

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 18TH DAY OF AUGUST 2015/27TH SRAVANA, 1937

CRP.No. 116 of 2014 ()

AGAINST THE ORDER IN EA NO.379/2013 IN EP NO.412/2011 IN ARBITRATION
O.P.NO.10/2008 DATED 10.12.2013 OF THE II ADDITIONAL DISTRICT COURT, ERNAKULAM

PETITIONER/1ST RESPONDENT:

M/S INDIA CEMENTS CAPITAL LIMITED
(FORMERLY KNOWN AS INDIA CEMENTS CAPITAL & FINANCE LTD.)
HAVING ITS REGD.OFFICE AT DHAN BUILDING,
827, ANNA SALAI, CHENNAI,
REP. BY THEIR VICE PRESIDENT SHRI.G.RADHAKRISHNAN

BY ADV. DR.GEORGE ABRAHAM

RESPONDENT(S)/CLAIM PETITIONER/RESPONDENTS 2 AND 3:

-
1. WILLIAM , S/O.JOHN, AGED 61 YEARS
ODATHAMPARAMBIL HOUSE, MAMANGALAM KARA
EDAPALLY SOUTH VILLAGE, KANAYANNUR TALUK, PIN 682 025
 2. K.T. SADANANDAN, S/O.THANKAPPAN, AGED 47 YEARS
KUNNAMPURAM HOUSE
THURAVUR VILLAGE, THURAVUR PO, ANGAMALY 683 572
 3. K.T. SHAJI, S/O.THANKAPPAN, AGED 44 YEARS
KUNNAMPURAM HOUSE, THURAVUR VILLAGE, THURAVUR PO
ANGAMALY 683 572.

R1 BY ADV.SRI.SREELAL N.WARRIER
R3 BY ADV.SRI.P.S.SREEDHARAN PILLAI
R3 BY ADV.SRI.T.K.SANDEEP
R3 BY ADV.SRI.ARJUN SREEDHAR
R3 BY ADV.SRI.JOSEPH GEORGE(MULLAKKARIYIL)
R3 BY ADV.SRI.ARUN KRISHNA DHAN

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 04.08.2015,
THE COURT ON 18-08-2015 PASSED THE FOLLOWING:

“C.R.”

A.HARIPRASAD, J.

C.R.P. No.116 of 2014

Dated this the 18th day of August, 2015

ORDER

An award made in favour of the revision petitioner under the provisions of the Arbitration and Conciliation Act, 1996 (in short, “the Act”) was sought to be enforced under the Code of Civil Procedure, 1908 (in short, “the Code”). At the instance of a third party to the arbitral proceedings, the court held that the award is a nullity and hence unenforceable. Insofar as the revision petitioner is concerned, that was a bolt from the blue. Feeling aggrieved, the revision petitioner challenges the order on E.A.No.379 of 2013 in E.P.No.412 of 2011 in Arbitration O.P.No.10 of 2008 before the District Court, Ernakulam on the ground that invocation of Section 47 of the Code by the court below was erroneous and opposed to law. According to the revision petitioner, except by way of taking a recourse against the award under Section 34 of the Act, neither a party to the award nor a non party can take a short cut under Section 47 of the Code to challenge the virus of the award.

2. Heard Dr.George Abraham, learned counsel for the revision

petitioner and Sri. Sreelal N.Warrier, learned counsel for the first respondent.

