WWW.LEGALERAONLINE.COM

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

TUESDAY, THE 7TH DAY OF FEBRUARY 2023 / 18TH MAGHA, 1944

CRP NO. 618 OF 2019

AGAINST THE ORDER/JUDGMENT in EP 97/2013 OF II ADDITIONAL DISTRICT COURT ,KOLLAM

REVISION PETITIONER/S:

M/S PENIEL CASHEW COMPANY
PUTHOOR P.O., KOLLAM - 691 507, REPRESENTED BY ITS PROPRIETOR JOB G. OOMMEN

BY ADVS.
T.KRISHNANUNNI (SR.)
SRI.N.D.PREMACHANDRAN
SRI.D.AJITHKUMAR
SRI.VINOD RAVINDRANATH

LEGAL MEDIA GROUP
LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

RESPONDENT/S:

M/S.AHCOM SARL
GALERIE DU GRAND LARGE, 42 QUAL JEAN - CHARLES REY, 98000 MONACO, REPRESENTED BY ITS AUTHORIZED SIGNATORY ANILKUMAR S, S/O. SREEDHARAN, AGED 54 YEARS, 237, 13TH STREET, GIRINAGAR, KOCHI - 682 020

BY ADV T.R.ASWAS

THIS CIVIL REVISION PETITION HAVING FINALLY HEARD ON 20.12.2022 AND THE COURT ON 7.2.2023 DELIVERED THE FOLLOWING:

WWW.LEGALERAONLINE.COM

C.S DIAS,J.

CRP 618 of 2019

Dated this the 7th day of February, 2023.

ORDER

The civil revision petition is filed by the award debtor in E.P No.97/2013 of the Court of the Second Additional District Judge, Kollam, challenging the order of his arrest and detention in the civil prison. The respondent is the award holder.

2. The salient background facts leading to the impugned order are:

2.1. The respondent has filed E.P No.97/2013 against the petitioner to execute a foreign arbitration award passed by Combined Edible Nut Trade Association (CENTA), London.

2.2. The respondent had initiated arbitration proceedings against the petitioner, based on an earlier contract to realise an amount of 2,88,125.20 U.S Dollars. The petitioner was not served with notice or given an

WWW.LEGALERAONLINE.COM

opportunity to contest the arbitration proceedings, but CENTA passed an exparte award on 20.12.2012.

2.3. The petitioner challenged the award before the District Court, Kollam, by filing O.P No.1/2013 under Section 34 of the Arbitration and Conciliation Act, 1996 (in short, 'Act'). The respondent questioned the maintainability of the original petition. The District Court rejected the objection. The respondent unsuccessfully challenged the order before this Court and the Hon'ble Supreme Court. Consequently, the District Court proceeded with O.P No.1/2013.

2.4. The respondent again filed I.A No.1464/2016 in O.P No.1/2013, to hear the question of maintainability. The District Court dismissed the said application.

2.5. The respondent challenged the order before this Court in O.P(C)No.2983/2016. This Court dismissed the original petition but directed the District Court to expeditiously dispose of O.P No.1/2013.

WWW.LEGALERAONLINE.COM

2.6. By order dated 6.7.2013, the District Court dismissed O.P No.1/2013 on the finding that Part I of the Act does not apply to foreign seated arbitrations.

2.7. The delay in the disposal of O.P No.1/2013 was on account of the various petitions filed by the respondent.

2.8. Aggrieved by the order passed in O.P No.1/2013 on the finding that the original petition was not maintainable and directing the petitioner to furnish fresh security, the petitioner filed Arbitration Appeal No.54/2017 and O.P (C)No.2932/2017 before this Court.

2.9. This Court dismissed the appeal and confirmed the order in O.P No.1/2013. Yet, this Court allowed O.P (C)No.2932/2017, observing that the question of security would arise only after ascertaining whether the award was enforceable.

2.10. In the interregnum, the respondent filed E.P No.97/2013 to execute the award. After the dismissal of the appeal, the District Court posted the execution petition for evidence. The respondent did not let in oral evidence. On the contrary, the petitioner and two witnesses were

WWW.LEGALERAONLINE.COM

examined as DWs 1 to 3 and Exts.B1 to B33 series were marked.

