

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.11.2018
DELIVERED ON : 02.01.2019

C O R A M

THE HON'BLE Mr.JUSTICE N.KIRUBAKARAN
AND
THE HON'BLE Mr.JUSTICE ABDUL QUDDHOSE

O.S.A.Nos.288 & 289 of 2018
&
C.M.P.Nos.13492 & 13493 of 2018

M/s.Perfint Healthcare Pvt. Ltd.,
No.16, III Floor, South West Boag Road,
T.Nagar, Chennai - 600 017
Represented by Board of Directors,
Mr.Nandakumar Subburaman
Mr.Guruswamy Krishnamoorthy
Mr.Sudhir Kumar Sethi
Mr.Gopalkrishna Kulkarni
Mr.Veeraraghavan Mohan Kumar

..Appellant in both OSAs.

Versus

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

..Respondent in both OSAs.

COMMON PRAYER: Original side Appeals filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of the Letters Patent against the orders dated 10.07.2018 in Application Nos.1633 & 1634 of 2018 in E.P.No.17 of 2017 passed by this Court.

Prayer in A.No.1633 of 2018: in EP.17 of 2017 filed to stay all further proceedings in EP 17 of 2017 pending before the learned Master during the pendency of the present application challenging the order dated 14/12/2017.

Prayer in A.1634 of 2018 in EP.No.17 of 2017 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 Appellant in both OSAs. ...Mr.Vinod Kumar

For Respondent in both OSAs....Mr.T.Mohan
for Mr.Christopher Manohara

COMMON JUDGEMENT

Judgement delivered by ABDUL QUDDHOSE,J.

The point for determination in these Appeals is whether the Master of this Court under the Madras High Court Original Side Rules is a Court for the purpose of enforcement of foreign awards both under the New York convention as well as Geneva convention. This issue has led us to deal with the functions of the Master under the Letters patent and the Madras High Court Original Side Rules. Under the Arbitration and Conciliation Act 1996 (in short "Act, 1996"), provisions for enforcement of foreign arbitral award is contained in Part II. Sections 44 to 52 of the Act, 1996 deals with enforcement of foreign awards under the New York convention and Sections 53 to 60 deals with enforcement of foreign arbitral awards under the Geneva convention. A foreign arbitral award made on or after 11th October 1960 is a New York convention award and a foreign arbitral award made after 28th July 1924 and not being an Award passed under the New York convention is a Geneva convention Award.

2. In the instant case, we are dealing with a foreign arbitral award which is a New York convention award. There seems to be disputes between the respondent and the Appellant and a foreign arbitral award dated 23.07.2015 came to be passed in favour of the respondent against the Appellant in ICDR Case No.50-20-1300-1133 by an Arbitrator Mr.Paul E.Burns at California, USA for a sum of US \$1,38,182.88 equivalent to Indian Currency of Rs.88,16,068/- calculated at the exchange rate of Rs.63.80 per US \$1 as on 23.07.2015. The respondent filed an execution petition E.P.No.17 of 2017 before the learned Master of this Court under Order XXI Rule 11A read with Rule 37 (1) and (2) of Code of Civil Procedure and Section 337 of the Companies Act, 2013 to execute the foreign arbitral award dated 23.07.2015 against the Appellant by arrest of the Managing Director or any other Director of the Board of Directors of the Appellant for being imprisoned in a civil prison within the jurisdiction of this Court for failure to pay the Appellant the amount awarded under the foreign arbitral award. A counter was also filed by the Appellant in E.P.No.17 of 2017 wherein they have stated that an execution petition is not maintainable under Order XXI of Code of Civil Procedure before the Master as it is well settled that before effective steps are taken for the execution of the foreign award, the parties seeking to enforce

the award under New York Convention has to proceed in accordance with sections 47 to 49 of the Act, 1996. It is also contended in the counter that the learned Master under Order XIV Rule 8 of the Original Side Rules can only deal with the matters enumerated in Order XIV Rule 10 of the Original Side Rules and since enforcement of foreign award is not one of the matters enumerated in Order XIV Rule 10, the learned Master lacks the inherent jurisdiction to entertain the execution petition for enforcement of foreign awards. The respondent also filed its rejoinder to the counter filed by the Appellant in E.P.No.17 of 2017 reiterating that the Master has got the jurisdiction to entertain the execution petition seeking to execute the foreign arbitral award passed in their favour. The learned Master by his Order dated 14.12.2017 in E.P.No.17 of 2017 held that the execution petition filed by the respondent to enforce the foreign arbitral award before him is maintainable and the foreign award is enforceable.

3. Aggrieved by the order dated 14.12.2017 passed by the learned Master, the Appellant filed Application Nos.1633 & 1634 of 2018 before the learned Single Judge of this Court reiterating that the execution petition filed by the respondent in E.P.No.17 of 2017 before the learned Master to execute the foreign arbitral award dated 23.07.2017 passed against the Appellant is not maintainable as it is contrary to the provisions of the Act, 1996 and Original Side Rules. A common counter was also filed by the respondent in Application Nos.1633 and 1634 of 2018 filed by the Appellant reiterating that the execution petition is maintainable and the learned Master has got powers under the Original Side Rules to entertain the execution petition for enforcement of foreign awards. A common rejoinder was also filed by the Appellant to the common counter filed by the respondent in Application Nos.1633 and 1634 of 2018. The learned Single Judge of this Court by order dated 10.07.2018, dismissed Application Nos.1633 and 1634 of 2018 filed by the Appellant and confirmed the order dated 14.12.2017 of the learned Master in E.P.No.17 of 2017.

4. The learned Single Judge in his order dated 10.07.2018 passed in application Nos.1633 and 1634 of 2018 held that two separate proceedings i.e., one under Section 47 to Section 49 of the Act, 1996 for enforceability and another for execution are not required and a single proceeding is sufficient both for enforceability and execution. He has also held that the learned Master has got powers to entertain the execution petition to enforce a foreign arbitral award.

5. Aggrieved by the order dated 10.07.2018 passed by the learned Single Judge in Application Nos.1633 & 1634 of 2018, the instant appeals have been filed by the Appellant.

Submissions of the learned counsels:

6. Heard, Mr.Vinod Kumar, learned counsel for the Appellant and Mr.T.Mohan, learned counsel for the respondent.

7. According to the learned counsel for the Appellant, the learned Master lacks inherent jurisdiction to entertain the execution petition filed under Order XXI Rule 11A read with Rule 37(1) and (2) of Code of Civil Procedure and Section 337 of the Companies Act, 2013 to enforce the foreign arbitral award. He submitted that the respondent will have to comply with the requirements of Sections 47 to 49 of the Act, 1996 for the enforcement of foreign arbitral award passed under the Newyork Convention. According to him, without complying with the mandatory requirements under the Act, 1996, the respondent has directly filed an execution petition before the learned Master under Order XXI Rule 11A read with Rule 37(1) and (2) of Code of Civil Procedure and Section 337 of the Companies Act, 2013 which is not maintainable as the learned Master lacks the inherent jurisdiction to entertain such a petition.

