited, in force at the date of this contract and of which both parties hereto shall be deemed to be cognizant.

Neither party hereto, nor any person claiming under either of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal (as the case may be) in accordance with the Rules of Arbitration and appeal of the Federation, and it is hereby expressly agreed and declared that the obtaining of any Award from the arbitrators, umpire or Board of Appeal (as the case may be), shall be condition precedent to the right of either party hereto or of any person claiming under wither of them to bring any action or other legal proceedings against the either of them in respect of any such dispute.

(emphasis supplied)”

13. Mr. Dholakia submits that these clauses make it clear that the English Law was expressly made applicable and the arbitration was required to take place in London as per rules of arbitration and appeal of the FOSFA. He, therefore, stated that it was not open to the appellants to contend that inspite of such specifically expressed intention of the parties; the agreement was governed by the laws of India. He further submitted that in the case of *Alimenta S A vs. NAFED 1987 (1) SCC 615* which was an appeal against the order of the learned Single Judge of this Court, the issue of applicability of FOSFA-20 was clearly settled by the

Hon'ble Supreme Court in the following terms set out in paragraphs 7 and 12 of the judgment which reads as follows: -

“7. We may at first deal with the appeal preferred by the appellant NAFED relating to the first contract. The question is whether by Clause 11 in the first contract, the arbitration clause in FOSFA-20 contract can be said to have been incorporated into the contract. It is now well established that the arbitration clause of an earlier contract can, by reference, be incorporated into a later contract provided, however, it is not repugnant to or inconsistent with the terms of the contract in which it is incorporated. Mr. G. Ramaswamy, learned Additional Solicitor General appearing on behalf of the appellant, has strenuously urged that the High Court was wrong in holding that the arbitration clause in the FOSFA-20 contract was incorporated into the first contract by virtue of the incorporation clause. He has drawn our attention to the second illustration at page 46 of Russell on Arbitration, Twentieth Edition. The illustration refers to the decision of Lord Esher M.R. in *Hamilton & Co. v. Mackie & Sons* [1889] 5 TLR 677 (C.A.). We have looked into that decision as much reliance has been placed thereon on behalf of NAFED. In that case a bill of lading contained the words "all other terms and conditions as per charter-party", The charterparty contained an arbitration clause. It was contended on behalf of the ship-owners that the arbitration clause in the charterparty was incorporated into the bill of lading. In overruling the said contention Lord Esher M.R. Observed:

Where there was in a bill of lading such a condition as this, 'all other conditions as per charterparty', it had been decided that the conditions of the charterparty must be read verbatim into the bill of lading as though they were there printed in extenso. Then if it was found that any of the conditions of the charterparty on being so read were inconsistent with the bill of lading they were insensible, and must be disregarded. The bill of lading referred to the charterparty, and therefore, when the condition was read in, 'All disputes under this charter shall be referred to arbitration,' it was clear that that condition did not refer to disputes arising under the

bill of lading, but to disputes arising under the charterparty. The condition therefore was insensible, and had no application to the present dispute, which arose under the bill of lading.

12. Relying upon the decision in *The Annefield* (1935 All ER Rep 863), it is submitted on behalf of the appellant that the arbitration clause in FOSFA-20 contract is not germane to the subject-matter of the first contract and, accordingly, it was not incorporated into the first contract. We are unable to accept the contention. It has already been noticed earlier that there has been a long continued practice in England that the arbitration clause is not incorporated into the bill of lading by general words, unless it is explicitly done in clear words either in the bill of lading or in the charterparty. In the instant case, we are not, however, concerned with a charterparty and a bill of lading contract. Even assuming that the subject-matters of FOSFA-20 contract and the f.o.b. contract are different, we do not think that any question as to the germaneness of the arbitration clause to the subject-matter would be relevant. It has been found by the learned Judge of the High Court that the Manager of NAFED, who had signed the first contract, was aware of the terms of the FOSFA-20 contract including the arbitration clause contained therein. It is, therefore, manifestly clear that by the incorporation of Clause 11 in the first contract, the appellant intended to incorporate into it the arbitration clause of FOSFA-20 contract. Thus where, as in the instant case, the parties are aware of the arbitration clause of an earlier contract, the subject-matter of which is different from the contract which is being entered into by them, incorporates the terms of the earlier contract by reference by using general words, we do not think there would be any bar to such incorporation merely because the subject-matters of the two contracts are different, unless, however, the incorporation of the arbitration clause will be insensible or unintelligible, as was in *Hamilton & Co. v. Mackie & Sons*, (1889 (5) TLR 677) (supra). In the instant case, the arbitration clause in FOSFA-20 contract will fit in the first contract. In other words, it will not be either insensible or unintelligible. In our opinion, therefore, the High Court was right in holding that the arbitration

clause in FOSFA-20 contract was incorporated into the first contract. (Emphasis supplied)”