2.11. The District Court, by orders dated 13.3.2018 and 15.3.2018, held that it has jurisdiction to decide the execution petition and that the award was enforceable.

2.12. The petitioner challenged the above order before this Court in O.P(C)No.1005/2018. This Court set aside the order and remanded the matter.

2.13. The District Court, by order dated 17.7.2018, reiterated that it had jurisdiction to decide the issue.

2.14. The petitioner again challenged the above order before this Court in O.P(C)No.1877/2018. However, this Court dismissed the original petition on 30.10.2018, and the Hon'ble Supreme Court confirmed the judgment in S.L.P No.122/2019.

2.15. The District Court, by its orders in E.A Nos.131/2018 and 441/2018, quantified the amount payable by the petitioner including interest.

2.16. Again, the petitioner challenged the above order before this Court in O.P (C)No.23/2019.

WWW.LEGALERAONLINE.COM

2.17. After this Court confirmed that the award was enforceable, the respondent filed E.A No.132/2018, to arrest and detain the petitioner in civil prison. The petitioner filed his objection to the notice issued under Order 21 Rule 37 of the Code of Civil Procedure (in short, CPC). He, *inter alia*, pleaded that he has no means to pay the award debt and is seriously ill due to renal issues. The respondent filed his reply affidavit to the objection and produced Exts.A1 to A5 documents.

2.18. By the impugned order, the court below held that the petitioner has the means to pay the award amount.

2.19. The impugned order is patently illegal, improper and irregular. Hence, the civil revision petition.

3. Heard; Sri. T Krishnanunni, the learned Senior Counsel appearing for the petitioner and Sri. T.R Aswas, the learned Counsel appearing for the respondent.

4. Sri. T Krishnanunni argued that the impugned order is erroneous for more reasons than one. His main contention was that the respondent company had ceased to exist; therefore, the execution petition was unsustainable in law.

WWW.LEGALERAONLINE.COM

According to him, Exts.B1 to B14 documents prove the above crucial aspect. The respondent has not let in any evidence to shift the onus of proof. Likewise, the court below failed to take note of the pivotal point, i.e., the means of the petitioner is to be considered on the date the award becomes enforceable and not on the date of passing of the foreign award. Furthermore, the respondent had failed to comply with the mandate under Order 21 Rule 11A CPC within the stipulated time period. The petitioner's properties have been proceeded against by the Bank under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Once the Court makes the Section 48 declaration, the Section 49 proceedings are strictly governed and regulated by the provisions of the CPC. Thus, the onus of proof rests on the shoulders of the respondent to prove that the petitioner has the means to pay the award debt. He placed reliance on the decisions of the Hon'ble Supreme Court in **Sushil Kumar v. Rakesh Kumar** [AIR 2004 SC 230], **Punit Rai v. Dinesh**

Chaudhary [AIR 2003 SC 4355], **Peirce Leslie and Co. Ltd. v. I.Miss Violet Ouchterlony Wapshare and others** [AIR 1969 SC 843], **Chatterjee Petrochem Co. & Anr v. Haldia Petrochemicals Ltd and others** [(2014) 14 SCC 574], **Mahanagar Telephone Nigam Ltd. v. M/S. Applied Electronics** [(2017) 2 SCC 37], the decision of this Court in **Joseph K.Mathai v. Luckose Kurian** [AIR 1979 Ker 235], the decision of Court of Appeals in **M.H Smith Plaint Hire Ltd v. D.L Mainwaring** [(1986) 2 Lloyd's Rep. 244] and the decision of the Rajasthan High Court in **Mukkaram and another v. Ardeep Singh** [AIR 1987 Raj 1] to fortify his contentions.

