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

Pronounced on: 06.09.2010

\+ **FAO (OS) 205/2000**

NATIONAL AGRICULTURAL CO-OPERATIVE MARKETING FEDERATION OF INDIA LTD.

….Appellant

Through : Sh. Shanti Bhushan, Sr. Advocate with Sh. A.T. Patra, Sh. Ajay Thakur, Ms. Roopa Dayal and Ms. A. Patra, Advocates.

Vs.

ALIMENTA S.A. …..Respondent

Through : Sh. S.K. Dholakia, Sr. Advocate with Ms. Bindu Saxena, Ms. Aparajita Swarup and Ms. Neha Khattar, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT

1. Whether the Reporters of local papers may be allowed to see the judgment? YES

2. To be referred to Reporter or not? YES

3. Whether the judgment should be reported in the Digest? YES

MR. JUSTICE S.RAVINDRA BHAT

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F.A.O. (O.S.) No. 205/2000:

1. This is an order deciding the reference made to this Court in FAO (OS) No. 205/2000 in view of a difference of opinion between the learned Judges of the Division Bench, on the question of maintainability of the present appeal against the impugned judgment of the learned Single Judge passed under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961. In the opinion of Justice Mukul Mudgal such an appeal is not maintainable, whereas

Justice Vipin Sanghi holds otherwise. Both the learned judges agree that the award in issue is a "foreign award".

2. Further to an agreement between the parties, disputes arose. The matter was referred to arbitration. Concededly, the award falls within the description of a foreign award, under Foreign Awards (Recognition and Enforcement) Act, 1961 (hereafter "the Foreign Awards Act"). The respondent, (hereafter "Alimenta") moved this Court for enforcement of the said award, under the Act. The appellant (hereafter called "NAFED") objected to the application, for enforcement. A learned single judge affirmed the award, in Suit No. 1885/1993, through his judgment and order, dated 28th January, 2000. An appeal was preferred to the Division Bench. Alimenta objected to maintainability, urging that by virtue of Section 6 (2) of the Foreign Awards Act, such decision was not appealable. It is under these circumstances that the divergence of views between the two learned judges, as to maintainability of such an appeal, occurred. Aside from the question of maintainability, no arguments were urged that the decree sought to be assailed, suffers from the grounds mentioned in Section 6 (2).

3. Mr. Shanti Bhushan urged- on behalf of NAFED that the appeal is under Section 6(2) of the Act, read with Section 10 of the Delhi High Court Act, 1966 and is thus also under the Letters Patent jurisdiction of this Court. The basis for this argument is that the Foreign Awards Act, 1961 clearly makes a distinction between "judgment" and "decree" under section 6, inasmuch as although appeal against a "decree" is barred under Section 6 (2) to the extent proscribed, nevertheless, a "judgment", pursuant to which a decree is made, is certainly appealable under the letters patent jurisdiction of this Court. It is argued, in this context, that the decision of the Court affirming an award, fulfils all the requirements of a judgment, as understood in legal parlance, as it is determinative of the rights of the parties before the Court, and rules upon the contentions raised.

4. Placing reliance on provisions of the old Arbitration Act, 1940 (hereafter "the 1940 Act"), particularly Sections 17 ("Judgment in terms of award") and Section 39 ("Appealable orders") NAFED states that Section 17 of the 1940 Act is analogous to Section 6 of the Foreign Awards Act, as it merely restricts the nature of the appeal against a decree to the issue of whether such a "decree is in excess of" or "not in accordance with" the award and that in absence of any provision like Section 39 (referring to section 39(1)(vi)) of the 1940 Act in the Foreign Awards

Act, the provisions of Letters Patent/High Court Act shall apply. He cited *Vinita M. Khanolkar v. Pragna M. Pai and Ors.,* (1998) 1 SCC 500 where the Supreme Court held that an appeal under the Letters Patent or an enactment, establishing a High Court, unless expressly excluded by the statute, would lie even if the statute otherwise bars an appeal. The said judgment was approved in a five judge constitution bench decision of the Supreme Court reported as *P.S. Sathappan (Dead) by Lrs. v. Andhra Bank Ltd. and Ors.,* AIR 2004 SC 5152, contends NAFED.

5. Reliance is next placed on *National Sewing Thread Co. Ltd. v. James Chadwick & Bros. Ltd. (J. & P. Coats Ltd., Assignee) and Intervener: Registrar of Trade Marks,* AIR 1953 SC 357 where clause 15 of the Letters Patent was held applicable to the decisions of the Single Judge of the High Court exercising jurisdiction under the Trade Marks Act, 1940, even though under that Act, no such appeal was provided for. Further, citing *Shah Babulal Khimji v. Jayaben D. Kania and Anr.,* AIR 1981 SC 1786, Mr. Shanti Bhushan submits that right of appeal under Letters Patent is not affected by other statutory provisions relating to appeal. The appellant also points out that section 100A of the Code of Civil Procedure, 1908 specifically bars an appeal against an order passed in appeal. However, such a bar is inapplicable where the order in question is not made in exercise of appellate jurisdiction. The said provision reads as follows:

> *"100A. No further appeal in certain cases.*- *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 in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge."*
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> *(emphasis supplied)*

6. It is contended that in absence of such express bar against a Letter Patent appeal, an appeal to the Division Bench is maintainable even against an appellate order. Further, placing reliance on section 6(2) of Arbitration (Protocol and Convention) Act, 1937, stating that the same is *pari materia* with the provision of Foreign Awards Act, 1961 the counsel states that in *Shiva Jute Baling Ltd. v. Hindley and Co. Ltd.,* 57 CWN 573 : ILR 1953 (1) Cal 29 the Calcutta High Court held that Letters Patent appeal against the judgment of a Single Judge was available; appeal against the said decision was dismissed by the Supreme Court in *Shiva Jute Baling Limited v. Hindley and Company Limited,* (1960) 1 SCR 569. This decision had again been

followed in another division bench of the Calcutta High Court in *S. Mohd. Naim Mohd. Alam v. Rouraffic and Far Eastern Ltd.,* AIR 1960 Cal 146.

7. NAFED argues that Section 6(2) of the Foreign awards Act does not cover an appeal against order or judgment under section 6(1) of the said Act and that the unlike section 39 of the 1940 Act where there is a clear bar to appeal, except against specific orders, there is no such bar in the case of an appeal against order or judgment in Section 6(1) under the Foreign Awards Act. To elaborate on this the counsel pointed out that in *Renusagar Power Co. Ltd. v. General Electric Company and Anr.,* AIR 1985 SC 1156 where the Supreme Court observed that

> *"Such being the scheme under the Foreign Awards Act we would reiterate our view that decisions of our Courts on similar or analogous provisions contained in the Arbitration Act would not be of any help to decide questions arising under the Foreign Awards Act."*

Thus, the counsel submits that the reliance by Justice Mukul Mudgal on the judgments under the 1940 Act is misplaced.

