

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
25-06-2018	10-07-2018

Coram:

The Hon'ble Mr. **Justice N.SATHISHKUMAR****Application Nos.1633 and 1634 of 2018
in E.P.No.17 of 2017**

M/s.Perfint Healthcare Pvt. Ltd.,
Rep. By its Board of Directors
Mr.N.Nandakumar Subburaman
Mr.Guruswamy Krishnamoorthy
Mr.Sudhir Kumar Sethi
Mr.Gopalkrishna Kulkarni
Mr.Veeraraghavan Mohankumar

...

Applicant/Respondent
[in both applications]

Versus

California Institute of Computer
Assisted Surgery Inc
502, Palm Avenue, Suite 1
Los Altos, California-94022(U.S.A.)

...

Respondent/Petitioner
[in both applications]

Prayers:

A.No.1633 of 2018 in E.P.No.17 of filed to stay all further proceedings in E.P.No.17 of 2017 pending before the Learned Master during the pendency of the present application challenging the order dated 14.12.2017.

A.No.1634 of 2018 in E.P.No.17 of filed to set aside the order dated 14.12.2017 passed by the learned Master in E.P.No.17 of 2017, whereby the

Learned Master has held that the said E.P. is maintainable.

For Applicant : Mr. Vinod Kumar
in both applications

For Respondents : Mr. T. Mohan,
in both applications Counsel for
Mr.R. Anish Kumar

COMMON ORDER

The applicant/respondent filed these applications for staying all further proceedings in E.P.No.17 of 2017 and to set aside the order dated 14.12.2017 passed by the learned Master in E.P.No.17 of 2017.

2. The respondent is the Decree Holder of Foreign Arbitration Award dated 23.07.2015 passed in ICDR Case No.50-20-1300-1133, by the learned Sole Arbitrator Mr.Paul E.Burns, California, U.S.A., who filed the Execution Petition before the learned Master seeking order to arrest Managing Director or any other Director of the Board of Directors of the Applicant Company for imprisonment in a Civil Prison. Preliminary objection was raised by the applicant before the Execution Court. The award being the foreign award, cannot be executed without satisfying the conditions laid down under Sections 47 to 49 of the Arbitration and Conciliation Act, 1996. Whereas without complying the requirements under Sections 47 to 49 of the Arbitration and Conciliation Act, the petition has been filed as Execution Petition, by surpassing the mandatory requirements to enforce the foreign award. The learned Master by his order dated 14.12.2017 negated

the contention of the applicant and held that the E.P.is maintainable and the foreign award is enforceable.

3. Being aggrieved over the order, the present applications have been filed. The main argument of the learned counsel for the applicant Mr.Vinod Kumar is that the explanation to Section 47 of the Arbitration and Conciliation Act, 1996 has been defined to mean that the High Court is having Original Jurisdiction to decide the question forming the subject matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction. Hence, it is the contention of the learned counsel for the applicant that in terms of Order XVII Rule 1 of the Original Side Rules, the ordinary and extraordinary original civil jurisdiction of the Court is to be exercised by a Judge or a Division Court. Therefore, the learned Master has not been authorized to deal with the Execution Petition. He has no jurisdiction to entertain the Execution Petition. It is the further contention of the learned counsel that minimum requirement set out in the Sections 47 to 49 ought to have been complied with, by the learned Master before passing any order to hold that award is enforceable.

4. In a given case except filing the Execution Petition the respondent has not filed any evidence as contemplated under Section 47 of the Arbitration

Act. Similarly, the Master has also not given any opportunity to the respondent to put forth his case to show that the foreign award is not enforceable under any of the ground set out in Section 48 of the Arbitration Act. Therefore, it is the main contention of the learned counsel that the order passed by the Master is liable to be interfered. In support of his submissions he relied upon the following judgments:

1. Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd., [(1999) 9 Supreme Court Cases 334]