5. Sri. T.R Aswas vehemently countered the above submissions and argued that the instant case depicts the miseries and desperation of a foreign award-holder because it is more than a decade since the foreign award was passed. The present revision petition is the twelfth round of litigation before this Court. The third round is pending before the Honourable Supreme Court. The petitioner approaches this Court at the drop of a hat and stalls the execution

WWW.LEGALERAONLINE.COM

proceedings. The contention that the respondent is no longer in existence is untenable, given the unchallenged findings of the court below in EA No.114/2018. The petitioner is estopped from raking up concluded issues. He also argued that the revision petition is not maintainable because the petitioner has failed to comply with the order dated 5.12.2018 passed by the court below in E.A No.255/2018, directing the petitioner to furnish fresh security. The said order has also attained finality. The learned Counsel further argued that by the common order in EA Nos.131 and 441 of 2018, the court below had quantified the award amount as 4,02,20,263/-. The Hon'ble Supreme Court has categorically held that an application for enforcement of a foreign award cannot be decided on a piecemeal basis. The petitioner had, in unequivocal terms, undertaken before this Court in O.P(C)No.222/2013 that he would not alienate/encumber his properties, which he has contemptuously flouted and has perpetrated a fraud on this Court. A reading of Ext A2 original petition filed under Section 34 of the Act before the court below would reveal that the petitioner had an annual

WWW.LEGALERAONLINE.COM

turnover of Rs.30/- Crore. Likewise, in Ext A3 affidavit filed by the petitioner, he has shown his assets at Rs.39,53, 55,550. Hence, the petitioner's plea that he has no means can only be accepted with a pinch of salt. Ext A5 directory published by the Cashew Export Promotion Council of India shows that the petitioner had an export performance of 450 metric tons worth Rs.35/- Crore in 2016. In Ext A6 counter affidavit filed in Section 9 petition, the petitioner had admitted that he had an export limit of Rs.30/- Crore on 28.6.2012. All the above admissions by the petitioner substantiate his means. The present stand is only to wriggle out of his liability to pay the award amount. The contention that it is only from the date of Section 48 declaration that the means of the judgment debtor is to be looked into is unsustainable. Exts.B1 to B14 documents are irrelevant and immaterial because they do not pertain to the respondent. The documents have not been properly proved and do not contain the mandatory certification under Section 65 B of the Evidence Act. The petitioner's admissions in the documents produced are more than sufficient to prove that

WWW.LEGALERAONLINE.COM

he has the means to pay the award debt. The court below has rightly concluded that the petitioner has the means to pay the award amount. There is no error, illegality or impropriety in the impugned award. The learned counsel principally relied on the decisions of the Honourable Supreme Court in **Gemini Bay Transcription Pvt Ltd v. Integrated Sales Service Limited** [AIR 2021 SC 3836], **M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd** [AIR 2001 SC 2293], **LMJ International Ltd v. Sleepwell Industries Co. Ltd** [(2019) 5 SCC 302], and the decisions of this Court in **Job G Oommen v. Ahcom Sarl Galeri Du Garind Largee** [2017 (5) KHC 444], **International Nut Alliance LLC v. Johns Cashew Company** [2022 (1) KLT 222] and **Emmanuel Cashew Industries v. CHI Commodities Handlers Inc** [2017 (1) KLT 850] to reinforce his submissions.

6. Is there any illegality, irregularity or impropriety in the impugned order?

7. E.P No.97/2013 is filed by the respondent against the petitioner to enforce a foreign award passed by 'CENTA'.

WWW.LEGALERAONLINE.COM

8. Chapter I of Part II of the Arbitration and Conciliation Act, 1996, deals with the enforcement of foreign awards.

9. The petitioner urged that the enforcement of the foreign award may be refused as it falls within the fouls under Section 48 of the Act.

10. Indisputably, by order dated 17.7.2018, the court below has held that the award is enforceable. The order has been concurrently confirmed by this Court in O.P (C) No.1877/2018 and the Hon'ble Supreme Court in S.L.P No.122/2019. Hence, the question regarding the enforceability of the award has attained finality.