8. The learned counsel for the Appellant drew the attention of this Court to Sections 47, 48 and 49 of the Act, 1996 and submitted that the explanation to Section 47 makes it clear that the Court as contained in Section 47 and the other Sections in Chapter I of Part II 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 and in other cases, the High Court having jurisdiction to hear appeals from decrees of Courts subordinate to such High Court. He further submitted that under Section 48 of the Act, 1996, the enforcement of a foreign arbitral award may be refused at the request of the party against whom it is invoked, if that party satisfies the Court that any of the conditions contained therein have not been fulfilled by the party seeking enforcement of the foreign arbitral award. He also submitted that under Section 49 of the Act, 1996 only when the Court is satisfied that the foreign arbitral award is enforceable, the Award shall be deemed to be a decree of that Court. Therefore, the learned counsel for the Appellant contended that the respondent has not satisfied the mandatory requirements under Sections 47 to 49 of the Act, 1996 and the learned Master also lacks the inherent jurisdiction to entertain the execution petition to execute the foreign arbitral award under Order XXI Rule 11A read with Rule 37(1) and (2) of Code of Civil Procedure and Section 337 of the Companies Act, 2013.

9. The learned counsel for the Appellant further drew the attention of this Court to Order XIV Rules 8 and 10 of the Original Side Rules and submitted that the Master is having power to entertain applications only relating to those enumerated in (i) to (l) in Order XIV Rule 10 of the Original Side Rules which itself is a delegated power given by the High Court to the Master. According to him, none of the powers under the Act, 1996 have been delegated to the learned Master by the High Court. According to him, the enforcement of foreign arbitral award under Section 47 of the Act, 1996 is not merely procedural, but mandatory statutory requirements which can be entertained only by the learned Single Judge of the High Court and not by the learned Master. According to him, the power to dispute the foreign arbitral award and consequently seek rejection of its enforcement under Section 49 of the Act, 1996 has been defeated, due to the respondent filing the execution petition before the learned Master without seeking for enforcement of the foreign arbitral award under Sections 47 to 49 of the Act, 1996. He also submitted that only after the court is satisfied that the foreign arbitral award is enforceable, the award shall be deemed to be a decree as per Section 49 of the Act, 1996. According to him, all these statutory requirements have been given a go-by. Instead the respondent has filed an execution petition before the learned Master to enforce the foreign arbitral award under Order XXI of Code of Civil Procedure which is not maintainable as the learned Master lacks jurisdiction to entertain such an application.

10. The learned counsel for the Appellant placed reliance on the judgment of the Hon'ble Supreme Court in the case of Fuerst Day Lawson Limited vs. Jindal Exports Limited reported in 2001 (6) SCC 356 and that of the Calcutta High Court in the case of Swiss Singapore Overseas Enterprises Pte Ltd vs. LMJ International Limited reported in 2017 SCC Online Cal 9335 and contended that enforceability of the foreign award and execution of the award can be done in the same proceeding before the learned Single Judge of this Court and not before the learned Master as he lacks the inherent jurisdiction to entertain applications for enforcement of foreign arbitral award. He submitted that in both the aforesaid judgments which have also been relied upon by the learned counsel for the respondent, the Hon'ble Supreme Court has held that before effective steps are taken for execution of the award, the party seeking to enforce the award has to proceed in accordance with Sections 46 to 49 of the Act, 1996. In the instant case, the respondent has not proceeded in accordance with Sections 46 to 49 of the Act, 1996 by filing an appropriate petition, before the learned Single Judge of this Court, but before the learned Master.

11. The learned counsel for the Appellant drew the attention of this Court to the Order dated 14.12.2017 passed by the learned Master in E.P.No.17 of 2017 and the order dated 10.07.2018 passed by the learned Single Judge of this Court in Application Nos.1633 and 1634 of 2018 which is the subject matter of challenge in this appeal and submitted that the learned Single Judge of this Court failed to take into consideration Order XIV Rules 8 and 10 of the Original Side Rules and Sections 47 to 49 of the Act, 1996 and has also misapplied and misconstrued the decision of the Hon'ble Supreme court in the case of Fuerst Day Lawson Limited vs. Jindal Exports Limited reported in 2001 (6) SCC 356 wherein the Hon'ble Supreme Court has held that before execution of a foreign award it is necessary to proceed in accordance with Sections 47 to 49 of the Act, 1996, before the Court. The Hon'ble Supreme Court never held that the Master can entertain an application under Section 47 of the Act, 1996 for enforcement of the foreign arbitral award. According to the learned counsel for the Appellant, the learned Single Judge has erroneously misconstrued the decisions of the Hon'ble Supreme Court by holding that the Master is empowered to entertain an execution petition to enforce a foreign arbitral award.

12. The learned counsel for the Appellant further submitted that the learned Single Judge has erred in coming to the conclusion that in terms of Order XLIII of the Original Side Rules, powers have been delegated to the learned Master to deal with execution proceedings. According to him, the learned Single Judge failed to see that Order XLIII Rule 12 specifically provides that all applications under the Arbitration Act, 1940 ought to be heard by a Judge. Hence, the purported reliance on Rule 13 of Order XLIII, which empowers the Registrar to issue process to parties to arbitration proceedings, to come to the conclusion that delegation of power to the learned Master is backed by statute is clearly erroneous.

13. The learned counsel further contended that the learned Single Judge failed to see that while Order I Rule 4(3) of the Original Side Rules defines Court to include the learned Master, such definition is not to be applicable if there is something repugnant in the subject or context. According to him, in the instant case, in view of the definition of Court provided in the explanation to section 47 of the Act, 1996 which is a special code by itself, the subject and the context clearly make the definition of Court in the Original Side Rules inapplicable. According to him, the learned Single Judge erred in coming to the conclusion that the definition of Court in Section 47 will not take away the powers already vested with the learned Master.

According to him, in the absence of specific delegation of powers to adjudicate the proceedings under Sections 47 to 49 of the Act, 1996, the learned Master ought not to have held that the foreign arbitral award is enforceable before him.

14. The learned counsel for the Appellant cited the following authorities:

a) Jeet Mohinder Singh vs. Harminder Singh And Another reported in (2004) 6 SCC 26

The above decision was cited for the proposition that though it is the substance and not the form which is material, that cannot be a reason to quote an inappropriate provision of law and then say "don't look at the nomenclature". According to the learned counsel, in the instant case, the execution petition was filed under Order XXI Rule 11A read with Rule 37(1) and (2) of Code of Civil Procedure and Section 337 of the Companies Act, 2013 and not under Sections 47 to 49 of the Act, 1996 which is a mandatory statutory requirement.

b) Hasham Abbas Sayyad vs. Usman Abbas Sayyad And Others reported in (2007) 2 SCC 355

The above decision was cited for the proposition that principles of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/Court which has no authority in that behalf. According to the learned counsel, in the instant case, the order passed by the learned Master entertaining the execution petition filed by the respondent to enforce the foreign arbitral award under Order XXI Rule 11A read with Rule 37(1) and (2) of Code of Civil Procedure and Section 337 of the Companies Act, 2013 is an order passed by a Court which lacks jurisdiction and therefore the said order is a nullity.

c) Life Insurance Corporation of India And Others vs. Retired LIC Officers Association And Others reported in (2008) 3 SCC 321

