

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 20TH DAY OF FEBRUARY 2015/1ST PHALGUNA, 1936

CRP.No. 65 of 2015

**AGAINST THE ORDER IN EP 81/2013 of DISTRICT COURT, ALAPPUZHA,
DATED 20-12-2014**

REVISION PETITIONER(S)/AWARD DEBTORS:

- 1. M/S.CHEMMARATHIL CASHEW COMPANY,
PAVITHRESWARAM P.O., PUTHOOR, KOTTARAKKARA
KOLLAM - 691 524,
REPRESENTED BY ITS MANAGING PARTNER, C.K.SYAM.**
- 2. C.K.SYAM,
MANAGING PARTNER, M/S.CHEMMARATHIL CASHEW COMPANY
PAVITHRESWARAM P.O., PUTHOOR, KOTTARAKKARA
KOLLAM - 691 524.**
- 3. C.K.SAM, MANAGING PARTNER
M/S.CHEMMARATHIL CASHEW COMPANY
RESIDING AT CHEMMARATHIL HOUSE
PAVITHRESWARAM P.O., PUTHOOR, KOTTARAKKARA
KOLLAM - 691 524, KOLLAM.**

**BY ADVS.SRI.K.S.HARIHARAPUTHRAN
SRI.M.D.SASIKUMARAN
SRI.GEORGE MATHEW
SRI.SUNIL KUMAR A.G
SRI.DIPU JAMES**

RESPONDENT(S)/WARD HOLDER:

**M/S.CHL COMMODITIES HANDLERS INC.
3950, 14TH AVENUE, SUITE 504
MARKHAM ONTARIO L3 R OA9, CANADA
REPRESENTED BY ANILKUMAR S, S/O.SREEDHARAN, 237
13TH STREET, GIRI NAGAR, KADAVANTHRA
COCHIN 682 020.**

BY ADV.SRI.T.R.ASWAS

**THIS CIVIL REVISION PETITION HAVING COME UP FOR ADMISSION
ON 20-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

P. BHAVADASAN, J.

C.R.P. No. 65 of 2015

Dated this the 20th day of February, 2015.

ORDER

With reference to a consignment of cashew nut, there arose a dispute between the petitioners before this Court and the respondent. As is envisaged under the agreement between the parties, the respondent before this Court resorted to arbitration proceedings after complying with the necessary formalities. Arbitration award was passed in New York under the laws applicable to New York arbitration proceedings.

2. That award was sought to be enforced in India. It cannot be disputed that the law governing the execution of foreign award is contained in Part II of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act). The relevant clauses as far as this case is concerned are Sections 47 and 48 of the Act.

3. It is not in much dispute that the decree holder who had obtained award in his favour has complied with Section 47 of the Act. The decree holder has filed all the necessary documents as contemplated under Section 47 of the Act.

4. Objections were taken to the execution of the award by the respondents before the court below. The court below, finding that there was no proof adduced by the judgment debtors regarding the non-receipt of notice of arbitration, held that such a plea cannot be countenanced in the absence of evidence in that regard and held that execution petition is maintainable and the decree holder was directed to take necessary steps.

5. Though several grounds were taken before the execution court by the judgment debtors and also before this Court, the only issue agitated at the time of argument is that the petitioners were not given adequate opportunity to

adduce evidence in support of the claim that they had no notice of the proceedings.

6. Assailing the order of the court below, Shri. Hariharaputhran, learned counsel appearing for the petitioners contended that going by Section 48 of the Act, the judgment debtors are called upon to prove a negative fact and the assertion in the objection that they had no notice of the proceedings would suffice. That ground has been taken in the objection filed by the petitioners. Further, it is contended that there was no opportunity given to the petitioners to adduce evidence in support of their case that there was no notice of the proceedings.

7. Learned counsel appearing for the respondent-decree holder on the other hand after referring to the various procedures that have to be undergone before and during the arbitration proceedings as per the relevant Rules contended that it is not correct to say that the

petitioners were denied opportunity to adduce evidence. It is contended that as could be seen from B Diary several opportunities were given to the petitioners for adducing evidence. In spite of a direction by this Court in an Original Petition to the petitioners to file their objection within ten days from the date of the judgment in the said Original Petition, that has not been taken seriously and adjournments continued to be taken one after another. Ultimately the decree holder had again to approach this Court for expeditious disposal of the execution petition. It was thereafter that objection was filed. A reading of the order of the court below would show that there was no prayer for adducing evidence at all and in the light of the said fact, it cannot be said that the petitioners were deprived of an opportunity to adduce evidence in support of their case. Accordingly, it is contended that there is no merit in this Civil Revision Petition especially when this

Court has only to look into whether there is any illegality, irregularity or impropriety in the order of the court below and unless it is so perverse or contrary to the materials on record, this Court may not be justified in interfering with the order even assuming that a different view is possible.

