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Sri Lanka Cricket (formerly known as Board of Control for Cricket in Sri Lanka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd)

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–04–964 OF 2004
GOPAL SRI RAM, HASHIM YUSOFF AND AZMEL JJCA
14 MARCH 2006

C

Arbitration — Award — Foreign award — No Gazette Notification declaring Singapore as party to the Convention — Whether Singapore award could be enforced in Malaysia — Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 s 2(2)

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The arbitration between the plaintiff (respondent) and defendant (appellant) was conducted, and the award made, in Singapore. The plaintiff sought to enforce the
E award in Malaysia. The defendant resisted. The judge held for the plaintiff. Hence this appeal. Both parties referred to s 2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('the Act') which provided that the Yang di-Pertuan Agong may by order in the Gazette, declare any State specified in the order is a party to the Convention and the order, shall be conclusive evidence that the State is a party to the Convention. Learned counsel for the defendant submitted that
F the learned judge lacked jurisdiction to permit enforcement as there was no Gazette Notification declaring that Singapore was a party to the Convention. In the absence of such a Notification, no question of enforcement arose. Counsel for the plaintiff however submitted that: (1) s 2(2) was merely permissive or directory and not mandatory; (2) s 2(2) was merely evidential in nature; and (3) the Act should be read
G purposively so as to promote the intention of Parliament to permit the enforcement of foreign arbitral awards in a summary fashion.

Held, allowing the appeal:

H

(1) The word 'may' when read in the context of s 2 and indeed the whole Act means 'must'. If His Majesty (in effect the Federal Cabinet) wishes to extend the benefit of the summary method of enforcement provided for by s 3(1) to a particular award then it is logical that he must by Gazette Notification declare the country in which that award was made to be a party to the Convention.
I If His Majesty elects not to do so, then that benefit is not available to the party seeking enforcement (see para 7).

(2) If the Act was not in force, the plaintiff would have had to sue on the award in an action at common law. Or it would have to register the award as a judgment in the Singapore court and then seek to register and enforce that judgment under the Reciprocal Enforcement of Judgments Act 1958. The right to enforce a Convention award pursuant to s 4(1) of the Act is therefore a benefit that the plaintiff would not but for the Act have. Hence, the requirement of Gazetting a country as a party to the Convention must have been intended by Parliament to be mandatory in effect (see para 10).

(3) Once it is determined that the s 2(2) is mandatory in nature, the s 2(2) argument that it was evidential fell to the ground. What the subsection does is to require His Majesty to Gazette a country as a party to the Convention and once that is done, no further proof of that fact is necessary. All that one has to do is to produce the Gazette and thereafter no evidence shall be admitted to contradict the contents of the Gazette. That is the effect of the conclusive evidence limb of s 2(2) (see para 11).

(4) The purpose of the Act is to give effect to the New York Convention subject to certain reservations. One of the steps that Parliament intended that the Executive should take to give the Act efficacy is to issue a Gazette Notification declaring one or more countries as a party or as parties to the Convention. That is the intention to which this court now are giving effect (see para 12).

(5) The plaintiff was not left remediless. There was nothing to prevent the plaintiff from having the award registered as a judgment in the Singapore High Court and then to seek registration of that judgment in this country pursuant to the Reciprocal Enforcement of Judgments Act 1958 (see para 13).

[Bahasa Malaysia summary

Penimbangtaraan antara plaintif (responden) dan defendan (perayu) telah dilaksanakan, dan award telah dibuat, di Singapura. Plaintif memohon untuk menguatkuasakan award tersebut di Malaysia. Defendan menentang. Hakim memutuskan bagi pihak plaintif. Justeru itu rayuan ini dibuat. Kedua-dua pihak merujuk kepada s 2(2) Akta Konvensyen Mengenai Pengiktirafan dan Penguatkuasaan Award Timbangtara Asing 1985 ('Akta tersebut') yang memperuntukkan bahawa Yang di-Pertuan Agong boleh melalui perintah dalam Warta, mengisytiharkan mana-mana Negera ditetapkan dalam perintah itu adalah pihak kepada Konvensyen itu dan perintah tersebut, hendaklah menjadi keterangan konklusif bahawa Negara itu adalah pihak kepada Konvensyen tersebut. Peguam yang bijaksana bagi pihak defendan berhujah bahawa hakim yang bijaksana tidak mempunyai bidang kuasa untuk membenarkan penguatkuasaan itu kerana tiada Pemberitahuan Warta mengisytiharkan Singapura sebagai satu pihak kepada Konvensyen tersebut. Dengan ketiadaan Pemberitahuan, persoalan penguatkuasaan tidak timbul. Peguam bagi pihak plaintif bagaimanapun berhujah bahawa: (1) s 2(2) hanya bersifat permisif atau berpanduan dan bukan mandatori; (2) s 2(2) hanya bersifat keterangan; dan (3) Akta tersebut hendaklah dibaca secara mengikut