The above decision was cited for the proposition that the delegated power to an authority has to be construed strictly. "Other matters connected therewith or incidental thereto" refers to those matters only which have direct nexus to the matters delegated to the authority. According to the learned counsel, in the instant case, the powers of the Master have been clearly enumerated in Order XIV Rule 10 of the Original Side Rules and he does not have any powers beyond the enumerated powers. But in

the instant case, he has exercised powers under Section 47 to 49 of the Act, 1996 encroaching upon the powers of the Court and therefore, the order passed by the learned Master is a nullity as he lacks inherent jurisdiction to deal with the matters relating to enforcement of foreign arbitral award.

d) P.K.Palanisamy vs. N.Arumugam And Another reported in (2009) 9 SCC 173

The above decision was cited for the proposition that "if an act or decision, or an order or other instrument is invalid, it should, in principle be null and void for all purposes; and it has been said that there are no degrees of nullity. Even though such an act is wrong and lacking in jurisdiction, however, it subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction. Until its validity is challenged, its legality is preserved." Relying upon this proposition, the learned counsel for the Appellant submitted that the order passed by the learned Single Judge has to be set aside.

e) Compania Naviera 'SODNOC' vs. Bharat Refineries Ltd & Anr. reported in (2007) 3 Mad LJ 1062

The above decision was cited by the learned counsel for the Appellant for the purpose of bringing to the notice of this Court the general procedure adopted by the Madras High Court for enforcement of foreign arbitral award and it has been the consistent practice that application under section 47 of the Act, 1996 is filed only before the learned Single Judge of this Court and not before the learned Master.

15. Per contra, learned counsel for the respondent would submit that the objects of the Act, 1996 is to give a speedy justice and recovery. According to him, if separate proceedings are to be taken for the enforceability of the award and the other proceeding for the execution of the award, it will defeat the object of the Act. Further in the instant case, the Appellant has admitted that a foreign award has been passed against them which is recognised under Section 44 of the Act, 1996. He further contended that the Act, 1996 never intended for two separate proceedings in respect of execution of foreign award namely one for enforcement and another one for execution. Both are part of single and composite proceeding. Therefore, it cannot be contended that Sections 47 to 49 of the Act, 1996 has not been complied with by the respondent.

16. The learned counsel for the respondent drew the attention of this Court to the Judgment of the Hon'ble Supreme Court in the case of Fuerst Day Lawson Limited vs. Jindal

Exports Limited reported in (2001) 6 SCC 356 wherein the Hon'ble Supreme Court has held that there is no need for separate proceeding, one for deciding the enforceability of the foreign award to make it a rule of the Court or decree and the other for its execution thereafter. Therefore according to him, since the execution petition has been filed by the respondent under Order XXI Rule 11A read with Rule 37(1) and (2) of Code of Civil Procedure and Section 337 of the Companies Act, 2013, the learned Master has got powers to convert the same into one filed under Section 47 of the Act, 1996.

17. The learned counsel for the respondent further contended that the respondent has complied with all statutory requirements. They had filed the original award and paid the required stamp duty for execution and they have also filed the duly certified copy of the agreement entered into between the Appellant and the respondent. The Arbitration dispute was also contested on merits by the Appellant before the International Arbitration Tribunal in USA which culminated in the foreign Award in favour of the respondent. According to him, the Appellant cannot merely state that the respondent has not complied with the mandatory procedure contemplated under the Act, 1996 and scuttle the proceedings. According to the learned counsel for the respondent, the respondent has complied with the requirements of Section 47 of the Act, 1996.

18. According to him, Section 48 shifts the burden on the Appellant to prove that the said foreign award is not enforceable. However, according to him, in the present case, no dispute has been raised by the Appellant about the validity of the award dated 23.07.2015. The decision of the Court under Section 49 of the Act, 1996 is based on the submissions made by the parties. Thus the objection regarding alleged non-compliance of Sections 48 and 49 of the Act, 1996 cannot be countenanced and merely is dilatory tactics adopted by the Appellant to delay the proceeding and the payment to the respondent.

19. The learned counsel for the respondent submitted that the Master has got powers to entertain applications for execution of a decree or an order for arrest and all applications relating merely to procedure under the Arbitration Act, 1940 and also generally in the matter of any Act unless otherwise provided for in the Act itself or by rules thereunder or by these rules. He referred to Order XIV Rule 10 of the Original Side Rules and in particular, he referred to Entry XXIX and Entry L and submitted that the Master is empowered to entertain application for execution of a decree or an order for

arrest as well as all applications relating merely to the procedure under the Arbitration Act, 1940 and generally in the matter of any Act unless otherwise provided for in the Act itself or by rules thereunder or by these rules.

20. The learned counsel for the respondent drew the attention of this Court to the Judgment of Hon'ble Supreme Court in the case of Shri Lal Mahal Limited vs. Progetto Grano Spa reported in (2014) 2 SCC 433 and he referred to paragraph 45 of the said judgment and submitted that Section 48 of the Act, 1996 does not give an opportunity to have a "second look" at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

21. According to him, defences available to the Appellant for refusing the enforcement of the foreign award in favour of the respondent which are merely procedural in nature and the learned Master is empowered to deal with the same in the execution proceedings. The learned counsel for the respondent drew the attention of this Court to the Division Bench judgement of this Court in the case of Sreyas Sripal and another vs. Upasana Finance Limited reported in 2007 (4) CTC 161 and submitted that as held in paragraph 8 of the said Judgment, that the Master being a delegatee of the High Court, the order passed by the learned Single Judge against the order passed by the learned Master is not an appeal or a revision, but is only a review of the order passed by the learned Master.

22. The learned counsel for the respondent also relied upon the Judgment of the Hon'ble Supreme Court in the case of Fuerst Day Lawson Limited vs. Jindal Exports Limited reported in 2011 (8) SCC 333 and submitted that an appeal against the order of the learned Single Judge is not maintainable as per Section 50 of the Act, 1996. He submitted that as per Section 50 of the Act, 1996, an appeal shall lie only from the order refusing to enforce the foreign award under section 48 to the Court authorised by law to hear appeals from such order. Therefore, according to him, applying the decision of the Hon'ble Supreme Court in the case of Fuerst Day Lawson Limited vs. Jindal Exports Limited reported in 2011 (8) SCC 333 as well as Section 50 of the Act, 1996, the present appeal filed by the Appellant is not maintainable before the Division Bench of this Court.

Discussion:

23. Chapter I of Part II comprising of Sections 44 to 52 of the Act, 1996 deal with New York convention awards and Chapter II of Part II of the Act, 1996, comprising of Sections 53 to 60 deal with Geneva convention awards. Since the case on hand involves a New York convention award, we are restricting our discussion only to the enforceability of a foreign arbitral award under the New York convention. Since the issue involved in the present dispute is whether the Master under the Original Side Rules has jurisdiction to execute the foreign award and whether the Master is a Court for the purpose of Sections 47 to 49 of the Act, 1996, we need to first examine the various provisions dealing with enforcement of foreign awards under the New York convention.