8. Learned senior counsel for NAFED argues that the Foreign Awards Act, is not a complete code. The preamble to the Act says that it is an Act to give effect to the New York Convention for Recognition and Enforcement of Foreign Awards. The counsel relies upon Section 47 of the 1940 Act, which reads as under:

> *"47. Act to apply to all arbitrations.- Act to apply to all arbitrations. Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:*
>
> *Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."*

The said Act applies to all arbitrations, save so far as otherwise provided by any other law, further, a Constitution Bench of the Supreme Court observed to this effect in *Societe De Traction Et D`electricite Societe Anonyme v. Kamani Engineering Company Ltd.,* AIR 1964 SC 558, held that:

"Section 47 of the Arbitration Act, 1940, is as much a part of the Indian Arbitration Act as any other provision and that section makes the provisions of the Arbitration Act applicable to all arbitrations and to all proceedings thereunder but subject to the provisions of s. 46 and save in so far as is otherwise provided by any law for the time being in force."

NAFED also relies upon the observation of the Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.*, AIR 1994 SC 860 (the second *Renusagar Case*):

"136. Moreover, S. 4(1) of the Foreign Awards Act lays down that the foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India. The provisions of the Arbitration Act, 1940 would, therefore, apply in the matter of enforcement of awards subject to the provisions of the Foreign Awards Act...."

To the same effect is also the judgment of this Court in *Ludwig Wunsche & Co. v. Raunaq International Ltd. and Ors.*, AIR 1983 Del 247, is relied on, where on a consideration of Section 4(1) of the Foreign Awards Act the Court observed that:

".....that matters, for which there was no provision in the Acts of 1937 and of 1961, would be regulated by the general provisions contained in the Act of 1940."

Section 4(1) of the 1961 Act reads as under:

"4. Effect of foreign awards.- (1) A foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India."

It is further contended that Section 4(1) and 9(a) and Article VII (1) of the Schedule to the Foreign Awards Act show that it is not a complete code in itself.

Article VII (1) of Schedule I of the Foreign Awards Act reads as under:

"1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral award entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

9. NAFED submitted that Foreign Awards Act cannot take away the right to appeal under the Delhi High Court Act, which is a later Parliamentary enactment. The Delhi High Court Act

provides for an appeal to the Division Bench against all orders of a Single judge, the only exceptions being in case of revision or criminal cases. Learned counsel also submits that the Delhi High Court Act is a special Act- applying only to the Delhi High Court, being different from the Foreign Awards Act, which applies to courts all over the territory of India. Stating that the Letters Patent is a special law, the counsel places reliance on paragraph 60 of the *Shah Babulal Khimji (supra)* case where the Supreme Court observed that the Letters Patent is a special law. Thus, The Delhi High Court Act being a subsequent Act, as well as a special Act will prevail over the provisions of the Foreign Awards Act.

10. Finally, the NAFED submits that as the Foreign Awards Act is silent about an appeal against an order or judgment under section 6(1), such appeal can be preferred by invoking section 39 of the 1940 Act, in view of section 47 of the said Act, which makes its provisions applicable to all arbitrations. The counsel places reliance on *Kamani Engineering Company (supra)* in this regard. The provision of appeal against an order under section 39(1)(vi) is unaffected by the bar in case of appeal against a decree under section 17 of the 1940 Act. A limb, and integral part of this argument is reliance on 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."*

11. Mr. S.K. Dholakia, Learned senior counsel, arguing for Alimenta, submitted that appeal is maintainable under the Foreign Awards Act but only on limited grounds provided under section 6(2) of the 1961 Act, i.e. where the decree is (a) in excess of; or (b) not in accordance with the award. The counsel states that the right to appeal is not a fundamental right but a creation of statute, and to permit an appeal beyond these limited grounds would violate the plain language of the said provision of the Foreign Awards Act, which is a special legislation, for speedy settlement of international disputes by ensuring expeditious recognition and enforcement of foreign awards. The counsel relies upon para 34 of *P.S. Sathappan (supra)*, para 14 of

Municipal Corporation of Delhi v. International Security & Intelligence Agency Ltd., (2004) 3 SCC 250, para 15 in *Ganga Bai v. Vijay Kumar and Others*, (1974) 2 SCC 393, further in para 22 of *Kamal Kumar Dutta & Anr. v. Ruby General Hospital Ltd. & Ors.*, (2006) 7 SCC 613, the Supreme Court observed that:

> *"So far as the general proposition of law is concerned that the appeal is a vested right there is no quarrel with the proposition but it is clarified that such right can be taken away by a subsequent enactment either expressly or by necessary intendment."*

12. Alimenta relies on *Ghulam Jilani v. Muhammad Hassan*, (PC) (1901-1902) Vol. XXIX Indian Appeals 51 where the Privy Council, while considering the scope of section 522 of the old Civil Procedure Code observed that:

> *"Those words appear to be perfectly clear. Their Lordships would be doing violence to the plain language and the obvious intention of the Code if they were to hold that an appeal lies from a decree pronounced under s. 522, except in so far as the decree may be in excess of or not in accordance with the award. The principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decisions in this country. The time has long gone by since the Courts of this country shewed any disposition to sit as a Court of Appeal on awards in respect of matters of fact or in respect of matters of law : see Adams v. Great North of Scotland Railway Company (1890) A. C. 31.)"*

13. It is pointed out that NAFED's Memorandum of Appeal states that it is an appeal under section 6(2) of the Foreign Awards Act read with Section 10 of the Delhi High Court Act, therefore, it can be limited to the two grounds available under the said provisions of the Foreign Awards Act. Next, Alimenta argues that Clause 10 of the Lahore Letters Patents is inapplicable in view of clause 37 of the same Letters Patent, which retains the right of Indian Legislatures to, inter alia, amend and alter the right of appeal granted under it, i.e. the Letters Patent. It is submitted that NAFED is intentionally not highlighting clause 10 of the Letters Patent (Lahore) which has to be read in conjunction with Clause 37 of the same Letters Patent, which clarifies that such Letters Patent are subject to the legislation, and that the negative mandate of Section 6 (2) itself overrides provision of any appeal.

14. It is also argued that where no appeal is provided by the legislature under a special act, then no appeal lies under the letters patent. To support the submission counsel relies on *UOI v.*

Mohinder Supply Co., AIR 1962 SC 256, this Court's Full Bench decision in *Milk Food Ltd.*, LPA No. 492/1998 (judgment dated 17.02.2003), affirmed in *Milkfood Ltd. v. M/s GMC Ice Cream (P) Ltd.*, (2004) 7 SCC 288. In the cases the Court was concerned with the Arbitration Act, 1940. The counsel submitted that as regards the Foreign Awards Act the intent of the Legislature in circumscribing the scope of the of appeal is manifestly clear, Section 6(2) limits the scope of appeal to the decree following the judgment pronounced under Section 6(1) on the two specific grounds.

15. Alimenta submits that the view upholding maintainability of an appeal to the Division Bench is incorrect because, that opinion, (of Sanghi, J) in paragraph 32 states that Section 6 of the Foreign Awards Act uses the expressions "order", "judgment" and "decree", whereas in fact the expressions used in the said provision are only "judgment" and "decree". It is argued that such observation is the foundation for the judgment, holding that an appeal on all grounds lies to the Division Bench. Secondly, the counsel states that in the event the learned Judge's observation is correct, it would render the section 6(2) otiose. Further, says Alimenta, reliance by the learned Judge on the *Vinita Khanolkar* case (supra) is misplaced as the same dealt with the Specific Relief Act, whereas in context of law dealing with arbitration numerous judgments rely upon clause 37 of the of the Letters Patent (Lahore), the Supreme Court's view has remained consistent from 1962 (*Mohinder Supply*) to 2002 (*Union of India & Ors. v. Aradhana Trading Company and Ors.*, (2002) 4 SCC 447), i.e. that one has to go by Clause 37 of the Letters Patent (Lahore). Again, (contends Alimenta) the reliance by NAFED, on the *Shah Babulal Khimji case* (supra) is misplaced since the facts of that case are entirely different from the present one in as much as, in that case the question was whether a decision rendered in the course of hearing and before the final judgment could fall within the meaning of the expression "judgment" under clause 15 of the Letters Patent (Bombay), which was answered in positive by the Court. However, according to Alimenta, no court has ever held that once a final judgment is rendered followed by a decree, such judgment is appealable separately from a decree.

