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DOCTRINE OF *FORUM NON CONVENIENS*: IMPACT ON RECOGNITION BY INDIAN COURTS OF ANTI SUIT INJUNCTIONS GRANTED BY FOREIGN COURTS

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Abstract: The article analyzes the impact of doctrine of forum non conveniens on the power and ability of the Indian courts in recognizing and enforcing the anti suit injunctions granted by foreign courts. The very genesis of doctrine of foreign non conveniens shows that it can be a potential exception to the rule that choice of exclusive jurisdiction results in one court having exclusive jurisdiction in disputes. Parties must be mindful of convenience of parties before determining the place of exclusive jurisdiction to avoid these issues at the time of recognition and enforcement of anti suit injunctions granted by the foreign courts. While the principles are age old, their evolution and application in cross border commercial disputes continues to be on upword journey.

1. The term *forum non conveniens* refers to discretionary power of a court to decline jurisdiction when convenience of parties and of justice would be better served if action were brought and tried in another forum.[1] Forum non conveniens (Latin for "inconvenient forum" or "inappropriate forum") has been explained by Indian courts as a discretionary power of the courts not to entertain a matter on the grounds that there exists a more appropriate court of competent jurisdiction, which would be in a better position to decide the matter, in the interest of justice and convenience of the parties. Conversely, an anti-suit injunction is granted by a court preventing the parties before it from instituting or continuing with proceedings in another court which may be a forum conveniens and could result in parties contesting their disputes in a forum non conveniens on account of their choice of jurisdiction in the contract.
2. A forum may be considered as a forum non conveniens if there is another forum which has a greater connection, a greater public interest or tighter connection with the subject matter and/or the parties. The situation to apply this doctrine would almost generally arise only when there are more than two forums having jurisdiction to adjudicate the dispute and none of them has been exclusively chosen by the contracting parties.[2]

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3. The doctrine is based on the right of the Court in the exercise of its powers to refuse to exercise its jurisdiction and relegate the matter for another forum, where action could be brought, to adjudicate the disputes keeping in mind the convenience of litigants and witnesses and in the interest of justice. The doctrine presupposes at least two forums in which the defendant is amenable to process and furnishes criteria for choice between such forums.[3] The rule is an equitable one embracing the discretionary power of a Court to decline to exercise jurisdiction which it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. The doctrine further presupposes that the parties haven't agreed to an exclusive jurisdiction of one of the Courts having jurisdiction, in which case, the application of the doctrine may result in injustice and defeat the purpose of having a contractually agreed exclusive jurisdiction.
4. While the Indian Courts have in many judgments discussed the doctrine, the roots of the doctrine can be traced in common law jurisdictions which are much older to ours. The principle of *forum non conveniens* was stated by Lord Kinnear in Sim v. Robinow[4]: thus:

> "The general rule was stated by the late Lord President in Clements v. Macaulay 4 Macph. 593, in the following terms: 'In cases in which jurisdiction is competently founded, a court has no discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which a suitor comes to ask. Judex tenetur impertiri judicium suum (a judge must exercise jurisdiction in every case in which he is seized of it) and the plea under consideration must not be stretched so as to interfere with the general principle of jurisprudence.'

5. The ratio in *Sim's*[5] case has been consistently cited in English judgments for more than a century. It was cited in the case of Lubbe (Suing As Administrator Of The Estate Of Rachel Jacoba Lubbe) and 4 Others v Cape plc and Related Appeals HL[6] where South African asbestosis victims suing in England submitted that to stay their proceedings in favour of the South African forum would violate their rights under article 6[7]. A stay was refused on the non-Convention ground that, because of the lack of funding and legal representation in South Africa, they would be denied a fair trial on terms of equality with the defendant.

> It was held by the House of Lords that Public Interest issues arising from the prosecution of the case should not prevent the court deciding whether a stay against action should be granted. The claimants' right to an action in South Africa would be ineffective, and the case would be allowed to proceed in England. Public interest issues not relating to any private law interests of the parties should not affect that question.

6. Further, the Sim's principle has been cited by the UK Supreme Court in the case of VTB Capital PLC vs. Nutritek International Corp and others[8] where the claimant bank appealed against findings that England was not clearly or distinctly the appropriate forum for resolution of VTB's tort claims.

   The Supreme Court dismissed the Appeal on point of jurisdiction by holding that permission to serve on a foreign resident should be refused unless the court felt it clear that England is the appropriate forum.