24. The objective of any arbitration proceedings is to settle the disputes between parties outside the traditional court system amicably and quickly without causing any unreasonable delay. Section 47 of the Act, 1996 provides that every application for the enforcement of foreign award under the Act, 1996 shall be accompanied by (1) the original award or a copy of the award as authenticated as per requirement of the country in which it was made; (2) the original arbitration agreement or a copy of the arbitration agreement; (3) and any evidence that is necessary to prove that the award is a foreign award; (4) in case, the award is in local language of the country in which the award is made then an English Translation of the award is to be accompanied with the application. The translation is to be verified by the consulate of the country in which it is made.

25. The explanation to Section 47 of the Act, 1996 states "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 in its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of Courts subordinate to such High Court.

26. Section 48 of the Act, 1996 lays down negatively conditions for enforcement of foreign awards. It lays down the grounds for refusal of enforcement of foreign awards. The grounds are as follows:

(a) The arbitration was not valid under the law to which parties to the agreement were subjected to.

(b) The parties to the arbitration agreement were under some legal incapacity in the country in which the award was made.

(c) The party against whom the award is to be invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was unable to present the case.

(d) The award deals with the differences not contemplated in the submission to arbitration or contains decision on matters beyond the scope of submission to arbitration.

(e) The composition of the arbitral tribunal or arbitral process was not in accordance with the agreement between the parties or failing such agreement, was not in accordance to the law of the country in which the award was made.

(f) The award had not become yet binding on the parties or suspended in the country in which it is made.

(g) The subject matter of the difference is not capable of settlement by way of arbitration under the law of India.

(h) The enforcement of foreign award was against the public policy of India. The award is said to be in conflict with the public policy in India if the making of award is induced by fraud or corruption.

27. Explanation 1 to Section 48 of the Act, 1996 clarifies that an award is in conflict with the public policy of India only if,-

(a) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81 of the Act; or

(b) it is in contravention with the fundamental policy of Indian law; or

(c) it is in conflict with the most basic notions of morality or justice.

28. Explanation 2 to Section 48 of the Act, 1996 makes it clear that the test as to whether there is contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. The Court under section 48(3) of the Act, 1996 may if it considers it proper, adjourn the decision on the enforcement of the award if an application for setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of section (1) of Section 48 of the Act, 1996 and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

29. As seen from Section 48 of the Act, 1996, the party against whom a foreign arbitral award is sought to be enforced is empowered to raise defences for rejection of enforcement as per the grounds enumerated in Section 48(1) and (2) of the Act, 1996.

29(i) As per Section 49 of the Act, 1996 only when the Court is satisfied that the foreign award is enforceable under Chapter I of Part II of the Act, 1996, the Award shall be deemed to be a decree of that Court.

30. Section 50 of the Act, 1996 contemplates that (1) an appeal shall lie from an order refusing to-

(a) refer the parties to arbitration under section 45;

(b) enforce a foreign award under section 48;

to the Court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

31. As seen from section 50 of the Act, 1996, no appeal is maintainable if the enforcement of foreign award is granted by the Court. But that does not take away the aggrieved party the right to appeal to the Hon'ble Supreme Court.

32. We need to now examine as to whether the Court for the purpose of Sections 47, 48 and 49 of the Act, 1996 include a "Master" under the Madras High Court Original Side Rules. In the case on hand, the respondent has filed an execution petition E.P.No.17 of 2017 under Order XXI Rule 11A read with Rule 37(1) and (2) of Code of Civil Procedure and Section 337 of the Companies Act, 2013 to enforce the foreign arbitral award dated 23.07.2015 passed in their favour by the sole arbitrator, Mr. Paul E. Burns at California, U.S.A in ICDR case No.50-20-1300-1133. The Appellant has raised the issue of maintainability of E.P.No.17 of 2017 before the learned Master on the ground that the learned Master lacks the inherent jurisdiction to entertain an execution petition to enforce a foreign arbitral award and only the learned Single Judge of this Court is empowered to deal with an application for enforcement of foreign arbitral award as contemplated under sections 47 to 49 of the Act, 1996.

33. Sections 47, 48 and 49 of the Act, 1996 refer to Court only and not to any other judicial authority. The Court means for the purposes of international commercial arbitration under Section 2(1)(e)(ii) of the Act, 1996 is as follows:

" "Court" means- (i) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of Courts subordinate to that High Court."

34. The explanation to Section 47 of the Act, 1996 gives the meaning of the Court for the purpose of Section 47 as well as the Sections following it in Chapter I. Chapter I of Part II of the Act, 1996 deals with Sections 44 to 52. Explanation to Section 47 reads as follows:

" In this section and in the sections following in this Chapter, "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 and in other cases, the High Court having jurisdiction to hear appeals from decrees of Courts subordinate to such High Court."

35. Under Section 49 of the Act, 1996, only when the Court is satisfied that the foreign award is enforceable under Chapter 1 of Part II, the Award shall be deemed to be a decree of that Court. Therefore, only after the foreign award becomes a decree, it can be executed.

36. We need to examine now as to whether the learned Master is a Court for the purpose of Sections 47 to 49 of the Act, 1996 and whether he has powers to pass a decree in terms of Section 49 of the Act, 1996 as well as the powers to execute the same under Order XXI of Code of Civil Procedure.

37. Order XIV Rules 8, 9, 10 and 11 of the Original Side Rules are relevant provisions for deciding whether the learned Master has got powers to execute a foreign award. Rules 8, 9, 10 and 11 of the Original Side Rules reads as follows:

"R.8. All applications other than those mentioned in Rule 10 infra shall be disposed of by a Judge; provided that a Judge may refer any matter brought before him under this rule to a Division Bench.

R.9 The Master will sit every day on which the office of the Court is open to dispose of the applications specified in rule 10. In the event of the absence of the Master, such applications, if of an urgent nature, may be made to the Judge.

R.10. All applications of the description or relating to the matters hereunder mentioned shall be made to the Master:

(i) Admission and rejection of complaints and applications for excusing delay in representation of pleadings beyond one month.

(ii) Applications for leave to sign and verify any pleadings or any other proceedings in suit or matter.

(iii) Applications for revocation of the appointment of an advocate and for change of advocates.

(iv) Applications for an order appointing a guardian-ad-litem of an infant or a person of unsound mind or for insertion of the name of the legal representative of a deceased party and for amendment of the record accordingly.

(v) Applications by strangers to a suit for leave to inspect the records and for obtaining copies of the records.

(vi) applications for inspection of documents received on subpoena or summons or letter of request or for obtained copies thereof.

(vii) Applications for production of records or documents or accounts filed in such record before any other Court or officer of such courts.

(viii) Applications for the issue of a proceedings to another Court for the production of the record of such Court or of notice or summons to a public officer for production of a public record or register.

(ix) Applications for an order directing the Registrar of Assurances to transmit a Will or codicil to the High Court.

(x) Applications for the issue of a citation to any person to bring into Court any testamentary document or paper.

(xi) Applications for enlargement or abridgement of time under Order I, Rule 7 of

these rules, and generally all applications for extension of time under the Code, or under these rules except with regard to time fixed by the Court in decrees for decretal orders.

(xii) Applications for adding or striking out parties in suits or other matters and for leave to amend a pleading or to strike out any matter therein.