tujuannya demi menyampaikan niat Parlimen untuk membenarkan penguatkuasaan award timbang tara asing dalam cara yang ringkas.

Diputuskan, membenarkan rayuan:

(1) Perkataan 'may' apabila dibaca dalam konteks s 2 dan sememangnya keseluruhan Akta tersebut bermaksud 'must'. Jika Yang di-Pertuan Agong (pada hakikatnya Kabinet Persekutuan) berhasrat menganjurkan manfaat cara ringkas penguatkuasaan yang diperuntukkan oleh s 3(1) terhadap suatu award maka adalah logik melalui Pemberitahuan Warta itu beliau hendaklah mengisytiharkan negara di mana award tersebut dibuat itu sebagai satu pihak kepada Konvensyen tersebut. Yang di-Pertuan Agong memilih untuk tidak berbuat demikian, maka manfaat itu tiada untuk pihak yang memohon penguatkuasaan itu (lihat perenggan 7).

(2) Jika Akta tersebut tidak dikuatkuasakan, plaintif akan menyaman atas award dalam satu tindakan dalam common law. Atau ia hendaklah mendaftar award itu sebagai satu penghakiman di mahkamah Singapura dan kemudian memohon untuk mendaftar dan menguatkuasakan penghakiman itu di bawah Akta Penguatkuasa Salingan Hukuman 1958. Hak untuk menguatkuasakan satu award Konvensyen menurut s 4(1) Akta tersebut adalah satu manfaat yang plaintif jika bukan kerana Akta tersebut dapat peroleh. Justeru itu, keperluan mewartakan satu negara sebagai satu pihak kepada Konvensyen tersebut adalah suatu yang memang diniatkan oleh Parlimen sebagai mandatori (lihat perenggan 10).

(3) Setelah ditentukan bahawa s 2(2) adalah bersifat mandatori, hujah tentang s 2(2) bahawa ia bersifat keterangan tidak boleh dilaksanakan. Apa yang subseksyen itu nyatakan adalah menghendaki Yang di-Pertuan Agong untuk mewartakan satu negara sebagai satu pihak kepada Konvensyen tersebut dan setelah itu dilaksanakan, tiada bukti lanjut tentang fakta itu diperlukan. Apa yang perlu dilakukan adalah untuk mengemukakan Warta itu dan setelah itu tiada keterangan perlu dikemukakan untuk menyangkal kandungan Warta tersebut. Itulah adalah kesan keterangan konklusif cabang s 2(2) (lihat perenggan 11).

(4) Tujuan Akta tersebut adalah untuk melaksanakan Konvensyen New York tertakluk kepada beberapa reservasi. Salah satu langkah yang Parlimen niatkan adalah badan Eksekutif hendaklah menunjukkan keberkesanan Akta tersebut dengan mengeluarkan Pemberitahuan Warta mengisytiharkan satu atau lebih daripada satu negara sebagai satu satu pihak atau pihak-pihak kepada Konvensyen tersebut. Itulah niat yang mahkamah sekarang laksanakan (lihat perenggan 12).

(5) Plaintif tidak dibiarkan tanpa remedi. Tiada apa yang menghalang plaintif mendaftarkan award di Mahkamah TInggi Singapura dan kemudian memohon pendaftaran penghakiman tersebut di negara ini menurut Akta Penguatkuasa Salingan Hukuman 1958 (lihat perenggan 13).]

Notes

For cases on foreign award, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1332–1334.