7. Therefore, it is clear that the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice. In all these cases there was one indispensable element present when the court gave effect to the plea of forum non conveniens, namely, that the court was satisfied that there was another court in which the action ought to be tried as being more convenient for all the parties, and more suitable for the ends of justice.

8. In Mayar (H.K.) Ltd v. Owners & Parties, Vessel M.V. Fortune Express[9], the Hon'ble Supreme Court of India has held that if the parties have chosen a particular forum and a particular set of laws in the world to govern them, then they are, in the large majority of ordinary cases, to be held to their bargain and not to be allowed to depart therefrom only because one party finds it convenient and, therefore, chooses to do so. The Supreme Court also quoted with approval the explanation of the ambit of the principle of forum non conveniens for issuing an order of stay as given by the House of Lords in Spiliada Maritime Corpn. V. Cansulex Ltd[10] which was to the following effect:

   "(1) The fundamental principle applicable to both the stay of English proceedings on the ground that some other forum was the appropriate forum and also the grant of leave to serve proceedings out of the jurisdiction was that the court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice....

   (2) In the case of an application for a stay of English proceedings the burden of proof lay on the defendant to show that the court should exercise its discretion to grant a stay. Moreover, the defendant was required to show not merely that England was not the natural or appropriate forum for the trial but that there was another available forum which was clearly or distinctly more appropriate than the English forum. In considering whether there was another forum which was more appropriate the court would look for that forum with which the action had the most real and substantial connection e.g. in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business. If

the court concluded that there was no other available forum which was more appropriate than the English Court it would normally refuse a stay. If, however, the court concluded that there was another forum which was prima facie more appropriate the court would normally grant a stay unless there were circumstances militating against a stay e.g. if the plaintiff would not obtain justice in the foreign jurisdiction..."

9. In a House of Lords decision in Tehrani v. Secy. of State for the Home Department[11] while discussing the doctrine of *forum non conveniens* it was observed as under: -

> "The doctrine of forum non conveniens is a good example of a reason, established by judicial authority, why a court should not exercise a jurisdiction that (in the strict sense) it possesses. Issues of forum non conveniens do not arise unless there are competing courts each of which has jurisdiction (in the strict sense) to deal with the subject matter of the dispute. It seems to me plain that if one of the two competing courts lacks jurisdiction (in the strict sense) a plea of forum non conveniens could never be a bar to the exercise by the other court of its jurisdiction."

10. Thus, the doctrine of forum non conveniens can only be invoked where the court deciding not to exercise jurisdiction, has jurisdiction to decide the case. The U.S. Supreme Court also held in Gulf Oil Corp. v. Gilbert[12] that:

> "Indeed, the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue".
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> *The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even where jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself."*

11. The Hon'ble Supreme Court of India in a recent judgment of Ahmed Abdulla Ahmed Al Ghurair vs. Star Health and Allied Insurance[13] had an occasion to analyze the maintainability of a derivative action bought by a foreign company in India. The Supreme Court relied on the doctrine of forum non conveniens as discussed in the judgment of Kusum Ingots and Alloys Ltd. vs. Union of India and Anr[14] and held that Indian Courts would not a convenient forum to decide disputes between the parties who are residing outside and the counterparty is also registered outside India and merely because one of the counterparties against whom

consequential reliefs are sought is in India, the convenience of the parties cannot be ignored and therefore the Courts in India were held to be not the right forum to adjudicate on such disputes. This is a classic case where in spite of natural jurisdiction on a part of the dispute, the doctrine of forum non conveniens came to aid of the parties outside India and the jurisdiction of the Indian Courts was taken away.

12. From the above discussion, it becomes abundantly clear that the doctrine of forum non conveniens should only be invoked where the court deciding not to exercise jurisdiction, has jurisdiction in the strict sense, but comes to the conclusion that some other court, which also has jurisdiction, would be the more convenient forum. It must also be kept in mind that the doctrine of forum non conveniens is essentially a common law doctrine originating from admiralty cases having trans-national implications. It is clear that the doctrine of forum non conveniens is only available when a Court has the jurisdiction and the respondent is able to establish the existence of another competent court. One important exception for application of this doctrine could be existence of an exclusive jurisdiction clause in the contract whereby parties have mutually chosen one forum over and to exclusion of the other available forums/courts having jurisdiction.