It is submitted that the Hon’ble Supreme court had settled the issue that FOSFA-20 was incorporated into the contract in the present case and FOSFA-20 contract clearly provides for the applicability of the English Law and the arbitration at London.

14. It was submitted that the Preamble to the Rules of Arbitration clearly provided as follows: -

“Any Dispute arising out of a contract subject to these Rules, including any questions of law arising in connection therewith shall be referred to arbitration in London (or elsewhere if so agreed) which shall be carried out in accordance with the Arbitration Act, 1950, 1975 and 1979 or any statutory modification re-enactment thereof for the time being in force.”

Consequently, Section 9 of the Foreign Awards Act was wholly inapplicable in view of the express conditions agreed upon by the parties about the applicability of the English Law and the situs of the Arbitration in London. That in the case of *National Thermal Power Corporation* (*supra*), there was an express stipulation that laws of India would apply whereas the stipulation is to the contrary in the present contract and consequently the said judgment is wholly inapplicable. Hence, the Arbitration Act, 1940

does not apply to the current appeal. The Foreign Awards Act constitutes a complete code and provides for all contingencies in relation to foreign awards made in pursuance to the New York Convention to which it applies as held by the Hon'ble Supreme Court in the case of *Renusagar Power Compant Ltd. Vs. General Electric Co., (1984) 4 SCC 679* and *Harendra H. Mehta Vs. Mukesh H. Mehta, (1995) 5 SCC 108*. The Foreign Awards Act was enacted to give effect to the New York Convention and, hence, has to be read in the spirit and purpose of the said Convention to which India is a signatory. The main aim of the convention was to provide a framework for speedy settlement of international disputes and thus encourage international trade and commerce as has also been held in the case of *ONGC Vs. Western Co. of North America, (1987) 1 SCC 496* and *Renusagar Power Co. Ltd. Vs. General Electric Co., (1994) Supp (1) SCC 644*.

15. The learned senior counsel for the respondent submitted that the appeal is maintainable on limited grounds in view of sub section 2 of Section 6 of the Foreign Awards Act. Sub section 2 of Section 6 of the Foreign Awards Act furnishes the grounds on

which an appeal lies against the judgment of a Single Judge. Sub section 2 of Section 6 states that no appeal shall lie except in so far as the decree is in excess of or not in accordance with the Award. The Memorandum of Appeal filed by the Appellant itself states as follows:

“Appeal under Section 6 (2) of the Foreign Awards Act read with Section 10 of the Delhi High Court Act against the judgment of Hon’ble Mr. Justice K. Ramamoorthy of this Hon’ble Court dated 28/01/2000 passed in Suit No. 1885(A) of 1993.”

Thus, in view of the above, the present appeal is limited only to the two grounds provided under sub section 2 of Section 6 of the Foreign Awards Act.

16. He further submitted that the contention is misconceived that under Clause 10 of the Letters Patent (Lahore), an appeal lies from an order of a Single Judge of the High Court to a Division Bench of that Court. This argument overlooks the provision of Clause 37 of the same Letters Patent, which reads as follows:

“37. Powers of Indian Legislatures Preserved- And we do further ordain and declare that all the provisions of these Our Letters patent are subject to the legislative powers of the Governor-General in Council under Section Seventy One of the Government of India Act, 1915 and also of the Governor-General in cases of emergency under section Seventy Two of that Act, and may be in all respects amended and altered thereby.”