16. The next argument by the Alimenta is that both the learned Judges have agreed that the award in question in the present case the award is a foreign award as defined in Section 2 of the Foreign Awards Act and by holding so the appellant's previous contention that Indian law is applicable to the contract (under which the dispute initially arose), and that the 1940 Act would

thereby apply has been rejected by the learned Judges. In such event, it is obvious that English law is applicable to the contract and, as such the Foreign Awards Act applies to the present case.

17. It is argued that the Foreign Awards Act, 1961 is a complete code and, therefore, reference to other laws for determination of questions arising under it, would be detrimental to the objective it seeks to achieve. The counsel relies on the first *Renusagar case* (1985), which was followed in *Harendra H. Mehta v. Mukesh H. Mehta,* (1999) 5 SCC 108. It is argued that where a special statute exists recourse cannot be taken to other laws for deciding the subject matter covered under such special statute; reliance is placed on *Ghaziabad Zila Sahkarui Bank Ltd. v. Addl. Labour Commissioner and Ors.,* (2007) 11 SCC 756, *State of Punjab v. Labour Court,* (1980) 1 SCC 4 and *Hira H. Advani v. State of Maharashtra,* (1969) 2 SCC 662. It is also argued that the Foreign Awards Act, being a special legislation exclude application of the Delhi High Court Act and the Code of Civil Procedure being both general laws. The Foreign Awards Act, deals with the enforcement of foreign awards on the whole and appeals in such cases are dealt in Section 6(2) of the Act, therefore, the general law dealing with appeals, i.e. Section 10 of the Delhi High Court Act would have no application. The counsel relies upon *Jogendra Lal Saha v. State of Bihar,* AIR 1991 SC 1148 and paras 21 and 22 in *Sanwarmal Kejriwal v. Vishwa Cooperative Housing Society Ltd. & Ors.,* (1990) 2 SCC 288.

18. Alimenta also contends that what is appealable under the Foreign Awards Act is only the decree and not the judgment. The counsel relies upon the decision in *Forasol v. Oil & Natural Gas Commission,* 1984 (Supp) SCC 263 at para 65, where the Court observed that a decree comes into existence as soon as the judgment is pronounced and not on the date when it is signed and sealed later, which is a mere administrative formality. The distinction sought to be made by NAFED between the terms "judgment", "order" and "decree" in the 1961 Act is therefore, fallacious. Thus, there is no question of appealing the judgment separately under s. 6(1) of the 1961 Act. The judgment cannot be separated from the decree in such cases, the counsel states that the principle of judgment merging into decree has been held in the following judgments- *M/s United Transport Company & Anr. v. Smt. Khatoon Begum,* AIR 2007 Chhattisgarh 77, *State of Assam v. Gobind Chandra Paul,* AIR 1991 Gau 104, *Bai Vasanti v. Suryaprasad Ishvarlal Patel,* AIR 1969 Guj 152 and lastly, *Harish Kumar Bapalal v. Channalal Ranchhodlal & Ors.,* AIR 1966 Guj 281. To allow NAFED's appeal would be contrary to the legislative intention. Further,

Sections 96 and 100 of the Code of Civil Procedure clarify that an appeal only lies against a decree and not a judgment preceding it, reliance placed on *Banarsi and Ors. v. Ram Phal,* (2003) 9 SCC 606 and *Jagat Dish Bhargava v. Jawahar Lal Bhargava,* AIR 1991 SC 832 are relied for this argument.

19. Alimenta also relies upon principles of Statutory Interpretation and doctrine of harmonious construction, saying that it is well settled that courts are not to render a construction which would render the statute otiose, as also adopt a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless, has to be avoided. The counsel relies upon *Sakshi v. Union of India,* (2004) 5 SCC 518, *State of Rajasthan v. Gopi Kishan Sen,* (1993) Supp. (1) SCC 590, *Gulzari Lal Agarwal v. Accounts Officer,* (1996) 10 SCC 590, *Ansal Properties & Industries Ltd. v. State of Haryana & Anr.,* (2009) 3 SCC 533. It is also urged that the Foreign Awards Act was enacted in furtherance to the New York Convention, as is clear from its Statement of Objects and Reasons and is, therefore, to be read in the spirit and purpose of that Convention. It is stated that the main aim of the Convention is to provide speedy settlement of international disputes and thus encourage international trade and commerce. The argument of NAFED defeats the object, which the Convention seeks to achieve, (through the Foreign Awards Act) by ensuring expeditious enforcement of foreign awards. Further, it is a universal principle that the Courts should, wherever possible, avoid conflict between international and municipal law and that the municipal law should be read harmoniously with the international law and treaty obligations, reliance here is placed on *Jolly George Varghese and Anr. v. The Bank of Cochin,* AIR 1980 SC 470 and *Apparel export Promotion Council v. A.K. Chopra,* AIR 1999 SC 625.

20. Lastly, urges Alimenta, the reliance on the Arbitration and Conciliation Act, 1996 to interpret the Foreign Awards Act, is erroneous, as an earlier statute cannot be interpreted in light of a later law; reliance is placed on the judgments reported as *Nalinikant Ambalal Modi v. S.A.L. Narayan Row, Commissioner of Income Tax, Bombay* AIR 1967 SC 193, and *Vajinath and Ors. v. Gurmma and Anr.,* AIR 1999 SC 555.

21. It would first be necessary to extract relevant provisions of the Foreign Awards Act, 1961, for purposes of this judgment, as well as the now repealed Arbitration Act, 1940. They are as follows:

RELEVANT EXTRACTS OF *The Foreign Awards (Recognition and Enforcement) Act, 1961 (Act 45 of 1961)*

"2. Definition.-In this Act, unless the context otherwise requires, "foreign award" means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-

(a) In pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies, and

(b) in one of such territories as the Central Government being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

Xxxxxxx xxxxxxxxx

5. Filing of foreign awards in court.- (1) Any person interested in a foreign award may apply to any Court having jurisdiction over the subject matter of the award that the award be filed in court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring them to show cause, within a time specified why the award should not be filed.

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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.

7. Conditions for enforcement of foreign awards.- (1) A foreign award may not be enforced under this Act –

(a) If the party against whom it is sought to enforce the award proves to the Court dealing with the case that-

(i) the parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made, or

(ii) the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, or

(iii) the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement:

Provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties of failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or

(b) if the Court dealing with the case is satisfied that-

(i) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(ii) the enforcement of the award will be contrary to public policy.

(2) If the court before which a foreign award is sought to be relied upon is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority referred to in sub-clause(v) of clause (a) of sub-section(l), the court may, if it deems proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to furnish suitable security."

