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X-Press Pearl, a Lesson in Disaster

On May 28, 2021, an ill-fated container vessel "X-Press Pearl", burned and sank off Colombo, and she could have been saved if the Nitric acid leak that was detected on the one of the Containers, loaded on board had been fixed before the Vessel commenced its sail.

As per reports, the vessel was on its way from UAE via Qatar, India and Sri Lanka en route to Singapore and had reported a nitric acid leak before reaching Sri Lanka on May 19 and on May 20, the fire erupted when the ship was anchored about 9.5 nautical miles (18 kilometers) northwest of Colombo,

waiting to enter the port. The investigating authorities believe that the blaze was caused by the vessel's chemical cargo, which was loaded on the Vessel at the Jebel Ali Port, UAE

As per reports the vessel, "X-Press Pearl" was carrying just under 1,500 containers, out of which 81 of those containers described as "dangerous" goods, had 25 tons of nitric acid and caustic soda, methanol and other chemicals. The nitric acid was stored in 36 international bulk containers on the outside deck and the leak is believed to have originated

in these containers because of poor quality packaging, one of the top reasons for fires on board ships.

The ship's crew had detected the leak after it left Jebel Ali in Dubai where it had loaded cargo and was en-route to Port of Hamad in Qatar and then to the Port of Hazira India. The leak was not fixed either in Qatar or in India allegedly due to the lack of adequate number of required manpower or equipment to discharge the containers with dangerous goods. After reaching the next port of call at Colombo, the vessel caught fire.

As per latest update from owners, ships aft portion



"A door is much smaller compared to the house; A lock is much smaller compared to the door and a Key is the smallest of all; but the Key can open the entire house.
Thus a small, thoughtful solution can solve major problems".

-DR. A. P. J. ABDUL KALAM



remains grounded on the seabed at a depth of about 21 meters and the owners have now declared the vessel as a total loss and consequently the Insurers will face hull and machinery, cargo and liability claims, although there is still much uncertainty about the total size of the loss.

Moreover, the environmentalists have warned that there's the potential for "a terrible environmental disaster" as hazardous goods, plastics, chemicals and oil could be released into the water and destroy marine ecological systems. Further, as Nitric Acid is also toxic when it burns, there is a fear of air pollution as well. As per the Experts since the wastes, toxins, plastics or chemicals do not follow the geographic boundaries as they will be carried by wind, waves, currents etc, the problem is by no means limited to the immediate area around the shipwreck on Sri Lanka's Western Coast but is

dreaded to affect the neighboring coastal areas as well, in due course.

The Sri Lanka Ports Authority, together with the navy have managed to recover the ship's voyage data recorder, or VDR, commonly known as the black box, which contains vital information related to the operation of the vessel and would be handed over to local law enforcement agencies investigating the incident. Further the Sri Lankan police are investigating the crew and a court in Colombo has imposed a travel ban to the captain, the engineer and the assistant engineer of the Vessel, from leaving the country. The government of Sri Lanka has said it will take legal action against the owners of the ship to claim compensation.