He submitted that this Clause has been interpreted in the following cases by the Hon'ble Court:

1. *UOI Vs. Mohindra Supply Co. AIR 1962 SC 256;*
2. *State of West Bengal Vs. Gourangal Chatterjee, (1993) 3 SCC 1 and;*
3. *Milkfood Ltd. Vs. M/s GMC Ice Cream (P) (2004) 7 SCC 288;*
4. *Milkfood Ltd. Vs. M/s GMC Ice Cream (P) LPA No.492/2008 decided on 17th February, 2003 by the Delhi High Court.*

17. In this context he submitted that the Foreign Awards Act is a special legislation and the Delhi High Court Act and the Civil Procedure Code are both general law. It is well settled that special legislation would keep away the application of general law. In the instant case the matter of appeal against decree on Foreign Award is specifically dealt with by sub section 2 of Section 6 of the Foreign Awards Act. The Foreign Awards Act is a special legislation dealing with enforcement of foreign awards and therefore the general law dealing with Appeals i.e. Section 10 of the Delhi High Court Act would have no application.

18. After having considered the rival pleas of Mr. Shanti Bhushan and Mr. Dholakia, I am of the view that there is merit in the preliminary objections raised by Sh.S.K. Dholakia about the maintainability of this appeal in the present form. An analysis of

Section 6 shows that once the Court is satisfied that the foreign award is enforceable under the Foreign Awards Act, which the learned Single Judge has already held by pronouncing a judgment affirming the Award, a decree follows as per sub-Section (2) and no appeal lies from a decree except to contend in appeal that the decree is in excess of or not in accordance with the award. In order to consider the plea of Mr. Shanti Bhushan that the appeal apart from being under sub section 2 of Section 6 of the Foreign Awards Act is also under Section 10 of the Delhi High Courts Act and under the letters patent jurisdiction of this Court, and is thus maintainable, it is necessary to consider the interplay of the Foreign Awards Act vis-à-vis the Delhi High Courts Act. This Court is consequently required to notice the position of law laid down by the Hon'ble Supreme Court in the case of *Renusagar Power Co. Ltd. (supra) and Harendra H. Mehta vs. Mukesh H. Mehta (supra)* wherein it has been held that the Foreign Awards Act was enacted to give effect to the New York Convention and the spirit and purpose of the said Convention was to provide the framework for the speedy settlement of the international dispute and thus encourage international trade and commerce as held by

the Hon'ble Supreme Court in the case of *ONGC vs. Western Co. of North America (supra)* and *Renusagar Power Co. Ltd. vs. General Electric Co. (supra)*.

19. Clause 37 of the Letters Patent indicates that the power of the Indian Legislature has been preserved and such Letters Patent is subject to the legislative power exercised by the Parliament. For this purpose, reference has been made to the decisions in the case of *UOI vs. Mohindra Supply Co. (supra)*; *State of West Bengal vs. Gourangalal Chatterjee (supra)* and *Milkfood Ltd. vs. M/s. GMC Ice Cream (P) (supra)*.

20. Furthermore, this Court cannot lose sight of the fact that the Foreign Awards Act being a special legislation and the Delhi High Court Act and the Civil Procedure Code being general legislations, special legislation has to prevail.

21. In so far as the plea of Mr. Shanti Bhushan, that no party can be left remediless is concerned, the legislative wisdom appears to be that such an opportunity is fully available before the learned Single Judge, but in order to ensure expeditious disposal of the international commercial disputes, an appellate remedy is only

confined to the two grounds referred to in sub-section 2 of Section 6 of the Act.

22. We are also unable to agree with the analogy sought by Mr. Shanti Bhushan under the provisions of Section 17 and 39 of the Arbitration Act, 1940 (hereinafter referred to as 'the 1940 Act'). Undoubtedly, Section 17 of the 1940 Act does indicate that it is parimateria with the Section 6 of the Act. But in our view, the fact that Section 39 of the 1940 Act specifically provided for an appeal without any restrictions, clearly indicates that the analogy, far from helping the case set up by the appellant, in fact goes contrary to the plea set up by Mr. Shanti Bhushan. The very fact that a provision such as Section 39 is not to be found in the Foreign Awards Act clearly indicates the legislative intention of circumscribing the scope of the appeal.