Cases referred to

Kali Pada Chowdhury v Union of India AIR 1963 SC 134 (refd)
Kuwait Minister of Public Works v Sir Frederick Snow [1984] 1 AC 426 (refd)
Pepper v Hart [1993] 1 All ER 42 (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50 (refd)
Warren, Re (1870) 4 SALR 25 (refd)

Legislation referred to

Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ss 2(2), 3(1), 4(1)
Federal Constitution art 40(1)
Interpretation Acts 1948 and 1967 s 17A
Reciprocal Enforcement of Judgments Act 1958

Appeal from: Originating Summons No R2–24–33 of 2004 (High Court, Kuala Lumpur)

Dato' Dr CV Das (Shamsul Manap and Lam Ko Luen with him) (Shook Lin & Bok) for the appellant.
Tommy Thomas (Rueben Mathiavaraman and John Skelchy with him) (Zaid Ibrahim & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] Twenty-one years ago, Parliament enacted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('the Act'). It was to give effect to what has come to be known as the New York Convention and which came into being in 1958. It was adopted by Malaysia but with some reservations which you will find written into the Act. Section 2 of the Act is important. In its first subsection it defines certain terms. One of these has immediate relevance to this appeal. It is the definition of 'Convention award' which is as follows:

> Convention award' means an award on differences between persons arising out of a defined legal relationship, whether contractual or not, considered as commercial under the law in force in Malaysia made —
>
> (a) in pursuance of an arbitration agreement to which the New York Convention applies; and
>
> (b) in pursuance of an arbitration agreement in the territory of a State other than Malaysia, which is a party to the New York Convention.

[2] Section 2(2) provides as follows:

> The Yang di-Pertuan Agong may, by order in the *Gazette*, declare that any State specified in the order is a party to the New York Convention, and that order shall, while in force, be conclusive evidence that that State is a party to the said Convention.

[3] The next provision relevant to the present case is s 3(1) of the Act which reads:

> 3(1) A Convention award shall, subject to the following provisions of this Act, be enforceable in Malaysia either by action or in the same manner as the award of an arbitration is enforceable by virtue of s 27 of the Arbitration Act 1952.

[4] It is common ground that the award in the present case and that it relates to a dispute that is commercial in nature. More importantly, it is common ground that there is no Gazette Notification as mentioned in s 2(2). The issue here is whether that prevents the enforcement of the award made in the present instance. Now, this is a case in which the arbitration was conducted, and the award made, in Singapore. The plaintiff (respondent before us) sought to enforce that award in Malaysia. The defendant (appellant before us) resisted. The judge held for the plaintiff. Hence this appeal.

[5] At the outset of his argument learned counsel for the defendant submitted that the learned judge lacked jurisdiction to permit enforcement as there was no Gazette Notification declaring that Singapore is a party to the Convention. In the absence of such a Notification no question of enforcement arises. In support of his argument learned counsel referred us to *Kuwait Minister of Public Works v Sir Frederick Snow* [1984] 1 AC 426 where Lord Brandon in his speech, after referring to the *in pari materia* provision in the parallel UK statute said this:

> My Lords, while I am content to decide the question raised by this appeal solely on what I consider to be the correct meaning of the expression 'Convention award' as defined in s 7(1) of the 1975 Act, it appears to me that that construction gains added support from the terms of s 7(2), which I also set out in full at an earlier stage. That subsection contemplates that the normal way in which a party, who seeks to enforce a foreign arbitral award under the 1975 Act, will prove that the state in which the award was made is a party to the convention is by producing an Order in Council of the kind there authorised. *It is clear from the wording of s 7(2) that the only matter which an Order in Council made under it can declare is that one or more foreign states specified in the order are, as at the date of the order, a party to the convention.* If the phrase 'which is a party to the New York Convention', as used in the definition of the expression 'Convention award' contained in s 7(1) of the 1975 Act, were to be construed in the way contended for by the appellants, one would expect that s 7(2) would authorise Orders in Council which not only declared that one or more foreign states were parties to the convention, but also stated the dates on which they became such parties.
>
> (Emphasis added.)