3. Brief facts relevant for appreciating the rival contentions are as follows: Revision petitioner is a public limited company engaged in the business of extending financial assistance to prospective customers. It is a non banking finance company. Second respondent requested the revision petitioner to finance for purchase of a vehicle. Accordingly, the revision petitioner extended a hire purchase finance facility to the second respondent with the third respondent as guarantor. An agreement was executed on 29.07.1998. Respondents 2 and 3 provided security to the revision petitioner, for prompt repayment of the hire purchase installments under the agreement, by creating an equitable mortgage over their property comprising 72 cents of land. Thereafter, respondents 2 and 3 made defaults in repaying the amounts. Therefore, the revision petitioner caused to issue a legal notice demanding the respondents to pay off the liability. Since they did not settle the claims, the revision petitioner invoked clause 21(a) and (b) of the hire purchase agreement, whereby the parties had agreed to settle all the disputes, differences and/or claims under the agreement by arbitration. Accordingly an arbitrator was appointed. In the claim petition, following prayers are made by the revision petitioner:

*“In these circumstances the Claimants pray
that an award be passed directing the
Respondents:*

I. to pay a sum of Rs.20,92,549/- as on 09.12.2008 to the claimants jointly and severally with interest @ 36% per annum till the date of realization, in default of which, the Claimants be permitted to bring the said property mortgaged by the third Respondent to sale with the intervention of court of competent jurisdiction and in the appropriate proceedings

II. To pay the cost of these arbitration proceedings and

III. To pass such further or other reliefs deem to fit and proper in the facts and circumstances of the case and render justice.”

4. In spite of sending notices to respondents 2 and 3, they did not appear before the arbitrator and contest the matter. The arbitrator had raised issues for consideration. The issue relevant for our purpose is issue No.5, which reads thus:

“Is the mortgage created by the Respondents valid and liable to be brought to sale for non payment of the award amount by the Respondents?”

On 26.10.2009, the arbitrator passed an award in the following terms:

“In the result Award is passed directing the Respondents 1 and 2 to pay jointly and severally a sum of Rs.24,23,802/- with interest at 18% per annum on the said sum from 27.10.2009 till the date of payment/realisation, and costs of Rs.27,000/- and

in default thereof the Claimants are entitled to bring the mortgaged property namely land measuring an extent of 29 Ares and 20 Sq.metres (72 cents) in survey number 649/1/25 now Resurvey Number 16/7 Block No.17 situate at Mookkannoor (Manapara) village, Aluwa Taluk, Ernakulam Dt. bound by the property of Kunnumpuruthu Sukumaran on the East, Road on the South, property of Kattayil Painadathu Chereya Ouseph on the West and Road on the North; to sale for realisation of the said amount by taking appropriate proceedings in the court of competent jurisdiction.”

A reading of the award will make it clear that it is a speaking award. As the claims in the award were not satisfied by respondents 2 and 3, the revision petitioner sought to enforce the award under Section 36 of the Act. E.P.No.412 of 2011 was filed before the District Court after the time prescribed to take a recourse against the arbitral award under Section 34 of the Act. Notices were issued to respondents 2 and 3. Third respondent alone appeared before the executing court and he filed an objection. Interestingly, the revision petitioner filed E.A.No.262 of 2011 for attachment of the immovable property shown in the schedule to the execution petition. According to the contentions of the petitioner and as per the award, the property sought to be sold is covered by an equitable mortgage. Why an order for attachment was claimed in respect of a property already charged is not at all clear. However, the third respondent responded to the notice.

When the execution court proceeded with sale of the property, the first respondent came forward with a petition under Order 21 Rule 58 of the Code claiming independent right over the property. Subsequently he filed E.A.No.379 of 2013 in the execution petition invoking Sections 47 and 151 read with Order XXI Rule 97 of the Code. On that application, the learned Additional District Judge passed the impugned order finding that the award itself is a nullity.

5. Learned Additional District Judge arrived at the said finding based on a decision by the Supreme Court in **Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. (AIR 2011 SC 2507)**. As mentioned above, the claim raised by the revision petitioner was solely based on a charge created on the property by way of an equitable mortgage. The learned Additional District Judge followed the ratio in **Booz Allen's** case that a dispute involving a mortgage is not an arbitrable one. It was also observed that such a dispute can only be tried by a court and not by an arbitral Tribunal. On this reasoning, the learned Additional District Judge turned down the request of the revision petitioner. Before dealing with the principles in **Booz Allen's** case, it will be profitable to go through certain provisions in the Act for a better understanding of the scope and legality of the contentions.

