

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 7TH DAY OF JULY 2015/16TH ASHADHA, 1937

OP(C).No. 554 of 2015 (O)

EP NO. 100/2013 of WAKF TRIBUNAL, KOLLAM

PETITIONER(S):

M/S. CHI COMMODITIES HANDLERS INC,
3950 14TH AVENUE, SUITE 504, MARKHAM,
ONTARIO L 3R 0A9
CANADA REP. BY ITS AUTHROSED SIGNATORY
ANILKUMAR.S., S/O. DR. SREEDHARAN, 237,
13TH STREET, GIRINAGAR, KADAVANTHRA.P.O.
COCHIN-682020.
(PETITIONER IS THE AWARD HOLDER IN E.P. NO. 100/2013 OF
THE WAKF TRIBUNAL, KOLLAM).

BY ADV. SRI.T.R.ASWAS

RESPONDENT(S):

M/S. NAJEEM CASHEW INDUSTRIES
KILIKOLLOOR
KOLLAM-691 004 REPRESENTED BY ITS PROPRIETOR
S. NEJUMUDEEN, S/O. SAINULBDEEN, SHAFFI MANZIL
PEROOR CHERRY, KOTTAMKARA VILLAGE
KOLLAM TALUK AND DISTRICT.
(RESPONDENT IS THE AWARD DEBTOR IN
E.P. NO. 100/2013 OF THE WAKF TRIBUNAL
KOLLAM).

BY ADV. SRI.P.RADHAKRISHNAN
BY ADV. SRI.MADHU RADHAKRISHNAN
BY ADV. SRI.NELSON JOSEPH
BY ADV. SRI.M.D.JOSEPH

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 07-07-2015, ALONG WITH
OPC. 1016/2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP(C).No. 554 of 2015 (O)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P1. JUDGMENT IN OPC NO. 992/13 DATED 14-3-2013.

RESPONDENT(S)' EXHIBITS

NIL

//TRUE COPY//

A.HARIPRASAD, J.

O.P.(C) Nos.554 & 1016 of 2015

Dated this the 7th day of July, 2015

JUDGMENT

These two original petitions are between the same parties.

O.P.(C) No.554 of 2015 was filed with following prayers:

"i) quash Exhibit P9 order dtd 12-03-15 in E.P. No.100/13 on the file of the Illrd Addl. District Judge, Kollam,

ii) hold that the Exhibit P2-Arbitration Award is enforceable under section 49 of the Arbitration & Conciliation Act, 1996,

iii) direct the Court below to expeditiously dispose off the E.P.No.100/13 within three months' time,

iv) pass such other orders that may be prayed for and deemed fit to grant in the total facts and circumstances of the case,

v) award the costs of this proceedings from the respondents and their assets."

Thereafter as per the directions of this Court the learned Additional District Judge, Kollam passed Ext.P9 order which is impugned in O.P.(C) No.1016 of 2015.

2. Heard the learned counsel for the petitioner and the respondent.

3. The only point arising in this case is about the application of the principles in Section 48 of the Arbitration and Conciliation Act, 1996 (in short, "Act"). It deals with enforcement of a foreign awards. For clarity, the said Section is reproduced hereunder:

"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

(c) 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.”

4. Learned counsel for the petitioner submitted that the order passed by the court below is not in accordance with the mandate of Section 48 of the Act. I find that the order is not only terse, but also not conforming to the parameters of Section 48 of the Act. Learned counsel for the petitioner contended that the courts having jurisdiction to enforce foreign awards are not doing it in a time bound manner causing much difficulties to the parties to arbitration and also thereby defeating the object of the Act. It is, therefore, requested that a general direction be issued to all the courts to expedite hearing and disposal of such matters. The provisions in the Act itself give out clear indications that the matters relating to enforcement of arbitration awards must be done as expeditiously as possible. Further, the object of the Act is to cut short the length of litigation and also to attain finality to the disputes between the parties wherein they agree to go for an arbitration. Considering the scheme of the Act as well as the object to be achieved, I am of the view that the courts, which are empowered to deal with enforcement of foreign awards, shall meticulously and scrupulously comply with the stipulations in the Act and dispose of the case within the time frame. Learned counsel for the petitioner placed

reliance on the observations in paragraph 4 of the decision in **Konkan Railway Corpn. Ltd. v. Mehul Construction Co. ((2007) 7 SCC 201)**. It reads as follows:

"To attract the confidence of International Mercantile community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalisation policy of the Government, Indian Parliament was persuaded to enact the Arbitration and Conciliation Act of 1996 in UNCITRAL Model and, therefore in interpreting any provisions of the 1996 Act, courts must not ignore the objects and purpose of the enactment of the 1996 Act. A bare comparison of different provisions of the Arbitration Act of 1940 with the provisions of the Arbitration and Conciliation Act 1996 would unequivocally indicate that 1996 Act limits intervention of court with an arbitral process to the minimum and it is certainly not the legislative intent that each and every order passed by an authority under the Act would be a subject-matter of judicial scrutiny of a court of Law."

5. Learned counsel for the contesting respondent contended that the "proof" referred to in Section 48 of the Act need not be by any extraneous matter and the grounds in Section 48 of the Act can be proved from the materials available on record. The person challenging enforceability of award can rely on the materials in the records itself to

prove that the foreign award is unsustainable. It is indisputable that what is required under Section 48 of the Act is only proof regarding the matters specified therein for finding a foreign award unsustainable. However, the burden to show that the award is not sustainable is on the person who challenges it. Stated differently, there is an initial presumption attached to a foreign award that it is sustainable unless otherwise established.

With these observations, the petitions are allowed. The first prayer in O.P.(C) No.554 of 2012 has become redundant. Ext.P9 order impugned in O.P.(C) No.1016 of 2015 is set aside. The court below is directed to dispose of the entire matter on merits within a period of two months from the date of production of a copy of this judgment. Parties shall appear before the court below on 20.07.2015.

A. HARIPRASAD, JUDGE.

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