RELEVANT EXTRACTS OF THE ARBITRATION ACT, 1940

14. Award to be signed and filed.- (1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filling of the award.

(3) Where the arbitrators or umpire state a special case under clause (b) of Section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award.

Xxxxxxx xxxxxxxxx

15. Power of Court to modify award. – The Court may by order modify or correct an award –

(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(b) where the award is imperfect, in form, or contains any obvious error which can be amended without affecting such decision;

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Xxxxxxx xxxxxxxxx

16. Power to remit award- The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit-

a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

b) where the award is so indefinite as to be incapable of execution; or

c) where an objection to the legality of the award is apparent upon the face of it.

(2) where an award is remitted under sub-section 1 the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the court;

Provided that any time so fixed may be extended by subsequent order of the court.

(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

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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.

Xxxxxxx *xxxxxxxxx*

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 orders 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.

46. Application of Act to statutory arbitrations- The provisions of this Act except sub-section (1) of Section 6 and Sections 7, 12, 36 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder.

Xxxxxxx *xxxxxxxxx*

47. Act to apply to all arbitrations- Subject to the provisions of Section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder"

Section 10 of the Delhi High Court Act, 1966, which too is relevant, reads as follows:

*"**10.Powers of Judges**. (1) Where a single Judge of the High Court of Delhi exercises ordinary original civil jurisdiction conferred by sub-section (2) of section 5 on that Court, an appeal shall lie from the judgment of the single Judge to a Division Court of that High Court.*

(2)Subject to the provisions of sub-section (1), the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and Division Courts of the High Court of Punjab and with respect to all matters ancillary to the exercise of those powers shall, with the necessary modifications, apply in relation to the High Court of Delhi."

The two clauses of the Lahore Letters Patent, i.e. Clauses 10 and 37, are extracted below:

> *"**10. Appeals to the High Court from Judges of the Court** –And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of Superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made on or after the first day of February, one thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or Successors in our or their Privy Council, as hereinafter provided."*
>
> ***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 Legislative Council, and also of the governor-General in Council under Section 71 of the Government of India Act, 1915 and also of the Governor-General in cases of emergency under Section 72 of that Act, and may be in all respects amended and altered thereby."*

22. The controversy here, is whether the expression *"....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"* in Section 6(2) constitutes a bar for the entertainment of an appeal, from the judgment and order of a Single judge of this Court, or whether a letters patent appeal, preserved under Section 10 of the Delhi High Court Act, enables a party aggrieved to approach a Division Bench, against such determination.

23. Under the scheme of the Foreign Awards Act, the procedure of filing an award, for seeking its enforcement is prescribed in Section 5. Section 7 provides for the grounds on which a foreign award can be interfered with, and the Courts in India, empowered not to recognize and give effect to such awards. These broadly include grounds such as the parties to the agreement were (under the law applicable to them), under some incapacity, or the arbitration agreement

being invalid under the law to which the parties have subjected it, (or, under the law of the country where the award was made). The other grounds are decisions in the award on points that are not the subject matter of reference, or that the procedure adopted by the arbitrator is not in accordance with the agreement. Once the Court is satisfied that no infirmity of the kind attaches to the foreign award (for any of the reasons stated under Section 7) it has to direct ("*shall order the award"*) to be filed and *"shall proceed to pronounce judgment according to the award."*

24. The structure of the enactment is quite similar to the Arbitration (Protocol and Convention) Act, 1937. What is striking about the law pertaining to foreign awards, as existing after the enactment of the Foreign Awards Act, (in comparison with the law relating to domestic awards), is the difference in treatment on a host of issues. Thus, for instance, the Court, in the Foreign Awards Act, is not empowered to modify or remit, the award (unlike in the case of domestic awards, which could have been modified or remitted, in exercise of the powers under Sections 15 and 16 of the 1940 Act). Domestic awards could be "set aside" and thereafter remitted, in exercise of various powers such as Sections 30 or 33, (for legal misconduct, etc). In the case of foreign awards, however, the Court had to satisfy itself, on a strict application of the facts of the case, to the grounds enacted in Section 7, whether the award could be enforced, and pronounce judgment. In case the Court felt that the award could not be enforced, there was no question of modifying it, or remitting it for curative consideration. It merely pronounced upon the (un) enforceability.

25. The above analysis, in the opinion of the Court, is important for a consideration whether Section 6(2) of the Foreign Awards Act, constitutes a bar or restricts the appellate remedy, vis-à-vis foreign awards. This analysis points to Parliament's classification of arbitral awards, into foreign awards and domestic awards. The former were always treated as a separate (and even special) class apart from awards arising out of domestic arbitration proceedings. The reason for this is not far to seek. Undeniably, arbitrations are a species of litigant chosen dispute resolution mechanism, where party autonomy is respected. However, in the case of foreign awards, where legal regimes intersect – on various aspects such as law governing the contract; the law governing the arbitration, the curative law, and the law governing the award, or its enforcement, there is a public policy perspective to ensure that these complexities do not undermine the process, and defeat parties' determined rights, which is so essential to international commerce. If

international commercial credit instruments and the evolution of common standards governing them is the life blood of foreign trade, international arbitration is the second institution which forms the bedrock of global commerce. Therefore, state parties consciously entered into treaties, such as the New York Convention, in an attempt to align municipal laws. A vital aspect in this alignment process was the evolution of a common standard for enforcement of foreign arbitration awards. This assured a modicum of uniformity in judicial approach, and predictability in the pattern of judicial decision making, thus paving the way for stability in regard to the rights of parties, who secured awards, after contest. The appeal provision thus, has to be seen from such perspective, and the objectives of the legislation, i.e. the Foreign Awards Act.

26. It would be now necessary to analyze the cases relied on by the parties about the right to appeal to the Division Bench, and whether Section 6(2) is an impediment. In *Union of India v. A.S. Dhupia and another* AIR 1970 Del 108, a Full Bench of this Court, which had occasion to deal with the import of Section 39 of the 1940 Act, held that it does not permit any appeal to the Division Bench, under Letters Patent. It was held, *inter alia,* that:

> *"XXXXXX XXXXXX XXXXXX*
>
> *……The construction of Section 39 of the Act came up for decision before the Supreme Court in Union of India v. Mohindra Supply Co., (AIR 1962 SC 256). There the question was whether an appeal under Cl. 10 of the Letters Patent of Lahore High Court lay against the judgment of the single judge notwithstanding the prohibition of second appeal as provided in sub-section (2) of S.39 of the Act. Their Lordships of the Supreme Court have held that the appeal was not competent…*
>
> --- --- ---
>
> *The Supreme Court, therefore, has clearly held that appeal against orders passed under the Act will only lie if the same are specified within Section 39(1) of the Act. The only argument to distinguish this authority urged by Mr. Sen, the learned counsel for the appellant, was that Section 10 of the Act of 1966 should be taken to be a special provision and, therefore, must be held to confer a right of appeal even against those orders which are not covered by Section 39(1) of the Act as according to him Section 10 of the Act of 1966 being a special provision would override Section 39(1) of the Act which is a general provision. In our view the argument is plainly untenable. 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 a special provision and will override Section 39(1) of the Act……..