6. The object of the Act is to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and

enforcement of foreign arbitral awards. It also defines the law relating to conciliation. From the preamble of the Act, it is clear that the Act was enacted in accordance with the recommendations of the General Assembly of the United Nations Commission on International Trade Law (UNCITRAL) which has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985. Part I of the Act deals with domestic arbitration and Part II deals with enforcement of certain foreign awards.

7. In Section 2(e), the term “court” is defined as the principal Civil Court of original jurisdiction in a district and includes the High Courts in exercise of its ordinary original civil jurisdiction. Section 5 declares the policy of the enactment stating that notwithstanding anything contained in any other law for the time being in force, in matters governed by the first part of the Act, no judicial authority shall intervene except where so provided in that part. Although the term 'judicial authority' is not defined under the Act, it is evident that it is any other judicial forum, except the “court” defined in Section 2(e) of the Act. Section 8 of the Act deals with the power of the judicial authority before which an action is brought, in a matter which is the subject of an arbitration agreement, to refer the parties to arbitration. It says that if an action, in a matter which is the subject of an arbitration agreement, is brought before a judicial authority and if a party so applies not later than when submitting his first statement on the substance of the dispute, the judicial authority shall refer the parties to arbitration.

The Section further says that the application referred to above shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. Various provisions in Part I of the Act deal with the composition of the arbitral Tribunals, jurisdiction of the arbitral Tribunals, conduct of arbitral proceedings, making of arbitral awards and termination of the proceedings. Chapter VII of the Act deals with recourse against an arbitral award. The term 'recourse' in the ordinary sense means going back or withdrawal. Black's Law Dictionary defines the expression 'recourse' as an act of seeking help or advice; enforcement or a method for enforcement of a right. Section 34 of the Act, the lone Section in Chapter VII, deals with an application for setting aside an arbitral award.

8. In Section 34 of the Act there are seven grounds in all for setting aside an award. An arbitral award can be set aside only if one or more of these seven grounds exists. Section 34(2)(a) of the Act contains the first five grounds. In order to successfully invoke any of these grounds, a party will have to plead and prove the existence of one or more of such grounds. In other words, the party challenging the award has to discharge the burden of proof by adducing sufficient evidence to show the existence of at least one of the said grounds. The remaining two grounds are mentioned in Section 34(2)(b) of the Act. These grounds empower the court *ex officio* to set aside an arbitral award, if the subject matter of the dispute is not arbitrable or the impugned award is in conflict with the public

policy of India. It further goes on to explain that an award is in conflict with the public policy of India, if making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81 of the Act.

9. Inarbitrability, as mentioned in Section 34(2)(b)(i) of the Act, is first of the two *ex officio* grounds for annulment of an arbitral award. This provision is attracted if the court which is called upon to set aside an award finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. The question whether a dispute can be referred to arbitration is usually set up as a defence at the first instance against the enforcement of the arbitral agreement. Later, it can be raised at the time when the award is sought to be enforced. The decision that a dispute is inarbitrable can checkmate an arbitration from continuing or result in the annulment of the award. Arbitrability, therefore, represents the limit upon the parties' right to engage in arbitration and upon the arbitrators' authority to decide.

10. The Law and Practice of Arbitration and Conciliation (O.P.Malhotra & Indu Malhotra, II Edition) enumerates six situations in which the question of non-arbitrability of the subject matter could arise. Out of these six situations, four relate to domestic arbitrations and the remaining two relate to enforcement of foreign awards. According to the learned authors, they are - (i) Section 2(3) of the Act which says that Part I of the Act shall not affect any other law for the time being in force by virtue