2. S.V.R.Saroja and others v. S.V.Matha Prasad [2016-3-L.W.692]

5. Learned Counsel Mr. T. Mohan appearing for the respondent submitted that the award passed in this case is a foreign award which satisfies the requirement laid down in Section 44 of the Arbitration and Conciliation Act, 1996 and his further contention is that though there are two stages under Section 47 to 49 of the Arbitration Act, the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the Court decides that the foreign award is enforceable, it can proceed to take further steps for execution of the same. The learned Master has considered the entire objections of other side and has rightly come to the conclusion that the award is enforceable. It is the further contention of the learned senior counsel that only the party against whom the enforcement award is passed has to furnish before the Court the relevant materials that the award is

not enforceable, in any of the grounds set out in the Arbitration and Conciliation Act. Even though he filed a counter in execution petition, he has not set out any ground to reject the enforcement award. Hence, it is the contention of the learned Senior Counsel that now the applicant cannot contend that he has not been given any opportunity by the Master. It is for him to establish that the award is not enforceable. Having failed to show any material which are falling within the ambit of Section 48 of the Arbitration Act, it cannot be said that the order passed by the Master is not according to law. The very object of the amended Act 1996 is for the speedy disposal and every final arbitral award is to be enforced as if it is the decree of the Court. Hence, the learned counsel for the respondent submitted that the contention of the applicant's counsel that the requirements contained in Section 47 to 49 of the Arbitration Act 1996 were not followed, cannot be countenanced.

6. The learned counsel also submitted that the applicant cannot take shelter under explanation to Section 47 of the Arbitration and Conciliation Act. The explanation shows that the Court viz., the High Court is having original jurisdiction to decide the questions forming the subject matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction. It does not mean only a judge of the court alone is having power to enforce the arbitral award. It is the contention for the learned Senior Counsel

that original Side Rules of the Madras High Court were framed by virtue of the powers conferred by the various enactments including Letters Patent. Order I Rule 4 of the Original Side Rules of the Madras High Court, 1994 defines "Court" includes a Judge, or Master or First Assistant Registrar, Original Side. Order XIV Rule 10 (xxix) clearly defines the power of the Master in an application for the execution of a decree. Hence submitted that the application may be dismissed. In support of his contention he also pressed reliance on the Judgment of the Apex Court reported in **2001 (6) SCC 356 [Fuerst Day Lawson Ltd., vs. Jindal Exports Ltd.,]**

7. In the light of the above submissions two points arise for consideration in the application:

1. Whether two separate proceedings, one under Section 47 and one under 49 are to be complied to enforce the foreign award ?

2. Whether the application to enforce such foreign award is maintainable before the Master Court?

Point No.1

8.(i) Part II of the Arbitration and Conciliation Act, 1996 deals with the reenforcement of certain foreign awards. Section 44 of the Act deals with the

foreign award. Section 46 of the Act deals with the binding nature of the foreign award. Section 47 of the Act deals with enforcement of foreign award.

8(ii). The party proposing to enforce foreign award is required to file

- (a) Original or certified Copy of the award 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
- (c) Such evidence as may be necessary to prove that the award is a foreign award.

8(iii). Sub Clause (2) of Section 47 deals with English translated version of the award. On a careful perusal of Section 47 of the Arbitration and Conciliation Act for enforcement of the award, the original award or certified copy of the award and original agreement are mandatory.

9. Section 48 of the Act stipulates the conditions for enforcement of foreign awards. Section 48, in fact, makes it obligatory on the party against whom it is invoked, to furnish before the court that such award is not enforceable under any ground set out in the Section 48. After taking into

consideration of such proof, the court has to decide whether it is satisfied to enforce the foreign award under Section 49. Only on such satisfaction, the award shall be deemed to be decree of such Court. It is to be noted that admittedly in this case application has been moved for execution of the foreign award with necessary original award and agreement etc., Separate applications are not mandatory under Section 47 and 48 of the Act. It is to be noted that once the application is moved for enforcement of the foreign award is filed, opposite party is put on notice and it is to be shown that the award is unenforceable by furnishing a proof, that the foreign award is hit by any of the grounds set out under Section 48 of the Act. Therefore, this Court is of the considered view that there need not be any separate application in every stage.