23. In our view, the plea of Mr. Shanti Bhushan that Section 9 of the Foreign Awards Act indicates that the Award was governed by the law of India is wholly unsustainable. The reliance on the judgment in the case of *NTPC* (supra) is inappropriate as the said judgment dealt with an award where the Agreement expressly provided that the laws of India would apply. In the present case,

the agreement between the parties and in particular Section 11 of the Agreement indicates that FOSFA-20 was to be applied. Clause 18 of the FOSFA, terms and conditions, clearly indicated that the Contract was deemed to be made in England and was specifically stated to be governed in all respects by English law. In fact subsequent to the judgment of the Hon'ble Supreme Court in the case of *Alimenta S.A. vs. NAFED* (supra) arising from the present dispute, this argument is no longer open to be raised by the appellant as the Hon'ble Supreme Court in paragraph 12 of the said judgment has clearly held that the arbitration clause in FOSFA-20 was incorporated into the present contract. Since the FOSFA-20 contract clearly provided for the applicability of English law and the arbitration in England, this plea is devoid of any merit whatsoever and is accordingly rejected. Further reliance on Section 9 is also unwarranted as sub-section 1 of Section 9 only speaks of enforcement of an award and not its appealability.

24. Mr. Shanti Bhushan has lastly relied upon the decision in the case of *Vanita M. Khanolkar vs. Pragna M. Pai 1998 (1) SCC 500* and a subsequent judgment of the Hon'ble Supreme Court in the case of *P.S. Sathappan (Dead) by L.Rs vs. Andhra*

Bank Ltd. and others AIR 2004 SC 5152 which approved the above judgment. The following position of law has been relied upon by Mr. Shanti Bhushan: -

“it is well settled that any statutory provision barring an appeal or revision cannot cut across the constitutional power of the High Court. Even the power flowing from the paramount charter under which the High Court functions would not get excluded unless the statutory enactment concerned expressly excludes appeals under the Letters Patent.”

25. Reliance has also been placed on the judgment of *National Sewing Thread Co. Ltd. AIR 1953 SC 357* to contend that in the absence of an express bar even against the letters patent appeal, the appeal would have been maintainable under letters patent, even against the second appellate order and consequently there is no bar in respect of the present appeal.

26. Mr. Dholakia appearing on behalf of the respondent, however, has relied upon the judgment of the Division Bench of this Court in the case of *RITES Limited vs. JMC Projects (India) Ltd. in FAO(OS) No. 173/2007 decided on 18th March, 2009* which had considered the plea relating to the effect of *Vanita's* case (supra). He has inter alia also relied upon the case of *UOI Vs. Mohindra Supply Co. AIR 1962 SC 256; State of*

West Bengal Vs. Gourangalal Chatterjee, (1993) 3 SCC 1;
Milkfood Ltd. Vs. M/s GMC Ice Cream (P) (2004) 7 SCC 288;
Milkfood Ltd. Vs. M/s GMC Ice Cream (P) LPA No.492/2008
decided on 17th February, 2003. He has submitted that in *RITES Ltd. vs. JMC Projects* (supra), a Division Bench of this Court while considering the effect of the plea based upon *Vanita's* case had rejected it with the following reasoning: -

13. "The Division Bench also referred to Section 39 of the Arbitration Act 1940 (old Act) which also contained a similar phraseology. Section 39(1) of the old Act stated "An appeal shall lie from the following orders passed under this Act (and from no others).....". Section 39 of the old Act was interpreted by the Supreme Court in *Union of India V. Mohindra Supply Co.*, AIR 1962 SC 256. The Division bench quoted the relevant extracts from the Supreme Court decision in *Mohindra Supply Co.*(supra). From the opening words of para 5 of the decision in *Mohindra Supply Co.*, it is evident that the Supreme Court was considering the issue "whether the right to appeal under the Letters Patent is at all restricted by Section 39 Sub-sections (1) and (2)". The Supreme Court in *Mohindra Supply Co.* held as follows:-

"5.....Under section 39(1), an appeal lies from the orders specified in that sub-section and from no others. The legislature has plainly expressed itself that the right of appeal against orders passed under the Arbitration Act may be exercised only in respect of certain orders. The right to appeal against other orders is expressly taken away. If by the express provision contained in

section 39(1), a right to appeal from a Judgment which may otherwise be available under the Letters Patent is restricted, there is no ground for holding that clause (2) does not similarly restrict the exercise of appellate power granted by the Letters Patent.....”

14. In para 6, the Supreme Court held:-

“6.....If the order is not one falling within Section 39(1), no appeal will evidently lie.....But the right to appeal is a creature of statute; no litigant has an inherent right to appeal against a decision of a Court.”