of which certain dispute may not be submitted to arbitration, (ii) In an application under Section 8 of the Act to refer the parties to arbitration, the opposite party may come and contend that the arbitral Tribunal lacks authority to determine the disputes because it is not arbitrable, (iii) In the course of an arbitral proceedings, the party may challenge the validity of the arbitration agreement under Section 16(1) of the Act on the ground that the arbitral Tribunal lacks substantive jurisdiction because the dispute under reference is not arbitrable, (iv) Section 34(2)(b)(i) of the Act providing that an arbitral award may be annulled by the court if it finds that the subject matter of the dispute resulting in the award is not capable of settlement by arbitration under any law for the time being in force, (v) Section 48(2)(a) of the Act providing that the court may refuse to enforce the foreign award if the subject matter of difference is not capable of settlement by arbitration under the law of India, and (vi) Section 57(1)(b) of the Act providing that a foreign award may not be enforceable if the subject matter of the award is not capable of settlement by arbitration under the law of India. In our case, the play of Section 34(2)(b)(i) of the Act could have been invoked by respondents 2 and 3. But, admittedly they did not raise any challenge either before the arbitrator or before the court by taking a recourse against the award. Now, the first respondent, claiming an interest over the property put up for sale, has come forward with a challenge against the award, that too mainly under Section 47 of the Code.

11. Section 36 of the Act says that the award made under the Act shall be enforced under the Code in the same manner as if it were a decree of the court. This deeming provision in the Act gives the award a status equal to that of a decree passed by the court defined under the Act. This legal fiction is available only in the matter of execution of the award.

12. In the above backdrop of events and legal principles, I shall examine the issues involved in this case.

13. In **Booz Allen's** case the following facts are involved: Two companies owned separate flats in Mumbai. Both the companies borrowed loans from SBI Home Finance Ltd. under two loan agreements by securing the said two flats in favour of SBI. Under two leave and licence agreements the said companies permitted the appellant (Booz Allen & Hamilton Inc.) to use their respective flats for a specified term. All the parties including the representatives of SBI signed the agreements. On the same day, a tripartite deposit agreement was entered into among the companies, the appellant and the SBI. Under the said agreement, the appellant paid a refundable security deposit of ₹6.5 crores to the companies in equal proportion. Out of the deposit amount, a considerable portion was directly paid to SBI towards repayment of the loan taken by the companies. As a consequence, the loan amount due by one company to SBI in regard to one flat was fully cleared, but the loan taken by the other company remained due and outstanding. First company however remained as a

guarantor for the repayment of amount by the second company whose loan was subsisting. Flat belonging to the first company was also secured in favour of SBI and remained charged for the liability of the second company. As the loan amount was not repaid by one of the companies, SBI filed a mortgage suit in the High Court of Bombay with the companies as defendants 1 and 3 and the appellant as the second defendant. The suit was in respect of the flat belonging to the first company. On a notice of motion taken out by the plaintiff seeking interim relief, the parties appeared and raised various contentions. Appellant did not file written statement in the suit, but filed a counter statement to the temporary injunction application. The appellant thereafter, before delivering the defence, took out a notice of motion praying that the parties to the suit be referred to arbitration as provided in Clause (16) of the deposit agreement executed between the parties. That application was resisted by SBI. Learned Single Judge of the High Court considered the matter and dismissed the application for multiple reasons. The matter was taken up before the Supreme Court. The Supreme Court raised various questions for determination. The question relevant for consideration reads as follows:

“Whether the subject-matter of the suit is “arbitrable”, that is, capable of being adjudicated by a private forum (Arbitral Tribunal); and whether the High Court ought to have referred the parties to the suit to arbitration under Section 8 of the Act?”

I am avoiding other questions posed by the Supreme Court as they are not relevant for the purpose of this case.

