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CASE COMMENT- Imax Corporation v E-City Entertainment(I) Pvt. Ltd. & Ors., (Bombay High Court)

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BOMBAY HIGH COURT: The Limitation Period for seeking execution of a foreign arbitral award is the same of execution of a Decree

CASE: Imax Corporation v E-City Entertainment(I) Pvt. Ltd. & Ors²²⁴⁴, (Bombay High Court, 13 November 2019)

BENCH: Single Judge Bench [G. S. Kulkarni J.]

ABSTRACT: In 2019, A Single Judge Bench of Bombay High Court clarified that the limitation period for enforcing a foreign award is twelve years from the date of the award, holding that the limitation period for foreign awards is same as that for the execution of a foreign decree as enforcement and execution proceedings are synonymous for foreign awards.

KEYWORDS: Challenge Petition, notice of motion seeking condonation of delay, Enforcement Petition, Execution Petition, period of limitation, Composite Proceedings

FACTUAL BACKGROUND

Imax Corporation (Petitioner) and E-City Entertainment(I) Pvt. Ltd. (Respondent) were involved in an international commercial arbitration dispute, wherein three awards were passed in favor of the Petitioner:

1. A liability award dated 9 February 2006
2. A quantum and jurisdiction award dated 24 August 2007
3. Final award dated 27 March 2008

(Hereinafter jointly referred to as the "Foreign Awards")

The present petition was filed seeking enforcement of the Three Above-Mentioned Foreign Awards.

It is imperative to first understand the history of litigation concerning these awards in order to understand the decision of the Bombay High Court in the present petition.

In July 2008, the Respondent filed a Challenge petition application under section 34 of the Arbitration and Conciliation Act, 1996 before the High Court, challenging the Foreign Awards to set it aside. The Challenge Petition was filed beyond the prescribed Ninety Day period mentioned in section 34, but within the extended period of Thirty Days. Hence, the Respondent also filed a notice of motion seeking condonation of delay in order to get the relaxation of those Thirty Days.

The Petitioner, however, opposed the notice of motion seeking condonation of delay on the ground that each of the Foreign Awards was a separate award, and hence separate applications under section 34 should have been filed instead of one, within the limitation period as per each award. Petitioner also questioned the maintainability of the Challenge Petition on the ground that the High Court did not have jurisdiction to entertain the same, as the awards under question in the present case were foreign awards, governed by Part II of the Arbitration & Conciliation Act, 1996.

On 10 June 2013, the High Court condoned the delay in filing the Challenge Petition and held that it would have jurisdiction to hear the same. Thereby, rejecting petitioner's arguments over maintainability of the challenge petition.

This decision of the High Court was impugned before the Hon'ble Supreme Court, which, by an order dated 19 November 2013 (Herein after referred to as Stay Order), stayed the Challenge Petition proceedings before the High Court. Thereafter, the Hon'ble Supreme Court finally

²²⁴⁴ Commercial arbitration petition no.414 of 2018

decided on 10 March 2017 (Herein after referred to as SC Final Order) that section 34 was not the appropriate remedy against the Foreign Awards, and hence the Challenge Petition was not maintainable.

Subsequently, the final petition was filed on 2 April 2018, for enforcement of the Foreign Awards before Bombay High Court.

ISSUES AND FINDINGS

The Respondent objected to the maintainability of the present petition. In the Respondent's view, since no limitation period is specifically prescribed for an enforcement petition under section 47 and Section 49 of the Arbitration & Conciliation Act, 1996 which talks about Evidence to be given at the time of enforcement of foreign a foreign award and that foreign award will be deemed as Decree of the court, such a petition would be governed by Article 137 of The Limitation Act, 1963, which is a residuary provision prescribing a limitation of three years if such category does not fall in any other article.

Given that the Foreign Awards had been respectively passed in February 2006, August 2007 and March 2008, it was contended that the present petition would be far beyond the period of limitation.