15. While dealing with Section 104 C.P.C, on which great stress has been laid by the learned counsel for the appellant, the Supreme Court held in Para 14:-

“The intention of the legislature in enacting sub-section (1) of section 104 is clear : the right to appeal conferred by any other law for the time being in force is expressly preserved. This intention is emphasised by section 4 which provides that in the absence of any specific provision to the contrary, nothing in the Code is intended to limit or otherwise affect any special jurisdiction or power conferred by or under any other law for the time being in force. The right to appeal against judgments (which did not amount to decrees) under the Letters Patent, was therefore not affected by section 104(1) of the Code of Civil Procedure, 1908.”

16. The Supreme Court also dealt with the legislative history of the law relating to arbitration and in Para 16 held as follows:-

“16. Prior to 1940 the law relating to contractual arbitration (except in so far as it was dealt with by the Arbitration Act of 1899) was contained in the Code of Civil Procedure and certain orders passed by courts in the course of arbitration proceedings were made appealable under the Code of 1877 by section 588 and in the Code of 1908 by section 104. In 1940, the legislature enacted Act X of 1940, repealing schedule 2 and section 104(1), clauses (a) to (f) of the Code of Civil Procedure, 1908, and the Arbitration Act of 1899. By section 39 of the Act, a right of appeal was conferred upon litigants in arbitration proceedings only from certain orders and from no others and the right to file appeals from appellate orders was expressly taken away by sub-section 2 and the clause in section 104 of the Code of 1908 which preserved the special jurisdiction under any other law was not incorporated in section 39. The section was enacted in a form which was absolute and not subject to any exceptions. It is true that under the Code of 1908, an appeal did lie under the Letters Patent from an order passed by a single Judge of a Chartered High Court in arbitration proceedings even if the order was passed in exercise of appellate jurisdiction, but the was so, because, the power of the Court to hear appeals under a special law for the time being in operation was expressly preserved.

17. There is in the Arbitration Act no provision similar to section 4 of the Code of Civil Procedure which preserves powers reserved to courts under special statutes. There is also nothing in the expression "authorised by law to hear appeals from original decrees of the Court" contained in section 39(1) of the Arbitration Act which by implication reserves the jurisdiction under the Letters Patent to entertain an appeal against the order passed in arbitration proceedings. **Therefore, in so far as Letters Patent deal with appeals against orders passed in arbitration proceedings, they must be read subject to the provisions of section 39(1) and (2) of the Arbitration Act.**

18. Under the Code of 1908, the right to appeal under the Letters patent was saved both by section 4 and the clause contained in section 104(1), but by the Arbitration Act of 1940, the jurisdiction of the Court under any other law for the time being in force is not saved; **the right of appeal can therefore be exercised against orders in arbitration proceedings only under section 39, and no appeal (except an appeal to this Court) will lie from an appellate order.**

19. There is no warrant for assuming that the reservation clause in section 104 of the Code of 1908 was as contended by counsel for the respondents, "superfluous" or that its "deletion from section 39(1) has not made any substantial difference" : the clause was enacted with a view to do away with the unsettled state of the law and the cleavage of opinion

between the Allahabad High Court on the one hand and Calcutta, Bombay and Madras High Courts on the other on the true effect of section 588 of the Code of Civil Procedure upon the power conferred by the Letters Patent. **If the legislature being cognizant of this difference of opinion prior to the Code of 1908 and the unanimity of opinion which resulted after the amendment, chose not to include the reservation clause in the provisions relating to appeals in the Arbitration Act of 1940, the conclusion is inevitable that it was so done with a view to restrict the right of appeal within the strict limits defined by section 39 and to take away the right conferred by other statutes. The Arbitration Act which is a consolidating and amending Act, being substantially in the form of a code relating to arbitration must be construed without any assumption that it was not intended to alter the law relating to appeals. The words of the statute are plain and explicit and they must be given their full effect and must be interpreted in their natural meaning, uninfluenced by any assumptions derived from the previous state of the law and without any assumption that the legislature must have intended to leave the existing law unaltered. In our view the legislature has made a deliberate departure from the law prevailing before the enactment of Act X of 1940 by codifying the law relating to appeals in section 39.”** (emphasis supplied)

17. It is, therefore, clear that no appeal could be maintained from an order of the Court passed under the old Act, by resort either to the Letters Patent or Section 104 CPC, unless the same fell within Section 39 of the old Act, even though the order passed by the Court may qualify as being a “judgment” within the meaning ascribed to that term in *Shah Babulal Khimji* (supra). The Act, having adopted the same terminology in so far as it defines the scope of the right to appeal against the orders of the Court passed under the Act, as used in the old Act, in our view the decision in *Mohindra Supply Co.* (supra) is squarely applicable, and resort cannot be had by the appellant to either the Letters Patent or Section 104 of the CPC to maintain the present appeal.