10. In this regard it is useful to refer the judgment of the Honourable Apex Court in ***Fuerst Day Lawson Ltd., V. Jindal Exports Ltd., (2001) 6 Supreme Court Cases 356*** wherein it is held as follows:

"Alternatively it was contended that a party holding a foreign award has to file a separate application and produce evidence as contemplated under Section 47 and also satisfy the conditions laid down under Section 48 and it is only after the Court decides about the enforceability of the award, it should be deemed to be a decree under Section 49 as available for execution. In other words, the party must separately apply before filing an application for execution of a foreign award. The Arbitration and Conciliation

Ordinance, 1996 was promulgated with the object to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral award and to define law relating to conciliation and for matters connected therewith or incidental thereto. In para 4 of the Statement of Objects and Reasons contained in the Act, the main objects of the Bill are stated. To the extent relevant for the immediate purpose, they are:

- "i) to comprehensive cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;
- ii)
- iii)
- iv) to minimize the supervisory role of courts in the arbitral process;
- v)
- vi) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;"

11. The Judgment relied upon by the applicant reported in ***Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd., (1999) 9 Supreme Court Cases 334*** has also been referred in the above judgment. The Apex

Court has categorically held that in the same proceedings there may be different stages. The Court has to decide about the enforcement of foreign award. Once the court is satisfied that the foreign award is enforceable, the award is deemed to be a decree of that court, and then Court proceeds to take further steps to execute the award. Therefore, the contention of the applicant cannot be countenanced in that aspect. Point No.1 is answered accordingly.

Point No.2

12. It is the main contention of the learned counsel for the applicant that as per the Explanation to Section 47 of the Arbitration and Conciliation Act, 1996, substituted by Act 3 of 2016, "Court" means the High Court having original jurisdiction to decide the questions forming the subject matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction. Therefore, Master has no jurisdiction to entertain the application to enforce the foreign award. Though explanation to Section 47 is amended on 23.10.2015, it is also relevant to note that Original Side Rules of Madras High Court is framed by this Court by virtue of powers conferred by the various enactments including the Letters Patent. Various enactments are set out in Appendix-I which include Letters Patent of the High Court Madras dated 11.03.1919. The preamble of the Original Side Rules makes it clear that, rules are framed by virtue of powers conferred not only by Letters Patent but also

various statutes set out in the Appendix-I. The Original Side Rules came into operation on 17.10.1994. The Letters Patent was all along treated as law but its applications are limited only to the chartered High Courts. In view of the power derived from the various enactments in Letters Patent, Original Side Rules were framed.

13. Order-I Rule 4 (3) reads as follows: "(3) "Court" includes a Judge, or Master, or First Assistant Registrar, Original Side." Order XIV Rule 10 (xxix) deals with application for or relating to an order for transmission or for the execution of a decree or order for arrest, attachment, sale or otherwise. Order XIV Rule 10 delegates the power to the Master in respect of description specifically made in the above rule. One such rule deals with Execution Petition. Order XLIII deals with the proceedings under the Arbitration Act (Act X of 1940) which remains unamended after Act XXVI of 1996 which deals with the procedure of filing the applications under Act X of 1940 to the Court. The unamended Rule also gives power to the Registrar to issue notice in executing the award. The unamended rule also clearly show that the rule was framed to delegate power only to the Master/Registrar to deal with the execution proceedings. Now the Central Act has been amended. As per the amended Act, in Explanation to Section 47 of the Arbitration Act, the word "Court" defined as the High Court having original jurisdiction to decide the questions forming the

subject matter of the arbitral award, if the same had been the subject matter of a suit on its original civil jurisdiction. In this regard it is useful to refer Order XVII of the Madras High Court Original Side Rules. Order XVII Rule 1 deals with the ordinary and extraordinary original civil jurisdiction of the Court and all such original civil and maritime jurisdiction as may be exercised by the Court of Admiralty or for the trial and adjudication of prize causes and other maritime questions and all such original jurisdiction as may be exercised by the Court in relation to the granting of probates and letters of administration and all original jurisdiction in matters matrimonial may be exercised by one Judge or by a Division Court composed of two or more judges; provided that the Judge before whom matter is posted for hearing may at any time adjourn it for hearing and determination by a Division Court.

14. Though the learned counsel for the applicant has placed much reliance on the above rule, submitting that it should be only before the Judge or by a Division Court. I am not able to persuade myself to the above argument. The above Rule in fact deals with the ordinary and extraordinary original civil jurisdiction of the Court and all such original civil and maritime jurisdiction may be exercised by the Court only where the trial, adjudication and other maritime issues relate to granting of Probates and Letters of Administration, it should be dealt by a Judge or by a Division Court.