To this end, the Respondent placed reliance on a previous decision of the High Court in *Noy Vallesina Engineering Spa v. Jindal Drugs Limited*²²⁴⁵, wherein it was held that enforcement petitions under section 47 of the Arbitration & Conciliation Act, 1996 would indeed be governed by Article 137 of the Limitation Act, 1963 and would hence have a limitation period of three years. Once the court was of the view that the foreign award was enforceable, the petitioner could then file for execution petition of the said award within the next twelve years, as per Article 136 of the Limitation Act. Thus, stating that petitioner should have filed 2 separate applications. One enforcement petition within 3

years and if court allows enforcement petition, then second execution petition within 12 years from that order. But as in the instant case, the petitioner took more than 3 years to file the first petition, the petition therefore is not maintainable.

The Petitioner, on the other hand, contended that enforcement and execution proceedings for foreign awards were synonymous, and therefore the enforcement petition would have a limitation period of twelve years only and there is no need to file separate application for execution per se. The Petitioner on the other hand, relied on the Supreme Court's judgment in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*²²⁴⁶, wherein it was held that a foreign award is "stamped as a decree" and that the Arbitration & Conciliation Act does not mandate two separate proceedings, i.e., one for enforcement and one for execution, in respect of a foreign award. It would be open for a party to jointly apply under section 47 and Section 49 of the Arbitration and Conciliation, 1996, to avoid multiplicity of proceedings.

It was also argued on behalf of the Petitioner in the alternative that, even assuming that Article 137 of the Limitation Act was to apply, according to which 3 years will be the limitation period, but as the Challenge Petition was pending before the High Court as it was being contested in The Supreme Court from July 2008 until 10 March 2017 (the date of the SC Final Order), this period would be excluded in calculating the limitation for the present petition as per Section 12(3) of The Limitation Act, 1963. Hence, the present petition had been filed within the limitation period of three years as prescribed.

The High Court agreed with the Petitioner's contentions on both counts. In its view, the High Court's previous decision in *Noy Vallesina Engineering Spa v. Jindal Drugs Limited*,²²⁴⁷ could not be relied on, as the proceedings before the court in the present petition were clearly composite proceedings for enforcement

²²⁴⁵ 2006 SCC Online Bom 545.

²²⁴⁶ (2001) 6 SCC 356.

²²⁴⁷ *Supra* 2

and execution, as stated in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*²²⁴⁸ This being the case, the High Court was of the view that such a combined petition would be subject to Article 136 of the Limitation Act, 1963, thereby having a limitation period of twelve years.

The High Court also agreed with the Petitioner that, even if the limitation period was considered to be three years, the present petition would nevertheless be considered to have been filed within time because the Petitioner could not have sought enforcement of the Foreign Awards until a decision was made on the Challenge Petition which had been pending before the Supreme Court from quite some time.

COMMENTS

The High Court, while reaching its decision, not only took into account the nature of an enforcement and execution petition, as decided in the case of *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*²²⁴⁹, but also the object of the Arbitration & Conciliation Act, 1996 and the underlying purpose of section 47 and Section 49 of the Act. The object of the Arbitration & Conciliation Act, 1996 is to facilitate and promote arbitration (along with other alternative dispute resolution mechanisms), while reducing court interference in the process. Considering the enforcement and execution of a foreign award as a combined proceeding not only streamlines the process for the award-holder, but also reduces the burden on courts as it reduces multiplicity of proceedings. Had the court declared both enforcement and execution as separate thing, then it would have prolonged the whole process and the very object of Arbitration & Conciliation act, 1996 would have been defeated.

The Court, however could have stressed more on Article 136 and Article 137 of The Limitation Act, 1963 as the whole case was merely based on a little misconception in interpretation of

bare provision of the two Articles. A little more stress on The Limitation Act, 1963 by the court would have made this judgment sounder.

This decision brings some clarity on the limitation period for a combined application and brings clarification on limitation periods for enforcing foreign arbitral awards in India but, does not extensively deal with these issues and does not lay down any rules or guidelines to prevent such disputes from arising in future. Court should have taken a little sterner approach and ensure that these issues do not arise in future. If the Court had done that, then it would have been true justice.

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²²⁴⁸ Supra 3

²²⁴⁹ Ibid