11. Now, what remains is the execution of the foreign award.

12. Dealing with Sections 47 to 49 of the Act, the Honourable Supreme Court in **Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.,** [(2001) 6 SCC 356] held thus:

> "31. Prior to the enforcement of the Act, the law of arbitration in this country was substantially contained in three enactments, namely, (*1*) the Arbitration Act, 1940, (*2*) the Arbitration (Protocol and Convention) Act, 1937, and (*3*) the Foreign Awards

(Recognition and Enforcement) Act, 1961. A party holding a foreign award was required to take recourse to these enactments. **The preamble of the Act makes it abundantly clear that it aims at consolidating and amending Indian laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The object of the Act is to minimize supervisory role of the court and to give speedy justice.** In this view, the stage of approaching the court for making the award a rule of court as required in the Arbitration Act, 1940 is dispensed with in the present Act. If the argument of the respondent is accepted, one of the objects of the Act will be frustrated and defeated. Under the old Act, after making award and prior to execution, there was a procedure for filing and making an award a rule of court i.e. a decree. **Since the object of the Act is to provide speedy and alternative solution to the dispute, the same procedure cannot be insisted upon under the new Act when it is advisedly eliminated. If separate proceedings are to be taken, one for deciding the enforceability of a foreign award and the other thereafter for execution, it would only contribute to protracting the litigation and adding to the sufferings of a litigant in terms of money, time and energy. Avoiding such difficulties is one of the objects of the Act as can be gathered from the scheme of the Act and particularly looking to the provisions contained in Sections 46 to 49 in relation to enforcement of a foreign award.** In para 40of *Thyssen* [(1999) 9 SCC 334] judgment already extracted above, it is stated that as a matter of fact, there is not much difference between the provisions of the 1961 Act and the Act in the matter of enforcement of foreign award. The only difference

WWW.LEGALERAONLINE.COM

as found is that while under the Foreign Awards Act a decree follows, under the new Act the foreign award is already stamped as the decree. 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/decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting in multiplicity of litigation. It is also clear from the objectives contained in para 4 of the Statement of Objects and Reasons, Sections 47 to 49 and the scheme of the Act that every final arbitral award is to be enforced as if it were a decree of the court. The submission that the execution petition could not be permitted to convert as an application under Section 47 is technical and is of no consequence in the view we have taken. In our opinion, for enforcement of a foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the court or decree and the other to take up execution thereafter. In one proceeding, as already stated above, the court enforcing a foreign award can deal with the entire matter. Even otherwise, this procedure does not prejudice a party in the light of what is stated in para 40 of *Thyssen* [(1999) 9 SCC 334] judgment.

WWW.LEGALERAONLINE.COM

32. Part II of the Act relates to enforcement of certain foreign awards. Chapter 1 of this Part deals with New York Convention awards. Section 46 of the Act speaks as to when a foreign award is binding. Section 47 states as to what evidence the party applying for the enforcement of a foreign award should produce before the court. Section 48 states as to the conditions for enforcement of foreign awards. **As per Section 49, if the court is satisfied that a foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that court and that court has to proceed further to execute the foreign award as a decree of that court.** If the argument advanced on behalf of the respondent is accepted, the very purpose of the Act in regard to speedy and effective execution of foreign award will be defeated. Thus none of the contentions urged on behalf of the respondent merit acceptance so as to uphold the impugned judgment and order. We have no hesitation or impediment in concluding that the impugned judgment and order cannot be sustained.

LEGAL MEDIA GROUP
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

13. Section 49 of the Arbitration and Conciliation Act, 1996, reads as follows:

> **"49. Enforcement of foreign awards.** — Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court".

14. The above provision undoubtedly prescribes that if the Court considering an application filed under Part II of the Act is satisfied that the award is enforceable, then the

WWW.LEGALERAONLINE.COM

foreign award will be deemed a decree of the said Court and can be laid to execution. Nevertheless, Part II of the Act does not lay down the procedure by which the foreign award has to be executed, unlike Section 36 in Part I of the Act, which deals with enforcing of domestic awards.

15. It is profitable to extract Section 36 (1) of the Act, which reads thus:

> "[1][**36. Enforcement**--(1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), **such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908)**, in the same manner as if it were a decree of the court".

LEGAL MEDIA GROUP
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

16. On a juxtaposition of Sections 36 and 49 of the Act, it is perceptible that Parliament has consciously omitted the words — **"such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908"** — from Section 49 of the Act.