(xiii) Applications for orders for production of prisoners and others under the Prisoners Act, 1900.

(xiv) Applications under Order I, Rule 8 of the Code, for leave to sue and defend on behalf of or for the benefit of all in the same interest.

(xv) Applications for orders concerning substituted service of summons or notices.

(xvi) Applications for leave to appear after eight days by a third party under the third party procedure.

(xvii) Applications for directions in respect of matters referred to in Order VI, Rule 8(1) to (5) and (8) of these rules.

(xviii) Applications relating to the conduct of suit previous to the hearing unless the suit is in one of the lists of causes for the day.

(xix) Applications for further and better statement of particulars under Order VI, Rule 5 of the Code.

(xx) Applications for decrees under Order VII of the Rules, in default of the defendant obtaining leave to defend or of his defence in pursuance thereof.

(xxi) Applications for summary suits filed under Order VII of these rules being treated as ordinary suits.

(xxii) Applications for transfer of suits from the list of default causes to the General list of causes or Monthly List of causes. Applications for transfer of suits from the list of contested suits to any other list.

(xxiii) Applications for leave to file further written statements.

(xxiv) Applications for discover and inspection.

(xxv) Applications for delivery of interrogatories and determining whether interrogatories are properly answered.

(xxvi) Applications for examination of witnesses de bene esse.

(xxvii) Applications, except in cases coming under Order VIII of these rules or Order XXXII of the Code for an order permitting the withdrawal or dismissal of a suit, appeal, application or matter, by consent or where the other side has not answered, or for passing a decree by consent.

(xxviii) Applications for the return of exhibits, both documentary and non-documentary, including applications under Order XIII, Rule 9 of the Code.

(xxix) Applications for or relating to an order for transmission or for the execution of a decree or order for arrest, attachment, sale or otherwise, with power to issue notice under Order XXI, Rules 16, 22, or 37 of the Code, or where notice is otherwise necessary or considered advisable (except matters dealt with by the Registrar under the powers delegated to him by the Chief Justice).

(xxx) Applications for precept under Section 46 of the Code.

(xxxi) Applications for the withdrawal of attachment or for return of a warrant.

(xxxii) Applications for confirming a sale in execution of, or under a decree held by the Official Referee, Commissioner or by the Sheriff.

(xxxiii) Applications for the examination of a judgement-debtor as to his property under Order XXI, Rule 41 of the Code.

(xxxiv) Applications under Section 52 of the Code.

(xxxv) Applications under Order XXI, Rule 50, sub-rule (2) of the Code where the liability is not disputed.

(xxxvi) Applications for possession under Order XXI, Rules 95 and 96 of the Code.

(xxxvii) Applications in execution for appointment of a receiver or for the issue of an injunction.

(xxxviii) Uncontested applications for recording satisfaction or adjustment of a decree.

(xxxix) Applications for concurrent and simultaneous execution of decrees.

(xl) Applications for payment out of moneys paid in execution of decrees or orders of Court or for delivery of effects and securities into or out of Court.

(xli) Applications for rateable distribution under Sec.73 of the Code.

(xlii) Applications arising from the death, marriage or insolvency of parties to suits or petitions or from the assignment, creation or devolution of any interest, estate or title pendente lite.

(xliii) Applications to set aside abatement of suits.

(xliv) Applications for commissions to examine witnesses under Order XXVI, Rules 1 to 8 of the Code.

(xlv) Applications under Order XXX, Rule 2 of the Code, for disclosure of partners' names.

(xlvi) Applications for leave to institute or defend any proceedings as indigent person and for investigation of pauperism.

(xlvii) Applications by Receivers and other relating to the ordinary management of property.

(xlviii) Uncontested applications in respect of proceedings for probate or Letters of Administration.

(xlix) Uncontested applications for amendment of decrees, and orders, settling

and approving deed of assignment in case of sale under the Guardians and Wards Act, applications by persons interested in the property of minors for inspection and taking copies of statements of accounts by the guardian.

(1) All applications relating merely to procedure under the Indian Companies Act, 1913; the Guardians and Wards Act, 1890; Indian Lunacy Act, 1912; the Indian Succession Act, 1925; the Court-Fees and Suits Valuation Act, 1955; the Indian Trusts Act, 1882; the Arbitration Act, 1940; the Powers-of-Attorney Act, 1882; the Bankers Books Evidence Act, 1891; and generally in the matter of any Act unless otherwise provided for in the Act itself or by rules thereunder or by these rules.

R.11. The Master or Registrar may refer to the Judge any matter which he considers to be a proper one to be so referred, and the Judge may either dispose off the matter or refer the same back to the Master or Registrar as the case may be with such directions as he may think fit.

As seen from the above mentioned rules, only a Judge shall hear an application if the said application does not fall in the enumerated list mentioned in Rule 10. Rule 10 enumerates the list of applications, which the Master is empowered to hear. None of those applications pertain to applications filed under the Act, 1996. Even Order XIV Rule 10(1) of the Original Side Rules, which the learned counsel for the respondent cited refers to only the Arbitration Act, 1940 (Old Act) and not the Arbitration and Conciliation Act, 1996 which is completely different from the old Arbitration Act. Even under Order XIV Rule 10 (1), applications under the Arbitration Act, 1940 (Old Act), the Master is empowered to hear only matters pertaining to mere procedure and not otherwise. Even under Rule 11, only with regard to applications enumerated in Rule 10, the Master may refer the matter to the Judge, if he considers it to be proper. This reference can also be done by the Master only when the application falls within the enumerated list of applications contained in Rule 11 and the Master is empowered to hear. Enforcement of foreign award is different from execution of decree under Order XXI of Code of Civil Procedure. Under Section 49 of the Act, only after the Court is satisfied that the foreign award is enforceable, it becomes a decree. Order XIV Rule 10 (xxix) of the Original Side Rules empowering the Master to deal with applications relating to execution of decree will not apply for the enforcement of foreign award.

38. It is settled law that the Arbitration and Conciliation Act, 1996 is a special law and it overrides the general laws like that of Code of Civil Procedure when the special law provides for separate procedure for enforceability and execution. As seen from Sections 47 to 49 of the Act, 1996, enforceability and execution are done in the same proceedings before the Court. Since the Master does not have power to deal with enforcement of foreign award, the learned Single Judge sitting in the original side alone has got the powers to hear applications pertaining to enforcement of foreign arbitral awards.

39. Clause 36 of the Letter Patent declares that any function which is directed to be performed by the High Court in the exercise of its Original or Appellate jurisdiction may be performed by any judge or by any Division Court thereof appointed or constituted for such purposes. Clause 36 of the Letters Patent reads as follows:

" 36.Single Judges and Division Courts.- And we do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Madras, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, in pursuance of Section 108 of the Government of India Act, 1915, and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case included who those first heard it."