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In *Mohindra Supply Co* (supra, a decision of four judges of the Supreme Court) it was held that:

> *"Under Section 39(1) the appeal lies from the orders specified in that subsection and from no others. The legislature has plainly expressed itself that the right of appeal against the order passed under the Arbitration Act may be exercised only in respect of certain orders. The right of appeal against other orders is expressly taken away. If by 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 Cl.(2) does not similarly restrict the exercise of appellate power granted by the Letters Patent."*

In the Allahabad High Court decision, *Ram Babu v. Lakshmi Narain and another* AIR 1963 All 252, it was observed that:

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> *As we have indicated earlier, the language of S. 17 of the Arbitration Act does not confer or create any right of appeal at all. All that that section does is to curtail the existing right of appeal so as to give finality to a decree passed on an award in certain circumstances. The right of appeal is preserved and left unaffected in those cases only where an appeal is sought on the ground that the decree is in excess of or not otherwise in accordance with the award. In other cases the right of appeal is taken away…"*

The question was revisited in *State of West Bengal v. M/s. Gourangalal Chatterjee* (1993) 3 SCC 1, where the Supreme Court held that:

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> *We find that prohibition against appeal is provided in two ways: one where it is indicated that appeal would lie against given orders and from no other orders and secondly, under sub-section (2) of Section 39 that no second appeal shall lie from an order passed in appeal under Section 39 of the Arbitration Act. In the alternate, the appellants' contention is that in any case a letters patent appeal would lie against the original orders of the Single Judge of the High Court to a Division Bench……..*
>
> *XXXXXX XXXXXX XXXXXX*

……..Normally, an appeal would be maintainable but there are two constraints as provided under the Special Act, namely, it should not be a second appeal as provided under sub-section(2) of Section 39 of the Act, which position is also clear in the case of Mohindra Supply Co. where it was held that the second appeal under Section 100 CPC or under the Letters Patent against an appellate order was barred by virtue of sub-section (2) of Section 39. Here we find that there is yet another constraint as provided under sub-section (1) of Section 39 of the Arbitration Act itself and it is emphatic too when it says that the appeal shall lie against the orders indicated in the provision and from no other order. Section 41 of the Arbitration Act makes the provisions of CPC applicable subject to the provisions of the Arbitration Act and the rules framed thereunder. Therefore, the nature of an order against which an appeal may lie must conform to the nature of the order as enumerated under sub-section (1) of Section 39 of the Arbitration Act. If it does not amount to such an order as enumerated under sub-section (1) of Section 39, the prohibition as contained in this sub-section ("against no other order") itself, would become operative……..

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In *Union of India & Ors. v. Aradhana Trading Company and Ors.* (2002) 4 SCC 447 the effect of Section 39 of the 1940 Act, and its implication in limiting or barring other categories of appeals, read with Section 17, was commented upon, in the following manner:

"Normally, an appeal would be maintainable but there are two constraints as provided under the Special Act, namely, it should not be a second appeal as provided under sub-section (2) of Section 39 of the Act, which position is also clear in the case of Mohindra Supply Co. where it was held that the second appeal under Section 100 CPC or under the Letters Patent against an appellate order was barred by virtue of sub-section (2) of Section 39. Here we find that there is yet another constraint as provided under sub-section (1) of Section 39 of the Arbitration Act itself and it is emphatic too when it says that the appeal shall lie against the orders indicated in the provision and from no other order. Section 41 of the Arbitration Act makes the provisions of CPC applicable subject to the provisions of the Arbitration Act and the rules framed thereunder. Therefore, the nature of an order against which an appeal may lie must conform to the nature of the order as enumerated under sub-section (1) of Section 39 of the Arbitration Act. If it does not amount to such an order as enumerated under sub-section (1) of Section 39, the prohibition as contained in this sub-section ("against no other order") itself, would become operative, subject to which alone provisions of CPC apply under Section 41 of the Act.

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In 2003, a larger Bench of this Court (five judges) re-examined the issue, and considered whether the decisions (relied on by NAFED in this case) in *Shah Babulal Khimji* and *Vanita. M. Khalonkar* had the effect of changing the law as to maintainability of appeals before the Letters Patent bench, against judgments or orders of single judges, in *Milk Food Ltd. v. M/s. GMC Ice Creams (P) Ltd. & Ors.* LPA No. 492/98 *(Decided on 17.*02.2003). The larger Bench held that:

> *"XXXXXX XXXXXX XXXXXX*
>
> *22. In view of the above, the question posed before us will have to be answered holding that in view of the law laid down by the Supreme Court in Mohindra Supply Company's case; Gouranglal Chatterjee's case; and Aradhana Trading Company's case (Supra),the appeal is not maintainable and to such an appeal the law laid down in Shah Babulal Khimji's and Vanita. M. Khalonkar will not apply and thus, appeal would not be maintainable under the Letters Patent.*
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> *XXXXXX XXXXXX XXXXXX"*

The above larger Bench decision was subsequently upheld by the Supreme Court in *Milkfood Ltd. v. M/s. GMC Ice Cream (P) Ltd. JT 2004 (4) SC 393*. It can therefore, be concluded that with the ruling in *Milkfood*, no appeals lie except on the subject matters provided under Section 39, under the Arbitration Act, 1940. 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 there is no right of appeal under the Special Act i.e. the Arbitration Act, 1940 and that they cannot be filed under the Letters Patent as there is no express provision in the Arbitration Act, 1940 which preserves such jurisdiction. I am in agreement with Mudgal, J, on this score.

27. It would now be necessary to closely examine the Constitution Bench judgment of the Supreme Court, in *P.S. Sathappan (Dead) by LRs v. Andhra Bank Ltd. and Ors.*, (2004) 11 SC 672. The relevant extracts of the decision are reproduced below:

> *"XXXXXX XXXXXX XXXXXX*
>
> *56. When a right of appeal is conferred under a special statute, the bar contained in sub-section (2) of Section 104 of the Code would not operate and a*

right of intra-court appeal provided for in the Letters Patent of the High Court subject to any statutory embargo would, thus, be saved. To put the matter differently, if a right of appeal is created by a statute, the same would be governed by the terms thereof. The question as to whether any appeal governed by clause 15 of the Letters Patent is maintainable or not will have to be judged having regard to the provisions contained therein as also the scheme thereof.

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58. Sections 104 and 105 provide for an integrated scheme. The provisions contained therein must be read as a whole. By reason of sub-section (1) of Section 104, a limited right of appeal has been conferred in relation to the categories of cases specified therein. However, if an order is passed which does not come within the purview of sub-section (1) of Section 104, the right of appeal must be referable to any other provision of the Code, as for example, Section 96 or Section 100 or any other special statute. Section 104 provides for an appeal from an order passed by an appropriate court. Section 104 and Order 43 of the Code contain provisions as regards appealability of the orders in the cases specified therein and in that view of the matter they must be invoked in their entirety and not in isolation.

59. A right of appeal is a creature of statute and the said right, thus, can only be enjoyed if law confers the same. The legislature thought it fit to confer such a right upon the suitor by reason of Section 104 of the Code read with Order 43 thereof. When a right is granted under a statute, a further right of appeal must receive such construction which would give effect to the plain meaning of the words emphasized in the section.