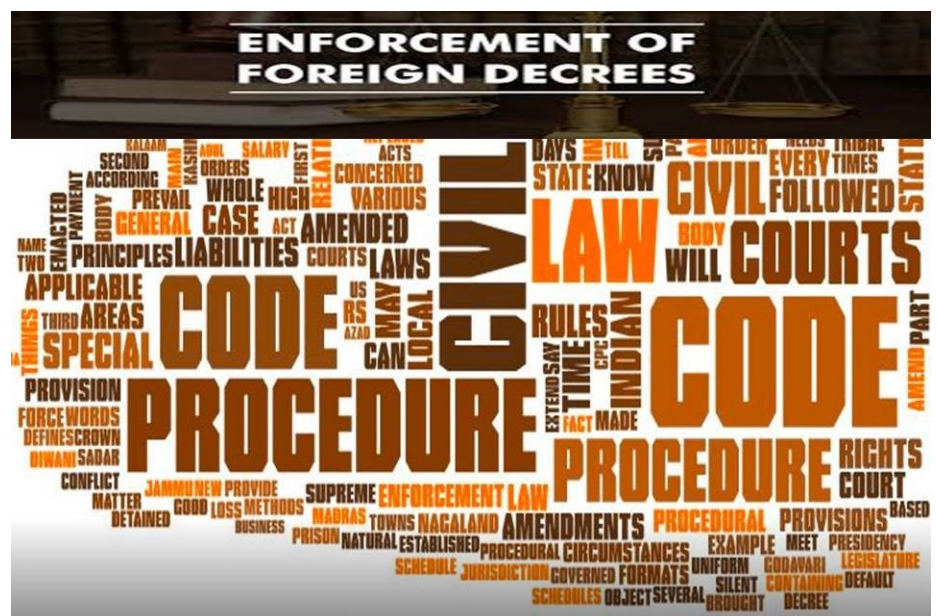
The question on whether this incident was an accident or negligence can be ascertained only after the completion of the investigation; however the important lesson to be

learnt here is never to take any leak or spillage lightly, specially a leak from vessel carrying the dangerous/hazardous goods as cargo, since as prevalent commercial practice most of the Carriers depend on the declaration of the Shipper, that they pack, load and seal the containers correctly, they tend to accept the containers as such from the Shippers without any further examination of the Consignments which at times might not be packed according to the International Rules/Regulations thereby resulting in such huge disasters. The "Xpress Pearl" incident shall be used to create an awareness among the Carriers as well as all the Parties involved in the business and the Authorities by strictly implementing Rules and Regulations, so that another such incident can be prevented or well-handled, if at all occurred.

KERALA HIGH COURT PAVES WAY FOR FASTER EXECUTION OF DECREES PASSED BY COURTS IN THE UAE IN INDIA

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It is a settled principle of law that a Judgement delivered in one country is neither directly binding nor enforceable in another country in the absence of an International Arrangement between the Countries. In India, Section 44A of the Civil Procedure Code envisages for such an International Arrangement between India and a Reciprocating Territory. The term Reciprocating Territory has been defined under Explanation 1 to Section 44A as any Country/Territory outside India, which the Central Government of India may, by notification in the Official Gazette, declare to be a Reciprocating Territory. Section 44A provided that any decree passed by a Superior Court in a



Reciprocating Territory is executable in India by filing a certified copy of the decree in a District Court, which would treat the decree in the same manner as if it had been passed by the District Court of India itself. However, the scope of this Section is limited to decrees involving payment of money.

India and the UAE entered into an Agreement on 25th October 1999 according to which both Countries were to extend Judicial Cooperation in Civil and Commercial Matters. This agreement included provisions w.r.t Cooperation in Execution of Judgements as well. However, it was only on 17th January 2020 that the Central Government declared, the UAE to be a reciprocating territory under Section 44A and declared the following Courts in the UAE to be Superior Courts of that territory, namely:

Federal Courts: (a) Federal Supreme Court and (b) Federal, First Instance and Appeals Courts in the Emirates of Abu Dhabi, Sharjah, Ajman, Umm Al Quwain and Fujairah.

Local Courts: (a) Abu Dhabi Judicial Department; (b) Dubai Courts; (c) Ras Al Khaimah Judicial Department; (d) Courts of Abu Dhabi Global Markets and (e) DIFC Courts.

However, instead of ironing the creases and paving way for smoother execution of decrees, this declaration sparked controversy leading to multiple Judicial Interpretations w.r.t the International Agreement between the two countries and the power of Central Government to issue Notifications with Retrospective Effect under Section 44A.