15. It is to be noted that some of the function of the judges exercising original civil jurisdiction are also delegated to the Master by statutory enactment in the original side rules. Such power of delegation was derived under statute. Therefore it cannot be said that Master has no jurisdiction and cannot be considered as a court in exercising jurisdiction of this Court. In this Court even power of the Judge in exercising original side jurisdiction and recording the evidence is also delegated to the Master, not only Master but also Additional Master. Such authority vested with the power delegated under the statute cannot be said to have no jurisdiction at all. As already discussed, the Original Side Rules have been framed on the basis of the various enactments set out in the Appendix-I. Power to frame such rule is derived from enactments. Delegation is backed by statute. Therefore, I am of the view that merely because the explanation under Section 47 of the Arbitration Act, added by Act 3 of 2016 of the Arbitration and Conciliation Act 1996, it cannot be construed that the power already vested with the Master under statute to exercise the power under original side jurisdiction is taken away. The amendment under Section 47 should be given a liberal meaning. The very purpose of such amendment in Chapter II is for the speedy disposal of the cases and enforcement of the award. Therefore, this Court is unable to find any inconsistency to explanation added under Section 47 of the Arbitration and Conciliation Act with the Original Side Rules of this

Court. Hence, the contention of the learned counsel for the applicant cannot be given much importance.

16. It is also useful to refer Judgment of a Division Bench of this Court reported in **2007 (4) CTC 161 [Sreyas Ripal and another v. Upasana Finance Ltd.,]** wherein the Division Bench has considered various rules of original side and power of the Master which is as follows:

“6. On a plain reading of the relevant O.S. Rules in conjunction with Section 128 of the Code of Civil Procedure, it is clear that the Master deals with these matters in exercise of the powers delegated to him under the O.S. Rules. It is well settled that where a statute itself has authorised the power to be conferred upon a specific authority, the status of delegate is that of an agent (See Huth Vs. Clarke (1890) 25 QBD 391). It is equally well settled that when an authority delegates its power, it does not completely divest itself of its power but is, in the absence of any statutory bar, capable of resuming it and, unless that is precluded by the terms of the delegation, even exercising concurrent powers. Thus, in Godhavari Vs. State of Maharashtra, [(1966) 3 S.C.R. 314], the Supreme Court held that after delegating its power under Section 30 of the Defence of India Rules to the District Magistrate, the State Government is still competent to make an order of detention itself. As a necessary corollary, since an agent has no independent power, but exercises the powers given to him by his principal, an act done by a delegate is

nothing but the act of the principal. Therefore, if an appeal or revisional power is vested in the delegator, to control its subordinates, the delegator cannot entertain an appeal or revision against the decision of its delegate, because the act of the delegate is that of the delegator and an authority cannot hear an appeal or revision against an order made by itself.”

17. Similarly, in a Judgment reported in **2016 (3) CTC 466 [BMIC Limited v. Chinnakannan Sivasankaran and ors.]** this Court held that order passed by delegate was in exercise of powers given by delegator; such order was not appealable or revisable.

18. The learned counsel appearing for the applicant has also produced judgment of this Court reported in **2007 SCC Online Mad 223 [M/s.Compania Naviera 'SODNOC' vs. Bharat Refineries Ltd., and Another]** which would show that an application has been filed before the Single Judge for enforcement of a foreign award. Such application has been dealt with by a single Judge. The Single Judge has entertained the application and passed order. The issue before the Single Judge was not pertaining to the jurisdiction of the Master. Hence the above judgment relied upon by the applicant was no way in help to the applicant.

19. As already discussed, it is for the person against whom the foreign

award was sought to be enforced to furnish the proof that the award is an unenforceable one. But in the given case, having taken objection that Master has to follow the procedure under Sections 47 to 49 of the Arbitration and Conciliation Act, 1996, no materials whatsoever have either been placed or pleaded to show under what circumstances the award becomes unenforceable. Therefore, now the applicant cannot agitate before this Court on the ground that the award is an unenforceable one. In fact, the Master has heard arguments and passed order and held that the award is enforceable one. Having regard to the facts of the case and in view of the delegated power of the Master, I am of the view that order passed by the Master cannot be found fault with. These applications lack merit and are liable to be dismissed. Point No.2 is answered accordingly.

20. In the result, Application Nos.1633 and 1634 of 2018 in E.P.No.17 of 2017 are dismissed. No costs.

10-07-2018

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N. SATHISH KUMAR, J.



Pre-Devlivery Common Order in:
A.Nos.1633 and 1634 of 2018
in E.P.No.17 of 2017

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