40. Since Clause 36 uses the word "may", certain functions have been delegated to the Master. The High Court exercising the power available to the High Court under Section 128 (2) (i) of the Code of Civil Procedure has delegated certain powers to the Master as enumerated in Order XIV Rule 10 of the Original Side Rules. Section 128 of the Code of Civil Procedure reads as follows:

"Matters for which rules may provide.- (1)
Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject

thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by subsection (1), such rules may provide for all or any of the following matters, namely:-

(a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service;

(b) the maintenance and custody, while under the attachment, of live-stock and other movable property, the fees payable for such maintenance and custody, the sale of such live-stock and property, and the proceeds of such sale;

(c) procedure in suits by way of counterclaim, and the valuation of such suits for the purposes of jurisdiction;

(d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts;

(e) procedure where the defendants claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not;

(f) summary procedure-

(i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising-

on a contract express or implied; or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than penalty; or

on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only; or

(ii) in suits for the recovery of immovable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant;

- (g) procedure by way of originating summons;
- (h) consolidation of suits, appeals and other proceedings;
- (i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and
- (j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts."

Therefore, the learned Master exercises certain judicial functions under Order XIV Rule 10 of the Original Side Rules only as a delegatee of the High Court and only the applications enumerated under Order XIV Rule 10 of the Original Side Rules can be heard by the learned Master.

41. Order I Rule 4 (3) of the Original Side Rules reads as follows:

"R.4. In these rules, unless there is something repugnant in the subject or context.....

(3) "Court" includes a Judge, or Master, or First Assistant Registra, Original Side;"

Since the High Court has not delegated any of the powers to the Master under the Act, 1996, he does not have power to hear applications under the Act, 1996. Therefore, the Court for the purpose of Order I Rule 4(3) of the Original Side Rules makes it clear that the reference to a Court under Sections 47 to 49 of the Act, 1996 refers only to the learned Single Judge sitting in the Original Side. The Master was never vested with the authority of the High Court to exercise the powers under the Act, 1996.

42. We are of the considered view that the learned Single Judge has erred in coming to the conclusion that in terms of Order XLIII of the Original Side Rules, powers have been delegated to the learned Master to deal with the execution proceedings for enforcement of foreign awards. Even under Order XLIII Rule 12 of the Original Side Rules, all applications under the Arbitration Act, 1940 (Old Act) shall be heard only by a Judge. Even though we are not dealing with the Arbitration Act, 1940 (Old Act) in the instant case, for the purpose of analogy, we can infer that the Court for the purpose of Sections 47 to 49 of the Act, 1996 shall mean only the learned Single Judge sitting in the Original Side of the High Court and not the Master.

43. The Division Bench Judgment of this Court in the case of Sreyas Sripal and another vs. Upasana Finance Litd., reported in 2007 (4) CTC 161 has rightly observed that the Master is only a delegatee of the High Court and exercises powers delegated by the High Court to him. Paragraph 8 of the said Judgment makes it clear that the Master passes an order in respect of applications filed under Order XIV Rule 12 of the Original Side Rules only in his capacity as a delegatee of the High Court. Paragraph 8 of the said judgment is extracted hereunder:

"8. Applying the same logic, this Court cannot exercise the power of Appeal or Revision against the order of the Master, which is passed by him in the capacity as a delegate of the High Court. It is well settled that ordinarily an Appeal would lie from a lower Authority to the higher Authority and an order passed by the delegate is in exercise of powers given by the delegator and such an order is not appealable or revisable . Therefore, we are inclined to accept the contention of the learned Senior Counsel Mr.Yashod Vardhan that the word 'Appeal' in Order 14, Rule 12 is a misnomer, but it is actually a power of review of this Court. Therefore, such an order passed by the Master is not appealable or revisable by the learned Judge under Rule 12. The power conferred under Rule 12 is really in the nature of power of Revision. Consequently, the bar under Section 100-A of the Code of Civil Procedure is not attracted and the Appeal are perfectly maintainable."

44. In India and in many other common law countries including England, the Master has been given certain functions. Masters are typically involved in hearing trials, case management, and in some jurisdictions dispute resolution or adjudication of specific issues referred to by the judges. As per the Madras High Court Original Side rules also, the delegated power given to the Master under Order XIV Rule 10 of the Rules, includes similar type of functions.

45. In a recent decision of Queen's Bench Division of England reported in (2018) EWHC 692 (QB), the status of the Master was considered. The relevant paragraphs of the above said Judgment is extracted hereunder:

Masters of the Queen's Bench Division

60. Section 109 of the Constitutional Reform Act 2005 incorporates the office holders listed in Sch. 14 as 'Judicial Office Holders'. Others Other Judicial Office Holders include Puisne Judges, Circuit Judges and District Judges.

61. This is confirmed by the Judicial Pensions and Retirement Act 1993s.1(6) which applies Sch.1 of that Act. Salaried Masters and others such as salaried Puisne judges, Circuit Judges etc including Tribunal judges, are said to be "Holders of qualifying judicial office".

62. Is a "Judicial Office Holder" a judge? Sch.1 of the 1993 Act divides Judicial Office Holders into sub-headings which are "Judges", "Court Officers", "Members of Tribunals", "Other offices whose holders are appointed by the Lord Chancellor" and lastly "Other offices". This may be evidence that there is a distinction between 'judges' and all other forms of judicial office holder.

63. Yet District Judges (county courts) are not included as "judges", nor is the Judge Advocate General, nor are Employment Judges, or Judges of the Upper Tribunal (and so on). It would create an absurdity (and probably some consternation), if it were to be the case that they are not, as they may have thought, judges after all. What they may think is of course not the point, with consternation or not, but the repercussions in legal terms which would arise from concluding that such judges are not judges after all would be so broad that it seems most unlikely that the 1993 Act intends that effect.

64. The subheading 'judges' in Sch.1 to the 1993 Act is in my judgment no more than an indication that the office holders set out there do not require some other additional description beyond the most simple one of 'judge'. Thus, for example in the case of District Judges (county courts), they appear as 'court officers' whereas Circuit Judges appear only as 'judges'. This is indicative of the fact that District Judges in addition to sitting as judges also have the duties of court officers while Circuit Judges do not.

65. I note that rule 2.3 of the Civil Procedure Rules includes within the definition of the term 'judge', "unless the context otherwise requires, a judge, Master or District Judge or a person authorised to act as such", which suggests that there is no distinction to be drawn between different sorts of judicial office holder as regards the question whether they are in the general sense 'judges'.

66. QB Masters are thus judges who are also court officers. Puisne judges are simply 'judges'. Masters for historical reasons transact the 'business' of the High Court as well as performing their (historically later acquired) judicial functions. The fact that since the latter half of the 20th century Masters have been required to take the full judicial oath on assuming judicial office is perhaps also a pointer to the same conclusion.

(ii) If Masters are judges, given the wording of s.4 SCA 1981 are they 'judges of the High Court', or if not, what is their position?

67. Recall that s.19(3) SCA 1981 provides that "Any jurisdiction of the High Court may be exercised only by a single judge of that court" (save where rules provide otherwise).

68. Given my conclusion that the High Court does not 'comprise' Masters (because of their omission from SCA 1981 s.4) it is clear that Masters, whilst being judges, are not 'judges of that court'. If they were, then s.19(3) would be a pointless provision since there would be no requirement for a provision enabling the grant of powers to Masters to exercise the jurisdiction of judges of the High Court.