14. The Supreme Court after considering various legal aspects found that a suit for enforcement of mortgage by sale should be tried by a court and not by an arbitral Tribunal. Reasons for the conclusion have been expatiated in paragraphs 46 to 49. Various provisions under Order XXXIV of the Code were considered in the decision. Apex Court noticed the mandate in Rule 1 of Order XXXIV of the Code that all persons having an interest either in the mortgage security or in the right of redemption shall have to be joined as parties to any suit relating to mortgage, whether they are parties to the mortgage or not. Considering the avowed object of the provisions, the Supreme Court held that the provisions are intended to avoid multiplicity of proceedings with the likelihood of divergent results. The advantage of passing a preliminary decree and a final decree as provided under Order XXXIV of the Code was also considered elaborately. The Court arrived at a conclusion that such an advantage may not be available to the parties while they try to resolve the disputes in respect of a

mortgage through arbitral proceedings. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being an enforcement of right in rem will have to be decided by courts of law and not by arbitral Tribunal. The Supreme Court after reckoning the entire legal aspects, restated the well settled principles that a suit for enforcement of a mortgage by sale of mortgaged property is an action in rem and for the enforcement of a right in rem. That is the clear and unquestionable ratio in the decision.

15. Dr.George Abraham, the learned counsel for the revision petitioner, contended that the principle laid down in **Booz Allen's** case is inapplicable to this case because neither the second respondent nor the third respondent did challenge the arbitrability of claim at the appropriate time. According to him, it may be too late, that too for a non party to the arbitral proceedings, to challenge the sustainability of the award at the execution stage. If the contention of the first respondent is allowed, according to the learned counsel for the petitioner, that will tantamount to adding another ground to Section 34 of the Act for setting aside an award. All these contentions of the revision petitioner are fallacious for the reasons mentioned hereunder.

16. Under Section 47 of the Code the jurisdiction exercisable by a court executing a decree is very wide. The Section says that all questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction

of the decree shall be determined by the court executing the decree and not by a separate suit. The contention of the revision petitioner that the first respondent is not a party to the proceedings is of no consequence here since the first respondent admittedly acquired an interest over the subject matter of the dispute pending the proceedings. True, Explanation II to Section 47 of the Code says that for the purpose of the Section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed. The normal rule is that a dispute between a party to the suit or his representative on the one hand and a stranger, who is not a purchaser at the execution sale, on the other hand, is outside the scope of the Section. By adding Explanation II to the Section, a purchaser of property at a sale in execution of a decree, though a stranger to the suit, is deemed to be a party to the suit in which the decree has been passed. Nevertheless, there is no bar under law for a stranger to the proceedings, who has an independent legal right to appear and contest the execution proceedings and whose property interests will be adversely affected by sale of the property in execution proceedings, to point out that the decree sought to be executed is a nullity. The first respondent filed the petition before executing court claiming reliefs not only under Sections 47 and 151, but also under Order XXI Rule 97 of the Code. It is his definite case that he is a bonafide purchaser of the property for value, purchased in the year 2008. It may be true that if a valid equitable

mortgage was in existence, the first respondent could have purchased only the equity of redemption. His right to approach the executing court under Order XXI Rule 97 of the Code anticipating dispossession cannot be rejected. The Supreme Court in **Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal (AIR 1997 SC 856)** has held that the words “any person” in Order XXI Rule 97(1) of the Code are comprehensive enough to include apart from judgment debtor or anyone claiming through him, even persons claiming independently and who would therefore be total strangers to the decree. What the first respondent challenges is the executability of the award itself. So, the first respondent's locus standi to file an application is well founded. In an application under Section 47 of the Code, the question that a decree is not executable being a nullity can be raised and the executing court is obliged to decide the question. Even if the judgment debtor did not raise the question, the remedy available under Section 47 of the Code cannot be denied to an affected party, if such a question is properly raised. It is well settled that a decree which is a nullity in the eye of law is no decree. Even by the consent of parties such a decree cannot be executed by the court. Supreme Court in **Kiran Singh v. Chaman Paswan (AIR 1954 SC 340)** held that though a court executing a decree cannot go into the question of correctness or legality of a decree, it can entertain the objection that it is a nullity on the ground that the court which passed it had no jurisdiction to pass it. Apex Court in **Sunder Dass v. Ram**