18. The Division Bench in *Canbank Financial Services Ltd* (supra) also took note of the decision of a Full Bench of this Court in *Union of India v. A. S. Dhupia*, AIR 1972 Delhi 108 which held that Section 10(1) of the Delhi High Court Act 1966 provides only a forum of appeal. It cannot be construed to mean that Section 10(1) of the Delhi High Court Act confers an unfettered right of appeal without any limitation on a party. The Full Bench held:

“...The Act is a specific Code dealing with the arbitration matters and Section 39(1) is a special provision indicating the orders which alone are appealable. It is wrong, therefore, to say that Section 10 of the Act of 1966 which only provides for a forum of appeal is special provision and will override Section 39(1) of the Act...”

19. The Division Bench in *Canbank Financial Services Ltd* (supra) also took notice of another decision of a Division Bench of this Court in *Banwari Lal Radhey Mohan, Delhi v. The Punjab State Co-operative Supply and Marketing Federation Ltd.*, AIR 1983 Delhi 402, which in turn had considered the decision of the Supreme Court in

Shah Babulal Khimji (supra). In *Banwari Lal* (supra), the Division Bench held as follows:-

“Section 39 of the Arbitration Act in terms says that no other orders would be appealable except those specified in the section. Therefore, on the ratio of *Shah Babulal Khimji's case*, which approves the rule enunciated by the Judicial committee of the Privy Council in *Chowdry's case*, (1882) 10 1nd App 4, it has to be held that no appeal is competent from the judgment under appeal before us. Indeed, if we are to read paras 33 and 34 of the judgment in *Shah Babulal Khimji's case* it would become apparent that the Supreme Court while upholding the right of first appeal against judgment of a Trial Judge from orders from which appeal is permissible under Section 39 of the Arbitration Act impliedly also held that the provisions of Section 39 of the Arbitration Act would apply in appeals from orders from which appeal is permissible under Section 39 or was impermissible. Their Lordships in *Shah Babulal Khimji's case*, a decision rendered by a Division Bench of the Supreme Court comprising of three Hon'ble Judges, noticed with approval the decision of the Supreme Court in the *Mohindra Supply Co.'s case*, AIR 1962 SC 256, given by a Bench of four Hon'ble Judges. **As noticed earlier, maintainability of an appeal from an order amounting to a judgment from which appeal is not permissible on a reading of Section 39 of the Arbitration Act was specifically ruled out in *Mohindra***

Supply Co.'s case. We are bound by that decision."

(emphasis supplied)."

27. In my view, the above judgment squarely deals with *Vanita M. Khanolkar's* case (supra) cited by Sh. Shanti Bhushan and we are bound by the view taken in the above Division Bench judgment and are, therefore, unable to accede to the plea of Mr. Shanti Bhushan relying on *Vanita M. Khanolkar's* case. This Court cannot lose sight of the fact that in respect of the Arbitration Act of 1940 the Hon'ble Supreme Court in *Mohinder Supply Co.'s* case clearly held that the exercise of the Letters Patent jurisdiction in respect to appeals in arbitration cases is subject to Section 39 of the Arbitration Act, 1940.

28. There are two aspects which arise in this matter. One is the right of appeal and the second is the scope of appeal. A combined reading of Section 17 and Section 39 of the Arbitration Act, 1940 is that an appeal lies against an order making the award a rule of the court, but the scope of hearing before the appellate court is restricted to whether the judgment of the learned Single Judge (and the administrative act of the Registrar in drawing a decree in

terms of the judgment of the learned Single Judge) is in excess of or not in accordance with the award.

29. The Full Bench judgment of this Court in *Milkfood Food Ltd. vs. M/s. GMC Icre Creams (P) Ltd. & Ors.* in LPA No. 492 of 1998 decided on 17th February, 2003 and as approved by the Supreme Court in *Milkfood Ltd. vs. M/s. GMC Ice Cream (P) Ltd. JT 2004 (4) SC 393* holds that no appeal lies except on the subject matters provided under Section 39. The *Milkfood* decision follows the line of reasoning of the Constitution Bench decision of the Supreme Court in *Mohindra Supply's* case. These judgments hold that where no appeal is provided under the Special Act i.e. the Arbitration Act, 1940 then the appeal cannot be filed under the Letters Patent as there is no express provision in the Arbitration Act, 1940 which preserves such jurisdiction. The conclusion is inevitable that it was done with a view to restrict the right of appeal in arbitration proceedings within the strict limits defined by Section 39 of the Arbitration Act, 1940 and to take away the rights conferred by other statutes.