This issue initially arose in the case of Manoj Moolekkudi Subramanian v. Rajesh Palliparambil Ravi. A decree for the realisation of money was passed by the Preliminary Court at Dubai and was confirmed by the Supreme Court at Dubai on Second

Appeal in 2015. An application for execution of the decree was filed in the District Court of Ernakulam under Section 44A of CPC in 2018. During the pendency of this suit, the Central Government declared the UAE to be a Reciprocating Territory under Section 44A of CPC. Thereafter, in March 2020 the issue of Maintainability of the Execution Petition was heard by the Court and it was held that the decree is executable based on the Agreement dated 25-10-1999 between India and the UAE which contained provisions for the execution of decrees for both countries and thus making the UAE a Reciprocating Territory under Section 44A of the CPC. The legality and propriety of the said order was challenged before a Single Judge Bench at the Hon'ble High Court of Kerala.

The Hon'ble Court divided the case into two broad issues i.e., (1) Whether the existence of a Reciprocating Agreement between the UAE and India is sufficient to attract Section 44A of CPC and (2) Whether the Notification of the Central Government declaring the UAE as a Reciprocating Territory has Retrospective Effect.

While deciding on the First Issue, the Hon'ble Court followed the observations laid down by the Supreme Court in *MV Al Quamar v. Tsaviris Salvage International Ltd* and held that A decree-holder who seeks execution under Section 44A of the Code must be armed with a money decree passed by any of the superior courts of any reciprocating territory, being any foreign country or territory which the Central Government, by notification in the Official Gazette, has declared to be a reciprocating territory for the purpose of the section. Further, Explanation 1 to Section 44A does not contemplate an agreement between 2 countries or its publication. It contemplates the declaration of a territory as a

Reciprocating territory by the Central Government through a notification published in the Official Gazette. Thus, the agreement which was entered by the Republic of India with the United Arab Emirates cannot be substituted in the place of a notification as mandated under Section 44A CPC.

While dealing with the Second Issue of Retrospective aspect of the Notification, the Hon'ble Court observed that the Central Government or the State Government (or any other authority), without the authorization under the Parent Statute, expressly or by necessary implication, cannot enact a subordinate legislation having retrospective effect. In case of a notification, retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication. Explanation 1 to Section 44A does not indicate legislative intent for authorizing the CG to issue a Notification with retrospective effect. Section 44A appears procedural in its character but it affects the vested rights of a litigant i.e., the right of executing and enforcing a foreign decree passed by a Reciprocating Country in India and therefore is to be construed as prospective. Thus, the notification dated 17-01-2020 issued by the Central Government, declaring the UAE as a reciprocating territory for the purposes of Section 44A of CPC, is prospective in operation and has no retrospective effect.

In less than 6 months, this issue was knocking on the doors of the Hon'ble High Court of Kerala once again in the case of *Kadheeja Kalladi Puthanpurayil v. Nazia Mohammed Nazir*. Herein, a decree was obtained by the Petitioners from a Court in the UAE in 2018. An execution petition filed before the Family Court at Thrissur was dismissed based on the precedent set in the case of *Manoj Subramanian*. However, the

Division Bench of the Hon'ble Court overruled the Judgement passed in the case of Manoj Subramanyan.

The Hon'ble Court while discussing the issue that whether the existence of a Reciprocating Agreement between the UAE and India sufficient to attract Section 44A of CPC observed that the notification issued by the Central Government dated 17.01.2020 is a declaratory notification. It is the settled principle of law that the declaratory statute or notification would operate retrospectively unless the contrary is expressed in the statute or notification. A Declaration always needs to be construed with reference to something in existence. That being so, it must be related to the agreement. Thus, the decree of the UAE court covered by notification issued on or after 25.10.1999 can be executed in Indian Courts.

The key distinction in both cases is the treatment of the Notification as a regular statute in the first case and as a declaratory statute in the second. To understand the essence of these Judgements, one must understand the meaning of a Declaratory Statute. For modern purposes, a Declaratory Act is defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. It does not create any new rights or obligations but merely declares and clarifies the real intention of the legislature in connection with an earlier existing transaction or enactment. The use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law.