8. There is no dispute regarding the fact that the provisions which govern the issue at hand are Sections 47 and 48 of the Arbitration and Conciliation Act. They read as follows:

“47. Evidence.-(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court-

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

© such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation.- In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

48. Conditions for enforcement of foreign awards.- (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that -

(a) the parties to the agreement referred to in section 44 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

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

© the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

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

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

(e) 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.

(2) Enforcement of an arbitral award may also be refused if the Court finds that-

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

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation.-Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it 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 give suitable security."

9. As has already been noticed, there is not much dispute in this case that Section 47 of the Act has been strictly complied with by the decree holder. The controversy centers around the requirements of Section 48 of the Act. Section 48 of the Act stipulates grounds on which objection to the execution of a foreign award can be taken by the judgment debtor. It is for the person who claims that the award cannot be enforced to prove the grounds on which he relies on. In the case on hand, the only contention raised before this Court is that the petitioners had no notice as mentioned under Section 48(1)(b) of the Arbitration and Conciliation Act or in other words, the arbitration proceedings are without notice to the petitioners.

10. A reading of Section 48 of the Act leaves one in no doubt that such a contention has to be proved by the person who takes up that plea. It is for him to adduce

evidence to show that he had no notice. Of course, he is called upon to prove a negative aspect. But that is the wisdom of the legislature. One would at least expect the judgment debtors to mount the box and swear that they had no notice of the arbitration proceedings.

11. The mere fact that there is no mention of notice having been issued in the arbitration award itself may not be much relevant in the context. First of all the Rules governing the arbitration proceedings etc. will have to be considered. Whatever that be, the burden is thrown on the person who claims that the award is not executable to prove the same on any one of the grounds made mention of in Section 48 of the Act.

12. Except for a bald assertion in the petition that there was no notice of the arbitration proceedings, there is nothing to show that the above claim is true or even possible.

13. It is trite that pleadings cannot be the substitute for proof. What is insisted in Section 48 of the Act is that the person who challenges the enforcement of the award has to furnish proof with regard to the ground on which he challenges the award. In this case, the petitioners have not adduced any evidence.

14. It is then contended that the petitioners were deprived of an opportunity to adduce evidence in support of their case and that has prejudicially affected their interests.

15. The argument looks very attractive on a first blush. But a perusal of B Diary explodes the above contention. As many as 14 postings were there in respect of this case till 8.4.2014 and many of them for the purpose of counter and evidence. It is also significant to notice that this Court in O.P.(C). 2471 of 2013 filed by the decree holder in respect of an attachment order which was sought

from this Court, there was a specific direction to the judgment debtors to file their objection within ten days of the date of judgment. The judgment debtors did not feel it necessary to do so and the matter kept on being adjourned for the objection of the judgment debtor. Ultimately, unable to bear any more, the decree holder again approached this Court by way of O.P.(C). 1356 of 2014 for an expeditious disposal of the execution petition. That was disposed of directing the court below to pass final orders on or before 31.8.2014. The impugned order is dated 20.12.2014. This Court need not undertake an enquiry as to at whose instance the learned District Judge had granted extension of time for filing objection and what was the reason for doing so. But one fact is clear and that is the claim that there was no opportunity to adduce evidence cannot be countenanced. Several opportunities were given for filing objection and for producing evidence, rightly so, because Section 48 of the

Act throws the burden on the judgment debtors. The initial burden of proof is on the judgment debtors and as has rightly been noticed by the court below, the evidence has to be first adduced by the judgment debtors.

16. In the light of the above fact, it is for the petitioners to prove that they were deprived of an opportunity to adduce evidence in support of their case that there was no notice of the arbitration proceedings. In spite of several opportunities being given, they did not feel it necessary to adduce evidence in support of their case. The contention that no opportunity was granted to adduce evidence cannot be countenanced.

17. As rightly noticed by the learned counsel for the respondent, this Court is unable to find any illegality, irregularity or impropriety in the order passed by the court below warranting interference under Section 115 of the Code of Civil Procedure.

This Civil Revision Petition is without merits and it is accordingly dismissed. There will be no order as to costs.

P. BHAVADASAN,
JUDGE

sb.