

# Cross-Border Litigation and Comity of Courts: A Landmark Judgment from the Delhi High Court

Written by Tarasha Gupta, student, Jindal Global Law School, Sonipat (India) and Saloni Khanderia, Professor, Jindal Global Law School

In its recent judgment in *Shiju Jacob Varghese v. Tower Vision Limited*,<sup>[1]</sup> the Delhi High Court (“HC”) held that an appeal before an Indian civil court was infructuous due to a consent order passed by the Tel Aviv District Court in a matter arising out of the same cause of action. The Court deemed the suit before Indian courts an attempt to re-litigate the same cause of action, thus an abuse of process violative of the principle of comity of courts.

In doing so, the Court appears to have clarified confusions arising in light of the explanation to Section 10 of the Civil Procedure Code, 1908 (“CPC”), on one side, and parties’ right to choice of court agreements and *forum non conveniens* on the other. The result is that, as per the Delhi HC, Indian courts now ought to stay proceedings before them if the same cause of action has already been litigated before foreign courts.

## **The Indian Position on Concurrent Proceedings in Foreign and Domestic Courts**

In the European Union, Article 33 of the Brussels Recast gives European courts the power to stay proceedings if concurrent proceedings based on the same cause of action are pending before a foreign court. The European court may exercise this right if the foreign court will give a judgment capable of recognition, and such a stay is necessary for the proper administration of justice. By contrast, in India, the Explanation to Section 10 of the CPC provides that the pendency of a suit in a foreign Court does not preclude Indian courts from trying a suit founded

on the same cause of action.

The Indian Supreme Court in *Modi Entertainment v. WSG Cricket*[2] upheld parties' right to oust the jurisdiction of Indian courts in favour of a foreign forum through choice of court agreements. Where parties have agreed to approach a foreign forum by a non-exclusive jurisdiction clause, they would have considered convenience and other relevant factors. Therefore an anti-suit injunction cannot be granted.

Notwithstanding this judgment, however, when it came to situations where parties did not confer jurisdiction upon a foreign court through a choice of court agreement, the explanation to Section 10 of the CPC would still apply. Therefore, a party could initiate proceedings before both foreign and domestic courts on the same cause of action, resulting in the possibility of conflicting judgements and creating a nightmare for their enforcement. It would also increase the costs of resolving any dispute, as multiple litigation proceedings may occur simultaneously.

Courts in India tried to mitigate the impacts that could arise from these conflicting judgements through the doctrine of '*forum non conveniens*'. The doctrine permits courts to stay proceedings on the ground that another forum would be more appropriate or convenient to adjudicate the matter. There are no fixed criteria in considering whether to invoke the doctrine. However, courts may consider, *inter alia*, the existence of a more appropriate forum, the expenses involved, the law governing the transaction, the plausibility of multiple proceedings and conflicting judgements.

The doctrine of *forum non conveniens*, however, is only a discretionary power and can only be invoked if the defendant is able to prove that the current proceedings would be vexatious or oppressive to them and the foreign forum is "clearly or distinctly more appropriate than the Indian courts" (clarified by the Indian Supreme Court in *Mayar (HK) Ltd. v. Owners and Parties, Vessels MV Fortune Ltd.*[3]). Thus, it would not be mandatory in every situation for an Indian court to stay a suit pending before it, even if proceedings on the same cause of action are pending or completed in a foreign court.

## **Dismissal of the Appeal before Indian courts in *Shiju Jacob***

The dispute concerned a Share Entitlement executed in favour of the present Appellant, based on which the Appellant had filed a civil suit before the Tel Aviv District Court. More than two years later, they filed a suit for interim relief that was partially allowed by the Tel Aviv District Court but set aside by the Supreme Court of Israel. After that, the Appellant filed a suit before the Indian court, which was dismissed as a re-litigation and violative of the principle of comity. Consent terms were then filed in the Tel Aviv suit, and the suit was disposed of as settled. Shortly after that, the appellant moved an application to rescind the order to dispose of the suit, which the Tel Aviv District Court dismissed.

The Respondents now claimed, before the Indian court, that the appeal against the previous order by the Indian court was infructuous in view of the consent order passed by the Tel Aviv District Court. The Appellants, on the other hand, argued that the explanation to Section 10 of the CPC allowed them to file a suit in India, even if it was on the same cause of action as the suit before the Israeli courts.

The Delhi High Court held that allowing the appeal to continue would violate the principle of comity of courts, as it could result in conflicting decisions between the Israeli and Indian courts. It would also constitute re-litigation, which, although may not in every case be barred as *res judicata*, depending on the facts and circumstances, could be an 'abuse of process'. The concept of 'abuse of process' is thus more comprehensive than the concept of *res judicata* or issue estoppel. The Court therefore held that a suit or appeal must be struck down as an abuse of process even if the party is not bound by *res judicata* if it is shown that the new proceeding is manifestly unfair or would bring the administration of justice into disrepute.

## **Implications of the Judgment**

The judgment thus provides that Indian courts must dismiss suits which have already been litigated before foreign courts. This is a welcome change, considering that the explanation to Section 10 of the CPC allows such proceedings to occur at the same time.

However, given that this is a High Court judgement, it will not be binding on Courts outside of Delhi and would simply have persuasive value. This difficulty is

compounded by the fact that as per the facts of *Shiju Jacob*, the suit had been dismissed by the Tel Aviv District Court by the time the appeal was heard. Thus, it is unclear whether Indian courts will be able to follow the same approach where proceedings in the foreign court haven't been completed yet. In fact, the HC had observed that the effect of the explanation to Section 10 of the CPC did not even arise for consideration in the present case, as the settlement in question was not being executed or enforced in the proceedings before the Indian Court.

That said, the judgment of the Single Judge (which was being challenged in the present appeal) dismissed the suit even before the consent terms were passed because it was violative of the principle of comity of courts and amounted to re-litigation. The judgment signals that the Delhi HC intended for courts to apply the same principle where proceedings on the same cause of action are ongoing in a foreign court.

Ultimately, however, it is unfortunate that this intervention had to come from the judiciary and not the legislature. India still does not have comprehensive legislation governing transnational disputes, and its position on private international law has been gauged by extending domestic rules by analogy. In the absence of legislation, uncertainty continues to reign as parties must piece together the position of law from hundreds of judgements. Regardless, the judgment in *Shiju Jacob* is an encouraging precedent for improving the finality of transnational litigation in India and ending the difficulties created by the explanation to Section 10 of the CPC.

[1] 2023 SCC OnLine Del 6630.

[2] (2003) 4 SCC 341.

[3] AIR [2006] SC 1828.