13. The doctrine applies when there are multiple courts which have jurisdiction to deal with the subject matter of the dispute majorly on account of part cause of action having arisen in each of such jurisdictions. As a generally understood perception, the plea of forum non conveniens can only be raised by a defendant or respondent. But, in India, there is an exception to this rule that the principle of forum non conveniens can only be invoked by a defendant. And, that is the case where a plaintiff is seeking anti-suit injunction, which is different and distinct from regular suits. But, even an anti-suit injunction cannot be granted to a plaintiff against a defendant where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, whose jurisdiction is sought to be curtailed. In exceptional circumstances such as (a) contract being void ab initio or non-enforceable; (b) which permit a contracting party to be relieved of the burden of the contract; or (2) where, after the date of the contract, subsequent events have made it impossible, for the party seeking injunction, to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist; or (3) because of a vis major or force majeure and the like, the doctrine of forum non convenience may be invoked in spite of exclusive jurisdiction clause.[15] The Court dealing with a request to apply the doctrine has to take into consideration various factors depending on the set of facts in each case and exercise its jurisdiction having regard to these aspects.

14. The doctrine of forum non conveniens is essentially a common law principle and an equitable option giving a court the discretion to not exercise a jurisdiction which it has on the ground that there exists another court which also has jurisdiction but which is more convenient to the parties and for the trial of the suit. Code of Civil Procedure while providing the procedure to determine territorial jurisdiction, does not provide for and factor in the doctrine of forum non conveniens, Courts have sporadically taken a view in equity and in the interest of justice that a particular matter is transferred to be dealt with a convenient forum. Ideally, under the Code of Civil Procedure, 1908 a court in which a suit is initiated, if only it has jurisdiction, has to proceed with the suit even if there is another court where also the suit could have been instituted. Only when there are two courts of competent jurisdiction, then, if the suit is instituted in one court, which is inconvenient to the defendant, the latter could invoke the provisions of Civil Procedure Code.[16]
15. Convenience being a relative term and capable of multiple valid interpretations, an interesting aspect could arise in a situation where a convenient forum at a given point of time becomes not convenient at another point in time and could give rise to a unique situation. Therefore, the application of the doctrine would be largely dependent on facts of each case and can vary from case to case and from time to time.
16. Having regard to the above discussions, it is important to analyze the impact of invocation of the doctrine of forum non conveniens on the recognition by the so called convenient Indian courts of anti-suit injunctions granted by either the Indian Courts or foreign Courts which are not convenient to the parties. While the interplay and application of both the doctrine to a given set of facts would have to be understood with the several other principles governing the jurisdiction, comity of courts, constitutional mandate and sovereignty etc. However, it is clear that, if the anti-suit injunction is granted by a forum which is not convenient for one of the parties, then taking up argument and application of the forum non conveniens by such party in a convenient Indian forum would become very difficult, especially given the fact that anti suit injunctions are generally granted by a court which has been conferred exclusive jurisdiction to the exclusion of all other courts including the convenient forum.

Footnotes

[1]8 BLACK'S LAW DICTIONARY, (Bryan A. Garner, ed, South Asia Publication Thomson Reuters, 2004) defines the phrase Forum Non Conveniens; Also see judgment of Johnson v. Spider Staging Corp., 87 Wash.2d 577.

[2]For detailed discussion on concept of forum non conveniens and its implications in jurisdiction agreements and anti-suit injunctions refer to Chapter 12 of 13 DICEY & MORRIS, THE CONFLICT OF LAWS 385-451 (Lawrence Collins ed., Sweet

and Maxwell Limited, 2000)

[3]Wilson v. Seas Shipping Co., D.C.N.Y., 77 F.Supp. 423,424. Also see Hayes v. Chicago, R.I. & P. R. Co., D.C. Minn., 79 F. Supp. 821, 824.

[4](1892) 19 K. 665.

[5]Supra at footnote 3.

[6][2000] UKHL 41, [2000] 4 All ER 268, [2000] 1 WLR 1545.

[7]Article 6 of the European Convention on Human Rights.

[8][2013] UKSC 5.

[9](2006) 3 SCC 100.

[10](1986) All ER 843.

[11][2006] UKHL 47.

[12] 330 U.S. 501. Also see article by Allan R. Stein " Forum Non Conveniens and the redundancy of court access doctrine" THE PENNSYLVANIA LAW REVIEW (Dec. 25, 2018, 11.58 AM), https://www.pennlawreview.com/.

[13]Judgment dated Nov. 26, 2018 of Justice A. K. Sikri in Civil Appeal Nos. 9786-9799 of 2018 of the Supreme Court of India.

[14](2004) 6 SCC 254.

[15]Please see Modi Entertainment Network and Another v. W.S.G. Cricket PTE Ltd : (2003) 4 SCC 341, 360).

[16]Sections 24 and 25 of CPC.