[6] From the general speech made by Mr Thomas of counsel for the plaintiff, we were able to discern three submissions on the way in which, he says, section 2(2) is to be interpreted. First, the section is merely permissive or directory and not

mandatory, because it uses the expression 'may' in the phrase, 'The Yang di-Pertuan Agong may, by order in the *Gazette*, declare …' Therefore it does not matter that there is no Gazette Notification. His second submission is that s 2(2) is merely evidential in nature. In other words, once there is a Gazette Notification then that Notification may be produced as conclusive evidence that the country concerned is a party to the Convention. Since it is merely a question of proof, it is open to his client to produce any other acceptable evidence to prove that the country in which the award was made is a party to the Convention. This method of proof includes producing secondary evidence through publications available on the internet. His third and more general submission is that the Act should be read purposively so as to promote the intention of Parliament to permit the enforcement of foreign arbitral awards in a summary fashion.

[7] With respect, these submissions of Mr Thomas are devoid of any merit and are contrary to common sense. In the first place, the word 'may' when read in the context of s 2 and indeed the whole Act means 'must'. If His Majesty (in effect the Federal Cabinet by virtue of art 40(1) of the Federal Constitution, see *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50) wishes to extend the benefit of the summary method of enforcement provided for by s 3(1) to a particular award then it is logical that he *must* by Gazette Notification declare the country in which that award was made to be a party to the Convention. If His Majesty elects not to do so, then that benefit is not available to the party seeking enforcement.

[8] That the context in which a word appears is of primary importance was emphasised in *Kali Pada Chowdhury v Union of India* AIR 1963 SC 134. Gajendragadkar J (delivering judgment for himself, Sinha CJ, Wanchoo and Shah JJ) said:

> Whether or not the word 'may' means 'may' or it means 'shall' would inevitably depend upon the context in which the said word occurs...

[9] Further, it is a salutary guide to construction that —

> When certain requirements are prescribed by a statute as preliminary to the acquisition of a right or benefit conferred by the statute, such prescriptions are mandatory for the acquisition of the right or benefit. See GP Singh's *Principles of Statutory Interpretation* (9th Ed).

[10] Now, apply that here. If the Act was not there, the plaintiff would have had to sue on the award in an action at common law. Or it would have to register the award as a judgment in the Singapore court and then seek to register and enforce that judgment under the Reciprocal Enforcement of Judgments Act 1958. The right to enforce a Convention award pursuant to s 4(1) of the Act is therefore a benefit that the plaintiff would not but for the Act have. Hence, the requirement of Gazetting a country as a party to the Convention must have been intended by Parliament to be mandatory in effect.

[11] In the second place, for the reasons already given, once it is determined that the s 2(2) is mandatory in nature, the s 2(2) argument that it is evidential falls to the ground. What the subsection does is to require His Majesty to Gazette a country as a party to the Convention and once that is done, no further proof of that fact is necessary. All that one has to do is to produce the Gazette and thereafter no evidence shall be admitted to contradict the contents of the Gazette. That is the effect of the conclusive evidence limb of s 2(2) (see *Re Warren* (1870) 4 SALR 25).

[12] In the third place, while we agree that the modern approach to interpretation of written law is examine the purpose of the particular statute (see *Pepper v Hart* [1993] 1 All ER 42, at p 50 per Lord Griffiths; s 17A of the Interpretation Acts 1948 and 1967) we are unable to see how that is of any assistance to the plaintiff. In our judgment, the purpose of the Act is to give effect to the New York Convention *subject to certain reservations*. One of the steps that Parliament intended that the Executive should take to give the Act efficacy is to issue a Gazette Notification declaring one or more countries as a party or as parties to the Convention. That is the intention to which we are now giving effect. It may be that the Executive has not acted for all these years on grounds of comity and reciprocity. Or perhaps it is an oversight. For we notice that although Malaysia has not issued a Gazette Notification pursuant to s 2(2), Singapore has in 1985 included Malaysia in its Gazette as a Convention party. In our judgment, the time has come for the Attorney General's Chambers to look into this matter.

[13] As a last ditch effort, counsel for the plaintiff said that his client will be left remediless. That, we think, is quite wrong. There is nothing to prevent the plaintiff from having the award registered as a judgment in the Singapore High Court and then to seek registration of that judgment in this country pursuant to the Reciprocal Enforcement of Judgments Act 1958.

[14] For the reasons already given, we allowed the appeal, set aside the judgment of the learned judge and made those orders usually consequent upon success.

Appeal allowed.

Reported by Loo Lai Mee