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"XXXXXX XXXXXX XXXXXX

64. By reason of sub-section (1) of Section 104 of the Code, appeals provided for under the statutes including Letters Patent might have been saved but that became necessary only because of appeals irrespective of the source of appeal whether accruing from the Code or any other statute were treated alike. What is, thus, saved is the right of appeal conferred under special statutes. By reason of such saving clause per se a right of appeal is not conferred nor such appeal can be said to have been preferred in terms of sub-section (1) of Section 104 of the Code. In case a right of appeal is limited or circumscribed by any condition under any special statute, the same would prevail over sub-section (1) of Section 104 because saving of such right would be subject to such limitations or conditions.

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69. Furthermore, it is now well settled that when two interpretations of a statute are possible, the court may prefer and adopt the purposive interpretation having regard to object and intent thereof. (See Swedish Match AB v. Securities & Exchange of Board of India).

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71. Letters Patent is a special statute but in the event of a conflict, as would appear from the discussions made hereinafter, the provisions of the Code shall prevail. The power under clause 15 of the Letters Patent is not a constitutional power of a High Court. Reliance placed on Vinita. M. Khanolkar and Sharda Devi in which one of us (Variava, J.) was a member is misplaced. This Court in the aforementioned decisions did not lay down a law that the statutory provision providing for an appeal under the Letters Patent was in terms of the constitutional power of a High Court.

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74. The Letters Patent although is a subordinate legislation but nevertheless would be a law within the meaning of Articles 225 and 372 of the Constitution, but the same cannot prevail over a legislative Act, if clause 44 of the Letters Patent is to be given a proper meaning. The provisions of Letters Patent despite attainment of independence by India are saved by Section 106 of the Government of India Act, 1919, Section 223 of the Government of India Act, 1935, clause 2(1) of the India (Adaptation of Existing Laws) Order, 1949 and Section 18(3) of the Independence Act, 1947. Letters Patent, thus, would undoubtedly come within the meaning of existing law but the status thereof cannot be higher than that of the statute-made law. Not only in terms of clause 44 of the Letters Patent, but having regard to the fact that the same is a subordinate legislation, it would be subject to laws made by a competent legislature.

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128. It is true that some stray observations had been made therein to the effect 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 an arbitration proceeding even if the order was passed in exercise of appellate jurisdiction, but that was so because the power of the Court to hear appeals under a special law for the time being in operation was expressly preserved. Furthermore, as has been noticed in Shah Babulal Khimji that in terms of clause 15 of the Letters Patent a second appeal could have been maintained only subject to leave granted by the appellate court therefor. No such leave has been taken in this case. The said observation would not mean in absence of any detailed discussion as regards interpretation of the provisions of the Code, that despite bar created thereunder, an appeal would still be maintainable under clause 15 of the Letters Patent.

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Conclusion

148. The upshot of our decision would be:

(1) Finality clause contained in a statute, unless attached to an order passed in appeal, would not take away the right of appeal expressly provided for under the special statute.

(2) Letters Patent being a subordinate legislation has the force of law but the same is subject to an Act of Parliament.

(3) If an appeal is maintainable under sub-section (1) of Section 104 of the Code, no further appeal therefrom would be maintainable in terms of sub-section (2) thereof.

(4) A right of appeal being creature of a statute, it may provide for a limited right of appeal or limiting the applicability thereof.

(5) Clause 15 of the Letters Patent cannot override the bar created under Section 104 of the Code. Section 104(1) of the Code must be read with sub-section (2) of Section 104; and by reason thereof saving clause in relation to the Letters Patent would not be attracted. An attempt should be made to uphold a right of appeal only on harmonious construction of Sections 4, 104 and other provisions of the Code.

(6) However, when an appeal is provided for under a special Act, Section 104 of the Code shall have no application in relation thereto as it merely recognizes such right but does not provide for a right of appeal.

(7) If a higher status is given to a Letters patent over a law passed by Parliament including the Code of Civil Procedure, the same would run contrary to the history of the Letters Patent as also the parliamentary Acts.

(8) The judgment of this Court must be read as a whole and the ratio therefrom is required to be culled out from reading the same in its entirety and not only a part of it.

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To this Court, it appears that the Constitution Bench was forthright in expressing the law that a right of appeal is a creation of law, and that letters patent though having the status of a law in force, when our country gained Independence, cannot prevail upon, or override express Parliamentary enactment, if a contrary intent is expressed in the latter. The decision also states that if a statute creates a special appeal, that is preserved. In addition, while speaking about the decision, in *Vinita. M. Khanolkar* it was held that:

"..71. Letters Patent is a special statute but in the event of a conflict, as would appear from the discussions made hereinafter, the provisions of the Code shall prevail. The power under clause 15 of the Letters Patent is not a constitutional power of a High Court. Reliance placed on Vinita. M. Khanolkar and Sharda

Devi in which one of us (Variava, J.) was a member is misplaced. This Court in the aforementioned decisions did not lay down a law that the statutory provision providing for an appeal under the Letters Patent was in terms of the constitutional power of a High Court…."

This Court, therefore, is of the opinion that *P.S. Sathappan* cannot be read the manner suggested by NAFED. Whenever called upon to decide whether an appeal provided by letters patent is available, the Court has to take a nuanced approach, having regard to the principles indicated in *P.S. Sathappan,* and the peculiar structure of the concerned law.

28. It would, at this stage, be relevant to consider NAFED's argument that having regard to Section 17 of the 1940 Act, and the circumstance that unlike in that enactment, which provides for an appeal, by virtue of Section 39, the absence of such provision, would mean that wherever feasible, and wherever letters patents exist, appeals can be preferred under such provisions. This Court cannot accept this submission. Section 17 of the 1940 Act is no doubt cast in identical terms as Section 6 of the Foreign Awards Act. Yet, Section 39 of the 1940 Act confers a wider right of appeal. This aspect is significant, because the 1940 model was available when the Foreign Awards Act was brought into force after 1961; Parliament however deliberately chose not to provide for an appellate remedy. This choice has to be understood as a conscious one, where the law maker (presumed to be aware of existing laws- Refer to the decision of the Supreme Court in *Syndicate Bank v. Prabha D. Naik,* (2001) 4 SCC 713) deliberately refrains from, or intentionally omits to, adopt the structure and frame of another earlier law, even though using *pari materia* phraseology, and provisions, in respect of one part of the later statute. This, contrary to NAFED's contention, clearly shows that Parliamentary intention was not to confer any right of appeal, against judgments holding foreign awards to be enforceable, except on the grounds permitted by Section 6. This conclusion is in tune with the previous decision of this Court in *Milkfood,* which was approved by the Supreme Court, as well as the previous decision of the Supreme Court in *Mohindra Supply* and the earlier Full Bench of this Court in *A.S. Dhupia,* and the decisions rendered earlier by the Supreme Court, in *Gouranglal* as well as *Aradhana Trading Company* all of which were approved (by the larger 5 judge Bench of the Supreme Court) in *P.S. Sathappan.*

29. Now, in order to examine relative merits of the rival submissions, in the light of the statutory provisions, it would be necessary to recollect the legal *regime.* The Arbitration