While looking at the power to enact Retrospective Statutes, the principles governing the same must be kept in mind. Any statute which affects substantive rights and a statute that not only changes the procedure but also creates new rights and liabilities

is construed to be prospective in operation unless otherwise provided, either expressly or by necessary implication. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair any existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of the Supreme Court, as well as English courts, is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospectively.

Article 2 of the Bilateral Agreement indicates that any request for legal assistance under the Agreement can only be made by the Central Authorities of the Contracting Parties i.e., the Ministry of Law, Justice and Company Affairs for India and the Ministry of Justice for the UAE. Further Article 22 states that it is the responsibility of the Central Authority of the Requesting Contracting Party to submit specific documents for Execution of Decree including an official copy of the decree, a certificate as to the finality of decree etc. The Agreement does not recognise the rights of individuals of a Contracting State to directly seek legal assistance from Courts in the other Contracting State for the execution of Decrees or other legal issues. The Declaration made under Section 44A specifically creates a right in favour of individuals, giving them the power to seek execution of decrees in India if it has been passed by a Superior Court in the Reciprocating Territory i.e., the UAE. But a declaratory statute is limited to

the removal of doubt in a legislature or clarifies the real intention of the legislature. It cannot create a new right. The words "Declares that" used in the Notification only indicate the introduction of new rules of law. In the absence of clear words indicating that the Notification is declaratory, and the Bilateral Agreement being clear and unambiguous, the Notification made under Section 44A cannot be interpreted as a Declaratory Statute.

Further, no power has been vested by the Legislature to the Central Government under Section 44A for giving retrospective effect to Notifications made thereunder. In the absence of such authorisation under the parent Act, the Notification cannot be treated to have Retrospective Application. The Supreme Court of India has time and again reiterated that where the parent statute prescribes the mode of publication or promulgation, the mode specified has to be followed. Such a requirement is imperative and cannot be dispensed with. The requirement under Section 44A is for a Notification to be published in the Official Gazette by the Central Government, and thus, only on such declaration of the Central Government can a Territory be recognised as a Reciprocating Territory under the Act and no Bilateral Agreement between two countries can replace this mandate.

To conclude, although the decision of the Single Judge Bench has been overruled by the Division Bench, there is a lot of grey area in the set Precedent. That being so, the decision will be welcomed by parties who can now directly execute any decree obtained from a Superior Court in the UAE in Indian Courts, thereby dissuading them from the practice of filing fresh suits in Indian Courts for obtaining a decree. Only time will tell whether this judgement is a step in the right direction or is it a stepping stone for future litigations.



THE PERSONAL DATA PROTECTION LAW: BAHRAIN AUTHORITY TO AMEND CERTAIN PROVISIONS



The Personal Data Protection Law (Law No. 30 of 2018) applies to the processing of data that is “Personal”, in any form concerning an identified or identifiable individual. The Act applies to (i) Every natural person (individuals) residing in or having workplace in Bahrain; (ii) Every legal person (Corporates) having place of business in Bahrain; (iii) Every natural or legal person not normally residing or having a business in Bahrain, where such persons are processing data using means available in Bahrain, except where such processing means are solely for the purpose of passing data through Bahrain. The proposed new amendments mentions the (1) the different circumstances where

the consent of the Data Subject will be required prior to processing personal data, conditions for valid consent and procedure to withdraw such consent; (2) the eligibility of criteria and the registration procedures of Data Protection Guardian who shall be appointed by the Data Controller to act as impartial intermediary between the Data Controller and the Authority; and (3) the obligation of Data Controller to adopt and implement procedures to ensure the security of personal data. In short, the newly proposed draft of amendment sets out the provisions to be followed by the Data Controllers and the Government has allowed time till end of June 2021 to provide feedback on the Draft Amendments.

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