Parkash (AIR 1977 SC 1201) has clearly held that this examination is not going behind the decree, since the decree being null and void, there is no decree at all. The same principle was restated by the Apex Court in **Rafique Bibi v. Sayed Waliuddin (AIR 2003 SC 3789)**. Court below correctly placed reliance on **Hira Lal Patni v. Sri Kali Nath (AIR 1962 SC 199)** to hold that validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have been in seizin of the case because the subject matter was wholly foreign to its jurisdiction. Therefore, there cannot be any doubt that the question of nullity of a decree should be examined by the executing court, if any one who is likely to be prejudicially affected by the execution of decree raises that question in a manner known to law. I hold therefore that the court below was well within its limits in entertaining the application at the instance of the first respondent. Hence the contention of the revision petitioner that the court below should not have entertained an application at the instance of the first respondent is not legally sustainable. It is the bounden duty of an executing court to pronounce on the executability of the decree, if a contention is properly raised that the decree is inexecutable because it is a nullity.

17. Learned counsel for the revision petitioner placing reliance on an unreported decision of the High Court of Judicature at Bombay in

Arbitration Petition No.1321 of 2012 contended that **Booz Allen's** case was interpreted by that Court and found that the ratio therein is not applicable to a proceeding under Section 9 of the Act. But, the Bombay High Court had no occasion in that decision to consider the executability of an award in respect of a claim under a mortgage. Therefore, the said decision has no application to the facts in this case. Another decision relied on by the learned counsel for the revision petitioner was pronounced by the High Court of Judicature at Madras in **L and T Finance Ltd. v. JKS Constructions Pvt. Ltd.**(legalcystal.com/1125524). That was also a case falling under Section 9 of the Act. **Booz Allen's** case was incidentally considered in that decision. The ratio in the decision was pronounced in a totally different set of facts. Hence, that cannot be applied here.

18. Petitioner's contention that if an award is declared to be a nullity in execution proceedings, it will amount to adding one more ground to Section 34 of the Act is totally unacceptable. As mentioned earlier, Section 34 of the Act provides seven grounds to set aside an award. If the expression "set aside" is understood correctly, there will not be any lack of clarity or obfuscation. Ordinarily the expression "set aside" is understood as meaning abandon, abjure, abrogate, discard, dispense with, to omit, reject, repudiate, etc. The term "set aside" is defined in Black's Law Dictionary (Eighth Edition) as *vb. (Of a court) to annul or vacate (a judgment, order, etc.)*. The term "set aside" in the legal parlance means, to cancel, annul or

revoke a judgment or order. It is an indisputable proposition that in order to set aside a decree or order or award, there must be one in existence. In otherwords, a decree or award not in existence cannot be set aside. No one can seek to set aside a decree or award which is not in existence. That exercise will be as futile, rather as impossible, as one attempting to commit feticide of an unborn foetus. Therefore, what is provided in Section 34 of the Act is only ways and means to set aside an award made in an arbitral proceedings. As succinctly stated by the Supreme Court, what is sought to be achieved by taking recourse to Section 47 of the Code is to make a declaration that the decree (here, an award) sought to be executed is a nullity. In otherwords, seeking a pronouncement that there is no executable decree or award at all. If the end result of an adjudication under Section 47 of the Code is entering a finding that there is no decree or award at all, there cannot be a question of setting aside such a decree or award in that proceedings. Therefore, the contention of the revision petitioner that the declaration of nullity of an award in a proceeding under Section 47 of the Code will tantamount to adding one more ground to Section 34 of the Act is legally incorrect and, therefore, not acceptable.