(Protocol and Convention) Act, 1937 sought to enact, into Indian municipal law, provisions of the Geneva Convention, 1927, the first multilateral treaty pertaining to foreign arbitrations. The 1937 Act came into force on 4th March 1937 and provided for the enforcement of foreign arbitral awards to which the Geneva Convention of 1927 applied. The New York Convention was signed in 1958; India ratified it. The effect of the convention was that awards which fell under its *regime*, and, the countries which ratified, and municipal laws to give effect to it, rendered the Geneva Convention of 1927 redundant; it ceased to have any effect. As a result, the Foreign Awards Act was brought into force – i.e. to give effect to, and assimilate into Indian municipal law, the provisions of the New York convention. If one sees the legislative history of the 1961 Act, it is apparent that it sought to create an entirely new class of rights, which did not exist, when the Lahore Letters Patent was promulgated. Thus, when the 1961 Act was brought into force, there was no pre-existing right – at least in relation to "foreign awards" as understood under that enactment, which were entirely different, having been the result of the *regime* sanctioned by the New York Convention (which it sought to give effect to, under Article 253 of the Constitution of India). Such being the case, the negative mandate contained in Section 6 (2) restricting appeal content to only two classes, applied with full vigor, and there was no question of any appeal other than those permissible, under that provision, in respect of judgments ordaining enforcement of foreign awards, under that Act. The restriction contained in Section 6 (2), in one sense was the expressed Parliamentary intent to allow only limited appeals. The enactment is admittedly post-Constitutional law, and did not amount to a law in force which existed, at the time the Constitution came into force. Thus, it had to prevail, over the letters patent, as held in *P.S. Sathappan.* To conclude to the contrary would be to accord sanctity to a colonial law, in preference to the Constitution, a proposition as startling as it is untenable. As far as Section 10 of the Delhi High Court Act, 1966 is concerned, no doubt Section 10 (1) does mention about appeals against judgments of single judges to Division Benches, and Section 10 (2) enacts that

> *"the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and Division Courts of the High Court of Punjab and with respect to all matters ancillary to the exercise of those powers shall, with the necessary modifications, apply in relation to the High Court of Delhi."*

This Court is of the view that Section 10 (1) cannot apply to proceedings under the Foreign Awards Act. The essential condition for applicability of Section 10 (1) is exercise of "ordinary

original civil" jurisdiction. Section 5 (2) confers such jurisdiction; admittedly the Punjab High Court, which was the precursor and predecessor of the Delhi High Court, did not possess such ordinary original civil jurisdiction. That was *created* by the Delhi High Court Act. Section 5 (2) reads as follows:

> *"(2)Notwithstanding anything contained in any law for the time being in force, the High Court of Delhi shall also have in respect of the said territories ordinary original civil jurisdiction in every suit the value of which exceeds rupees twenty lakhs."*

Now, a proceeding under the Foreign Awards Act is not an "ordinary original civil suit". That expression would comprehend general civil causes or claims, such as money suits, mortgage claims, summary suits, claims for partition, injunction, and the like. Even proceedings under the old Arbitration Act (of 1940) were deemed to be treated as suits, by virtue of its provisions; yet, certain matters – particularly interim injunction petitions, applications under Section 28, etc, were treated differently. Therefore, there can be no question of cases under the Foreign Awards Act, being deemed to be "ordinary original civil suits" – the latter clearly means that the Court tries the cause itself, after following a full trial procedure, and does not (as under the Foreign Awards Act) confine its enquiry to the record, and consider the effect of the findings rendered in the foreign award. So far as Section 10 (2) is concerned, it has already been concluded that the negative mandate of Section 6 (2) has to be construed as a bar in respect of appeals against judgments (affirming enforceability of such foreign awards) save the two category of cases, which overbore letters patent provisions. Therefore, there was no power with the Division Bench, to review, in appeal, under letters patent, the correctness of findings of a single judge, in respect of such matters. These observations, to this Court's mind, are in accord with *Mohindra Supply*, *Gouranglal* and *Aradhana Trading*, all of which endorsed the special and restrictive nature of Section 39 - (of the old Arbitration Act of 1940)- which apply with equal force in respect of the restrictions enacted by Section 6 (2) of the Foreign Awards Act) and negative the maintainability of letters patent appeals; this line of reasoning was approved in *P.S. Sathappan.*

30. That brings the discussion next to the question whether the 1961 Act was a "special" Act, which remained unaffected by the later enactment, i.e. the Delhi High Court Act, 1966. Alimenta relied on *Ghaziabad Zila Sahkarui Bank Ltd. v. Addl. Labour Commissioner and Ors.*, (2007) 11 SCC 756, *State of Punjab v. Labour Court*, (1980) 1 SCC 4 and *Hira H. Advani v. State of Maharashtra*, (1969) 2 SCC 662. The view that a special law prevails over a general law, even is

embodied in the maxim *generalia specialibus non derogant*. This was recognized by a four judge Bench of the Supreme Court, long ago, in *Patna Improvement Trust v. Lakshmi Devi,*1963 Supp (2) SCR 812, in the following terms:

> *"The law on the subject is very well settled and, in my view, the learned Judges of the High Court have correctly appreciated it and applied it to the facts of the case. Two principles noticed by the High Court are apposite. The first principle is generalia specialibus non derogant. This principle is exemplified by the decision of the Privy Council in Secretary of State v. Hindustan Cooperative Insurance Society Ltd. AIR 1931 PC 149. The second principle is that if a statute directs a thing to be done in a certain way that thing shall not, even if there be no negative words, be done in any other way. This principle is illustrated by the decision in Ex-parte Stephens.(1876) 3 Ch D 659. A combined effect of the said two principles may be stated thus: a general Act must yield to a special Act dealing with a specific subject-matter and that if an act directs a thing to be done in a particular way, it shall be deemed to have prohibited the doing of that thing in any other way. Under the Act, the Trust is authorised to implement the improvement schemes in a particular way and for the purposes of implementing them to acquire land in a prescribed manner. If that be so, the Trust is bound to implement the scheme in the manner prescribed and cannot resort to any other method, that is to say it can acquire land for trust purposes only by resorting to the provisions of the Land Acquisition Act as modified and incorporated by reference in the Act."*

The principle was again stated, and applied in *U.P. SEB v. Hari Shankar Jain,* (1978) 4 SCC 16, in the following words:

> *"The maxim "Generalia specialibus non derogant" is quite well-known. The rule flowing from the maxim has been explained in Mary Seward v. Owner of the "Vera Cruz"* 1884 (10) AC 59, *as follows:*
>
> > *"Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."*
>
> *The question in Seward v. Owner of the "Vera Cruz" was whether Section 7 of the Admiralty Court Act of 1861, which gave jurisdiction to that Court over "any claim for damage done by any ship" also gave jurisdiction over claims for loss of life which would otherwise come under the Fatal Accidents Act. It was held that the general words of Section 7 of the Admiralty Court Act did not exclude the applicability of the Fatal Accidents Act and therefore, the Admiralty Court had no jurisdiction to entertain a claim for damages for loss of life.*
>
> ***9.*** *The reason for the rule that a general provision should yield to a specific provision is this: In passing a special Act, Parliament devotes its entire consideration to a particular subject. When a general Act is subsequently passed, it is logical to presume that Parliament has not repealed or modified the former Special Act unless it appears that the Special Act again received consideration from Parliament. Vide London and Blackwall*

Railway v. Limehouse District Board of Works, LJ (Ch) 164: 69 ER 1048 and Thorpe v. Adams 1871 LR (6) CP 125. In J&K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of U.P AIR 1961 SC 1170, this Court observed (at p. 1174):

> *"The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions, one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect."*