The status of a Master in the Madras High Court is almost akin to the status of a Master in English Courts. As per the Madras High Court Original side rules also, the Master has been given power to exercise functions as enumerated in Order XIV Rule 10 of the Original Side Rules by the High Court exercising its powers to delegate under Section 128 (2) (i) of the Code of Civil Procedure. Similar to the English courts as laid down in Section 19(3) of SCA, 1981 extracted in paragraph 67 of the English Judgment referred to supra, we have a similar provision under clause 36 of the Letters patent which declares that any function which is directed to be performed by the High Court in the exercise of its Original or Appellate jurisdiction may be performed by any Judge or by any Division Court thereof appointed or constituted for such purpose.

46. In line with the Judgment of the Hon'ble Supreme Court in the case of Fuerst Day Lawson Limited vs. Jindal Exports Limited reported in 2001 (6) SCC 356 and that of the Calcutta High Court in the case of Swiss Singapore Overseas Enterprises Pte Ltd vs. LMJ International Limited reported in 2017 SCC Online Cal 9335, the enforceability of the foreign award and execution of the award will have to be done in the same proceeding.

47. The only point for consideration is whether the Master is a Court for the purpose of Sections 47 to 49 of the Act, 1996 relating to enforcement of foreign award. As observed earlier, the Master is not a Court for the purpose of Sections 47 to 49 of the Act, 1996. There are four stages for enforcement and execution of foreign award. The first one is filing an application under Section 47 of the Act, 1996 by the party having an award in its favour, the second one is refusal of enforcement of foreign arbitral award, if the opposite party satisfies any of the grounds mentioned in Section 48 of the Act, 1996 for its non-enforceability, the third one is the Courts satisfaction about the enforceability of the award under Section 49 and only thereafter, the award shall be deemed to be a decree of the court and the fourth stage is execution of the arbitral award. All the four stages shall be executed in the same proceeding, initiated by the party holding the foreign award in its favour before the learned Single Judge of the High Court under Sections 47 to 49 of the Act, 1996. This is the intention of the legislature under the Arbitration and Conciliation Act, 1996 and that is what the Hon'ble Supreme Court has also held in the case of Fuerst Day Lawson Limited vs. Jindal Exports Limited reported in 2001 (6) SCC 356.

48. Since the Master has not been delegated by the High Court with powers as contemplated under Sections 47 to 49 of the Act, 1996 and is not a court for the said purpose, the learned Master has erroneously exercised execution powers under Order XXI of Code of Civil Procedure giving a go-by to the mandatory statutory requirements as contemplated under Sections 47 to 49 of the Act, 1996 relating to New York convention Awards. The Master has by his erroneous exercise of authority has disabled the Appellant to raise all defences statutorily available to them under Section 48 of the Act, 1996. The learned Single Judge under the impugned order has also misapplied and misconstrued the Judgment of the Hon'ble Supreme Court in the case of Fuerst Day Lawson Limited vs. Jindal Exports Limited reported in 2001 (6) SCC 356 by erroneously coming to the conclusion that Master as a delegatee of the High Court is empowered to hear applications under Sections 47 to 49 of the Act, 1996. Even in the Judgment of the Hon'ble Supreme Court in the case of Fuerst Day Lawson Limited vs. Jindal Exports Limited reported in 2001 (6) SCC 356 cited supra, it was the learned single Judge who exercised jurisdiction under Sections 47 to 49 of the Act, 1996 and not any other delegated judicial authority.

49. The explanation to Section 47 of the Act, 1996 has also made it clear that the 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 and in other cases, in the High Court having jurisdiction to hear appeals from decrees of Courts subordinate to such High Court.

50. Even though the definition of Court for the purpose of international commercial arbitration as contained in section 2 (e) (ii) applies only to Part I of the Act, 1996, the same definition can be imported to Part II also, as such import will not be inconsistent with any of the provisions of the Act, 1996 including Part II. As seen from the definition, the Court means in the case of international commercial jurisdiction, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit and in other cases, a High Court having jurisdiction to hear appeals from decrees of Courts subordinate to that of High Court. Therefore, only the learned Single Judge of the High Court sitting in the original side can hear the applications for enforcement of foreign award.

51. The Hon'ble Supreme Court in a Company Petition filed for winding up, in the case of Dolphin International Limited vs. V.O.Tyazhpromexport reported in (2012) 12 Supreme Court Cases 312 accepted the views of the Delhi High Court in the case of Marina World Shipping Corporation Ltd. v. Jindal Exports (P) Ltd reported in (2004) 122 Comp Cas 399 (Del) and the Calcutta High Court in the case of Vinayak Oil and Fats (P) Ltd. v. Andre (Cayman Islands) Trading Co. Ltd. reported in (2005) 2 Arb LR 551 (Cal) and both the decisions held that an execution petition under Order XXI of Code of Civil Procedure is not maintainable to enforce a foreign award without complying with the mandatory statutory requirements as contemplated under Sections 47 to 49 of the Act, 1996 relating to enforcement of foreign award. The relevant paragraphs of the Hon'ble Supreme Court Judgment reported 2012 (12) SCC 312 cited supra are extracted hereunder:

" 14. In support of this plea Mr Hansaria referred to the judgment of the Supreme Court in Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., Marina World Shipping Corpn. Ltd. v. Jindal Exports (P) Ltd. of this Court and that of the Calcutta High Court in Vinayak Oil and Fats (P) Ltd. v. Andre (Cayman Islands) Trading Co. Ltd.

15. In Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., the Supreme Court while dealing with the enforceability of such foreign awards has laid down, in no uncertain terms, that when such a foreign award is sought to be enforced through a court of law in India, in the first

instance and at the first stage it is incumbent upon the court to satisfy itself about the conditions of such terms as laid down in Sections 47 to 49 of the Act. Relevant portion of the said judgment, in this behalf, is reproduced below: (SCC p. 371, para 31)

"31.... Thus, in our view, a party holding a foreign award can apply for enforcement of it but the court before taking further effective steps for the execution of the award has to proceed in accordance with Sections 47 to 49. In one proceeding there may be different stages. In the first stage 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 effective steps for execution of the same. There arises no question of making foreign award a rule of court/decreed again."

It, therefore, cannot be disputed that before passing any orders in aid of execution of such an award, it is the first requisite that conditions contained in Sections 47 to 49 of the Act are satisfied.