30. A reading of sub section 2 of Section 6 of the Foreign Awards Act does not bar or prohibit the filing of an appeal but

only restricts the scope thereof. In fact, sub section 2 of Section 6 does not bar an appeal but in fact allows an appeal, though restricting its scope. Therefore, as there is no bar in filing of an appeal, the decisions of *Mohindra Supply's* case and *Milkfood* case will not bar the filing of an appeal before the Division Bench under sub section 2 of Section 6 of the Foreign Awards Act but it is evident that the appeal can only be filed limited to the ground that the decree was in excess of or not in accordance with the award.

31. The learned Single Judge by his order dated 28th January, 2000 pronounced a judgment and allowed the petition which inter alia prayed for the following reliefs: -

(a) to order that the Award of arbitration dated 15th November, 1989 and/confirmed by the Appeal Award dated 14.9.90 by the Board of Appeal of Federation of Oil Seeds and Fats Association Ltd. (FOSFA) (Annexure B & C hereto) be filed in this Hon'ble Court.

(b) pronounce judgment according to the Award and pass a decree upon judgment being so pronounced.

The learned Single Judge allowed the petition after dismissing the applications filed by the appellant and thereby

directed the Registry to prepare a decree in terms of the above order.

32. In my view, the Foreign Awards Act, 1961 applies to the award and the dispute in question. The Foreign Awards Act constitutes a complete code and provides for all contingencies in relation to foreign awards made in pursuance of the New York Convention to which it applies. Section 6 of the Foreign Awards Act provides that the appeal against a decree is limited only to the two grounds provided under sub section 2 of Section 6. The initial part of the said sub-section 2 provides that upon the judgment so pronounced, a decree shall follow which had to be read in conjunction with sub-section 1 of the Section 6. A perusal of Section 6 clearly postulates that once the Court is satisfied that the foreign award is enforceable under this Act, the Court, that is, the Single Judge, shall order the Award to be filed and proceed to pronounce judgment according to the award and upon the judgment so pronounced, a decree shall follow. The appeal against such decree prepared after the judgment has been pronounced would be limited to the grounds mentioned in sub-section 2 of Section 6. However, when sub section 2 of Section 6

specifically limits the scope of the appeal even against the decree, and does not refer to the appealability of the judgment, to permit the judgment to be appealed against by resort to the Letters Patent jurisdiction would defeat the legislative mandate of the limited nature of appeal provided by sub section 2 of Section 6, that too only against the decree on specified grounds. Thus, this Court is unable to accede to the plea of Sh. Shanti Bhushan that the fact that an appeal against the judgment has not been mentioned in Section 6 should lead to an inference that such an appeal against the judgment was permitted under the Letters Patent jurisdiction. In my view, the exclusion of appeal against a judgment in Section 6 is a considered omission by the legislature and this Court cannot accept the plea that such an omission implied the maintainability of an appeal beyond the Act. When both judgment and decree are mentioned in sub-section 2 of Section 6 and yet an appeal is only provided in a constricted manner against the decree alone, there cannot be a better indication of the legislative intent to exclude any appeal against the judgment.

33. It would be an extremely anomalous situation if the decree was to be appealable in a limited manner under the Foreign

Awards Act and the judgment could, under the Letters Patent jurisdiction, be appealed without reservations. This, in my view, would completely defeat the legislative intent which was to give effect to the New York Convention for the speedy settlement of international disputes.

34. Accordingly, there is no merit in the pleas of Mr. Shanti Bhushan. The preliminary objections of Mr. Dholakia succeed and the appeal is consequently dismissed as not maintainable on pleas of merits sought to be raised, particularly when it was not urged before us during arguments that the appeal falls within the restricted scope of sub section 2 of Section 6 of the Foreign Awards Act i.e. that the decree was in excess of or not in accordance with the Award.

(MUKUL MUDGAL)
JUDGE

July 10, 2009
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