In an earlier decision, *Maharaja Pratap Singh Bahadur v. Thakur Manmohan Dey*,(1966) 3 SCR 663, the Supreme Court held that absent an express intent to override the previous special law, or create a provision that would prevail, a later general law almost invariably yields to the previous law on a special subject matter:

> *"**9.** It is, therefore, clear that Act 5 of 1859 is a special statute and Act 4 of 1870 is a general statute. The special statute does not make the sanction of the Board of Revenue a pre-condition for the validity of the lease executed by a Court of Wards so as to bind an future possessors of the said land, whereas Section 9 of Act 5 of 1859 imposes such a condition. The argument is that both the Acts should be read together and, if so read, the sanction of the Board of Revenue would also be a pre-condition in addition to the conditions imposed under the proviso to Section I of Act 5 of 1859. In our view, such a contention is untenable. The principle of law in this regard is well settled. In Maxwell on the Interpretation of Statutes, the relevant principle is stated, at p. 168, thus:*
>
> *"A general later law does not abrogate an earlier special one by mere implication. Generalia specialibus non derogant, or, in other words, 'where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. In such cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act'."*
>
> *If this principle is applicable to the instant case — we do not see any reason why it is not — the special provisions made under Act 5 of 1859 in regard to the conditions imposed for the validity of such a lease should prevail over those imposed under the General Act, Act 4 of 1870. The General Act in regard to leases of ghatwali lands should yield to the special Act. On this construction, the condition for the validity of the lease in question is that it should have been executed by the Court of Wards for the purpose of erection of dwelling houses. The lease of 1873 expressly states that the lease was granted for erecting dwelling houses."*

Here, in this case, the Foreign Awards Act, is in a sense, a sub-species of a special law, because the law pertaining to arbitrations is itself a special law. The Foreign Awards Act is a special law pertaining to, and dealing exclusively with, foreign awards. On the other hand, the Delhi High Court Act concerns itself with the establishment of the High Court, and general provisions concerning its administration, and governance, organization of its jurisdiction, etc. It contains no

express provision – nor does it reveal a necessary implication – of overriding the negative mandate of Section 6 (2) restricting appeals under the Foreign Awards Act. Though the Delhi High Court Act is a later law, yet, being a general enactment, on an application of the maxim *generalia specialibus non derogant*, and the principles indicated by the Supreme Court in its decisions, it is concluded that it has to yield to Section 6 (2) – of the Foreign Awards Act.

31. The Court next considers NAFED's other contention, based on Section 47 of the Arbitration Act, 1940 and Section 9 of the Foreign Awards Act. As regards Section 47 of the Act, it is expressly conditioned upon applicability of Section 46, and, more crucially, subject to any other statute. In the decision reported as *Sumitomo Heavy Industries Ltd. v. ONGC Ltd. & Others.*, 1998 (1) SCC 305, the Supreem Court commented on two provisions, as follows:

> *"16. The law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement. Having regard to the clear terms of clause 17 of the contract between the appellant and the first respondent, we are in no doubt that the law governing the contract and the law governing the rights and obligations of the parties arising from their agreement to arbitrate, and, in particular, their obligation to submit disputes to arbitration and to honour the award, are governed by the law of India; nor is there any dispute in this behalf Section 47 of the Indian Arbitration Act, 1940 reads thus:*
>
> > *" 47. Act to apply to all arbitrations.- Subject to the provisions of Section 46, and save insofar as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder :*
> >
> > *Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending."*
>
> *17. The only other statute which is required to be considered in the context of the provisions of the 1940 Act is the Foreign Awards (Recognition and Enforcement) Act, 1961. For the purposes of determining whether the provisions of the 1940 Act are subject to the provisions of the 1961 Act, Section 9 is relevant It reads thus :*
>
> > *"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."

By reason of Section 9(b), the 1961 Act does not apply to any award made on an arbitration agreement governed by the law of India. The 1961 Act, therefore, does not apply to the arbitration agreement between the appellant and the first respondent. The 1940 Act applies to it and, by reason of Section 14(2) thereof, the courts in India are entitled to receive the award made by the second respondent."

Here, the Arbitration Act, 1940, contains provisions that are not consistent with the Foreign Awards Act, as far as enforcement (of awards) is concerned. While the former subjects award (i.e. domestic awards) to a process of judicial scrutiny, after which a decree is made, the latter merely requires that judgment is pronounced in terms of the award, if it measures up to the standards requisite for its enforcement. The Court, in the Foreign Awards Act, possesses no supervisory control enabling it to modify the terms of the award, or even remit it to the arbitrator for reconsideration; enforcement is a "one shot" process. There are other fundamental provisions under the 1940 Act which cannot apply to foreign arbitral awards, too. Therefore, this Court is of the opinion that the submission that since there is no express provision for appeals under the Foreign Awards Act, the provisions enabling such appeals can be sought recourse to, under the 1940 Act, (by relying on Section 47 of the 1940 Act, and Section 9 of the Foreign Awards Act) is unpersuasive; the same is, therefore, rejected.

32. That brings the discussion to NAFED's argument that startling consequences would follow if letters patent appeals are held not to be admissible. It was urged that in almost all parts of the country, except in Delhi, Mumbai, Chennai and Kolkatta, where High Courts possess original civil jurisdiction, lack of such appellate remedy would lead to the absurd result that review of such decisions would be possible only by the Supreme Court, in the exercise of special leave jurisdiction. This Court is of the view that the plain language of Section 6 (2) forbids courts from interpreting the statute on a consequence based approach. If in principle, the right to appeal is a creature of statute, the logical consequence of lack of such appeal should not boggle one's mind. Parliament, advisedly felt that there should be minimal judicial scrutiny and interference of foreign awards. If the pecuniary civil jurisdiction of courts is asymmetrically organized in the country, resulting in its being exercised in some instances by the High Courts, and in other instances by other courts, the fact that the award in question is a foreign award is no way different; the standards for review are based on the statute, which is uniformly applied

throughout the country. It could possibly be argued – though the question does not arise here, that Section 6(2) is not a bar to supervisory review based on Constitutional provisions, by High Courts, in such cases. Such review, of course would not be as wide as an appeal, and the standards for their exercise are extremely narrow and circumscribed. No final opinion however, is being expressed on the issue, as doing so would be unfair, since neither contesting party addressed any arguments on this aspect. If indeed, it is felt that such a situation is anomalous, the remedy is not to interpret Section 6 (2) on the basis of such assumed absurdity, but to leave it to be addressed appropriately by Parliament. Having regard to the previous history of the legislation, and the deliberative manner in which judicial intervention was kept to the minimum apparently to further the aims which were to be achieved by international conventions, courts should be slow in enlarging their scrutiny either in the content and merits of foreign awards, or by addition of appellate judicial fora, which inevitably would delay final determination of parties' rights, thus defeating the objective of global uniformity in international commercial arbitration.

33. As a result of the above discussion, this Court answers the reference, by holding that a letters patent appeal is not admissible, in respect of the judgment and order dated 28th January, 2000 of the learned Single judge, in Suit No. 1885/1993. The Court is in agreement with the opinion of Mudgal, J, on this aspect, which was the sole point of reference (to the third judge).

ORDER OF COURT

34. In the result, it is held that the above appeal is not maintainable; it is dismissed. In the circumstances, parties are left to bear their costs.

September 06, 2010 **(S.RAVINDRA BHAT)**

JUDGE