16. In Marina World Shipping Corpn. Ltd. reported in (2004) 122 Comp Cas 399 (Del) which was a company petition filed on the basis of a foreign award, the Company Judge of this Court refused to entertain such a petition for same reasons and pointed out that the objections to the award which can be filed under Sections 47 and 48 of the Act would appropriately be determined in civil proceedings. Without burdening this judgment with the detailed discussion contained therein, for the reasons which we shall point out hereafter, it is sufficient to reproduce the conclusive para of the said judgment:

"... Therefore, a clear stand was taken by the arbitrator that he was not going to decide any question with regard to existence of arbitration agreement/arbitration clause and also the issue with regard to validity of the arbitration agreement. Therefore, whether or not the respondent Company had

acquiesced or waived its right to question the existence of an arbitration agreement or competence of the sole arbitrator to adjudicate and decide and also whether or not an arbitration agreement was entered into between the parties through fax and/or other communications exchanged between the parties are disputes, with regard to facts and, therefore, are disputed questions of fact. Adjudication of such issues would necessarily require investigation and enquiry into facts and evidence produced. The respondent had definitely raised an objection with regard to existence and validity of the arbitration agreement at a very initial stage. The aforesaid objection raised by the respondent with regard to the existence and validity of the arbitration clause is also a defence available against enforcement under the Arbitration Law of India. The said issue also relates to the very foundation on the basis of which the arbitrator has assumed the power and sought to decide the dispute. Such a vitally important question is, therefore, required to be examined minutely and decided in accordance with law. It is also settled law that there can be no waiver as against jurisdiction. These are, therefore, matters which are required to be decided by an appropriate civil court in accordance with law and the company court being a court of limited jurisdiction and its proceedings being summary proceeding, it may not be appropriate to decide the aforesaid questions in the present proceedings. I have restrained myself from discussing and examining the pleas with regard to validity and existence of the arbitration agreement in minute detail in view of the fact that any discussion on the merit of the aforesaid pleas would amount to expressing an opinion on the merit of the same, which could be a subject-matter of a petition under Sections 44 to 48 of the Arbitration Act. Therefore, in my considered opinion, it would be improper to give any opinion, at this stage, with

regard to merit of the aforesaid pleas as it might prejudice one way or the other." (Marina World Shipping Corpn. Case [(2004) 122 Comp Cas 399 (Del)] , Comp Cas pp. 415 H-416 E)

17. Following the aforesaid judgment of this Court, the Calcutta High Court has taken similar view in Vinayak Oil and Fats (P) Ltd. v. Andre (Cayman Islands) Trading Co. Ltd. [(2005) 2 Arb LR 551 (Cal)]

18. It clearly follows from the aforesaid decisions that had the company petition been filed solely on the basis of a foreign award, the direction of the learned Single Judge to the Appellant to deposit the amount covered by the award before decision on the objections under Sections 47 to 49 of the Arbitration and Conciliation Act, 1996 would have been erroneous as it would go contrary to the dicta laid down in the aforesaid judgments.

Therefore, it is absolutely clear that only after a party holding a foreign arbitral award in his favour complies with the statutory requirements of Sections 47 to 49 of the Act, 1996 and obtains the satisfaction of the learned Single Judge of the High court, as regards its enforceability, the Award shall be deemed to be a decree of that Court and only thereafter, it can be executed in the same proceeding before the learned Single Judge of the High Court.

52. For the foresaid reasons, we are of the considered view that the Master of the Madras High Court lacks inherent jurisdiction to exercise powers under Sections 47 to 49 of the Act, 1996 relating to enforcement of foreign arbitral award. Master can exercise functions and hear applications only limited to those enumerated in Order XIV Rule 10 of the Original Side Rules. All other applications will have to be heard only by the learned Single Judge of the Madras High Court sitting in the Original Side . The foreign arbitral award cannot be enforced and executed under Order XXI of the Code of Civil Procedure just like a domestic award or any other decree of a court. Therefore, Order XIV Rule 10(xxix) of the Original Side Rules which deals with execution of decrees will not empower the Master to enforce and execute a foreign arbitral award. The Master without statutory authority and without jurisdiction has under Order XXI Rule 11A read with Rule 37(1) and (2) of Code of Civil Procedure and Section 337 of the Companies Act, 2013 erroneously held the award to be enforceable. The Order dated 14.12.2017 passed by the Master in E.P.No.17 of 2017 holding the foreign award to be enforceable is a nullity as the Master lacks the inherent

jurisdiction to entertain applications under Part II of the Act, 1996 relating to enforcement of foreign awards.

53. The Hon'ble Supreme Court has also held in the case of P.K.Palanisamy vs. N.Arumugam and Another reported in 2009 (9) SCC 173 that it is settled principle of law that an order passed by a court lacking inherent jurisdiction is a nullity when it is brought to the notice of the court. The Master who himself is a delegatee of the high court has acted in violation of the provisions of the Arbitration and Conciliation Act, 1996.

54. Since we have held that the learned Master lacks inherent jurisdiction to enforce a foreign arbitral award under Order XXI of Code of Civil Procedure, the judgment relied upon by the learned counsel for the respondent in the case of Fuerst Day Lawson Limited vs. Jindal Exports Limited reported in 2011 (8) SCC 333 will not apply to the facts of the instant case as the order passed by the learned Master is not an order passed under Sections 47 to 49 of the Act, 1996. Section 50 of the Act, 1996 which deals with the appealable orders is attracted only when the order appealed is an order passed under Section 47 to 49 of the Act, 1996. But in the case on hand, the Master has erroneously exercised jurisdiction under Order XXI of Code of Civil Procedure, which he inherently lacks with regard to enforcement of foreign arbitral award.

55. Eventhough the scope of inquiry under Section 48 of the Act, 1996 does not permit a review of foreign awards on merits, but it is a statutory requirement which necessarily has to be complied with. The decision relating to the enforcement of foreign arbitral award under Sections 47 to 49 of the Act, 1996 shall be rendered only by the learned Single Judge of the High Court sitting in the original side. The reference by the learned counsel for the respondent to the Judgment of the Hon'ble Supreme Court in the case of Shri Lal Mahal Limited vs. Progetto Grano SPA reported in (2014) 2 SCC 433 will not have any applicability to the facts of the instant case as the proceeding relating to enforcement of foreign arbitral award shall be heard only by the learned Single Judge of the High Court sitting in the original side.

Conclusion:

56. We therefore, allow both the appeals and hold that the order dated 10.07.2018 of the learned Single Judge made in Application nos.1633 & 1634 of 2018, confirming the order dated 14.12.2017 of the learned Master in E.P.No.17 of 2017 is erroneous. In the result, the order dated 10.07.2018 of the learned Single Judge confirming the order of the learned Master is hereby set aside and E.P.No.17 of 2017 filed by the

respondent is dismissed. Consequently, connected miscellaneous petitions are closed. However, we grant liberty to the respondent if so advised to file an application under Section 47 of the Arbitration and Conciliation Act, 1996 to enforce and execute the foreign arbitral award dated 23.07.2015 before the learned Single Judge of this Court in the Original Side. No costs.

Sd/-
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

nl

(Note:)

Registry of this Court is directed to take note of this Judgement and in future, not place matters relating to enforcement and execution of foreign arbitral awards before the Master of this Court and place the same only before the learned Single Judge of this Court sitting in the original side, hearing applications under Part-II of the Arbitration and Conciliation Act, 1996.

To

1. The Sub Assistant Registrar,
Original Side, High Court, Madras.
2. The Section Officer, F Section,
High Court, Madras.(for takes appropriate action)

Copy to:

1. The Registrar Judicial, High Court, Madras.
2. The Registrar General High Court, Madras.
3. The Assistant Registrar (AE Section), High Court, Madras.
4. The Sub Assistant Registrar, (AE Section) High Court, Madras.

- + 1 cc to Mr. R. Anish Kumar, Advocate SR.564
+ 1 cc to MR. Vinod Kumar, Advocate Sr.244

O.S.A. Nos.288 & 289 of 2018

GJII(CO)
EU(18/01/2019)