19. Learned counsel for the revision petitioner contended that a Bench of the Supreme Court with the same strength as in **Booz Allen's** case has considered in **Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co.(P) Ltd. ((2010) 8 SCC 24)** the scope of Section 89 and

Order X Rule 1A of the Code and identified various types of cases referable for arbitration. According to the learned counsel, there is no embargo, as per the decision in **Afcons Infrastructure Ltd.**'s case, to refer a claim in respect of a mortgage to arbitration. In answer to this argument, Sri.Sreelal N.Warrier, learned counsel for the first respondent, contended that the decision in **Afcons Infrastructure Ltd.**'s case was rendered in a totally different context. Primary question mooted before the Supreme Court in that decision was whether Section 89 of the Code empowered a court to refer the parties to a suit to arbitration without the consent of both the parties. While answering this question, various provisions in the Act and the Code were referred to by the Supreme Court. The contention of the first respondent is acceptable for the reason that the points considered by the Supreme Court in **Afcons Infrastructure Ltd.**'s case was entirely different and there was no occasion for the court to consider the scope of arbitrability of a claim based on a mortgage. In **Booz Allen**'s case that question was specifically considered by the Supreme Court and the law is clearly pronounced. It cannot be considered that the principles in **Afcons Infrastructure Ltd.**'s case is a deviation from those in **Booz Allen**'s case.

20. My attention is drawn to Rule 5(g) of the Civil Procedure (Alternative Dispute Resolution) Rules, 2008. It says thus:

“(g) Where there is no consensus among the parties as to the mode of settlement, the Court

shall, after affording to the parties an opportunity of hearing, persuade the parties to arrive at a consensus as to the mode of settlement and if the parties are not able to arrive at a consensus as to the mode of settlement, consider whether the matter can be referred for decision by arbitration, if one of the parties is willing for settlement by arbitration as provided under clause (f) above.”

Dr.George Abraham argued that the observations therein that the court shall consider whether the matter can be referred for decision by arbitration, if one of the parties is willing for settlement by arbitration is directly in conflict with the law laid down in **Afcons Infrastructure Ltd.**'s case. True, there is an apparent conflict between the provision quoted above and the principles in **Afcons Infrastructure Ltd.**'s case. As there is no specific challenge raised against the said provision in this case and the issue thereunder does not arise for the determination of this case, I do not intend to make any pronouncement thereon.

21. During the course of hearing, a reference was made about special enactments whereby charge created on a property by way of mortgage could be enforced by other means than a suit. For example, the provisions in the State Financial Corporations Act, 1951 (in short, “1951 Act”) and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, “2002 Act”) are some of them. Learned counsel for the revision petitioner placing reliance on

State of Rajasthan v. Gopi Kishan Sen ((1993) Supp.1 SCC 522) and **P.Rajan Sandhi v. Union of India (2010 (4) KLT 92)** contended that the provisions in a special enactment will prevail over provisions in a general enactment. Therefore, it is argued that the provisions in the Act should be given primacy than Section 47 of the Code. This contention also cannot be upheld. The provisions in the Code relating to the execution of decrees are made applicable by the Act itself for executing an award. Hence all provisions in the Code relating to the execution of a decree are applicable for the execution of an award as well. Section 29 of the 1951 Act deals with the rights of Financial Corporations in case of default by loanees. It empowers the Corporation to take over management or possession of the industrial concern to which it had given financial assistance. It further confers on the Corporation a right to transfer the assets by way of lease or sale of the property pledged, mortgaged or hypothecated or assigned to the Corporation and realise the amount. Similarly in the 2002 Act also, Section 13 deals with power of enforcement of security interest. It is to be remembered that these Central Acts are enacted with specific purposes and they are self contained enactments. Therefore, the provisions in these enactments cannot be compared with the provisions in the Act to contend that an award can be challenged only in accordance with Section 34 of the Act. I am of the view that the contention of the revision petitioner in that regard also deserves to be rejected.

22. For the aforementioned reasons, I find no merit in the challenges raised in this revision petition against the order passed by the executing court. Hence it is liable to be dismissed.

In the result, the revision petition is dismissed. No order as to costs.

A. HARIPRASAD, JUDGE.

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