17. In **Member, Board of Revenue v. Arthur Paul Benthall** [(1955) 2 SCR 842 : AIR 1956 SC 35], the Honourable Supreme Court observed as follows:

WWW.LEGALERAONLINE.COM

"4. ……... When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense, and the conclusion must follow that the expression "distinct matters" in Section 5 and "descriptions" in Section 6 have different connotations.

18. Again, in **B.*R*. *Enterprises v. State of U.P.*,** [(1999) 9 SCC 700] the Honourable Supreme Court held thus:

"70. ……. Significantly, the different use of words in the two Articles is for a purpose; if the field of the two Articles are to be the same, the same words would have been used. It is true, as submitted, that since "trade" is used both in Articles 298 and 301, the same meaning should be given. To this extent, we accept it to be so, but when the two Articles use different words, in a different set of words conversely, the different words used could only be to convey different meanings. If different meaning is given then the field of the two Articles would be different……".

19. Besides the above exposition of the law in **Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.,** [(2012) 9 SCC 552] a Constitutional Bench of the Honourable Supreme Court held as follows:

WWW.LEGALERAONLINE.COM

"194. In view of the above discussion, we are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. **We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in the Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996**".

20. In **Union of India v. Vedanta Ltd.,** [(2020) 10 SCC 1] the Honourable Supreme Court made the following observation:

"83.15. If the Court is satisfied that the application under Section 48 is without merit, and the foreign award is found to be enforceable, then under Section 49, the award shall be deemed to be a decree of "that Court". The limited purpose of the legal fiction is for the purpose of the enforcement of the foreign award. The High Court concerned would then enforce the award by taking recourse to the provisions of Order 21 CPC".

WWW.LEGALERAONLINE.COM

21. On a contemplation of the wordings in Sections 36 and 49 of the Act and the interpretation given by the Honourable Supreme Court, this Court is of the view that the stipulation under Section 36 of the Act that the provisions of the Code of Civil Procedure have to be followed for the enforcement of a domestic award cannot be insisted upon with all its rigour and strictness for the enforcement of a foreign award under Section 49 of the Act. Schematically, only the broader principles of the CPC, the principles of natural justice and fair trial will have to be followed by Courts while dealing with an application under Section 49 of the Act.

LEGAL MEDIA GROUP
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

22. Viewing the matter from the above legal perspective, we return to the facts of the case.

23. The respondent has laid the foreign award to execution invoking Sections 47 and 49 of the Act. The execution petition was initially objected to by the petitioner, *inter alia*, contending that the execution petition is verified

WWW.LEGALERAONLINE.COM

and filed by an imposter, who has no authority to represent, that the entire contract formation is vitiated by fraud, that the petitioner has not received notice in the arbitral proceedings, that the award is unenforceable in India and has not become final etc.

24. The respondent had also filed O.P (Arb) No.324/2012 before the court below, under Section 9 of the Act, for the interim attachment of the properties belonging to the petitioner. The petitioner resisted the original petition through Ext A6 counter affidavit contending that he has already challenged the award passed by CENTA by filing O.P (Arb)No.1/2013 before the court below.

LEGAL MEDIA GROUP BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

25. The petitioner has, in unequivocal terms in paragraph No.25 of Ext A6 counter affidavit, admitted that he has been in the cashew business/export for the past several years, that he has enjoyed an export limit of Rs.30/- Crore from 28.06.2012, that he has a turnover of 32/- Crore, that he is operating several cashew factories in the State and providing employment to thousands of workers, that he

WWW.LEGALERAONLINE.COM

has the financial liquidity and that it is illogical to put forth the theory of alienation.

26. Alleging inaction on the part of the court below in passing orders in O.P (Arb)No.324/2012, the respondent filed O.P (C) No.223/2013 before this Court. Then, the petitioner undertook before this Court that he would not encumber his properties until further orders. The undertaking was recorded by this Court.

27. After several rounds of litigation, the court below held that the award was enforceable. This Court and the Hon'ble Supreme Court concurrently confirmed the said order.

BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

28. After this Court dismissed O.P.(C) No.1877/2018, the respondent filed E.A.No.132/2018 for the personal execution of the petitioner. Then, the petitioner raised the plea of no means and that he was suffering from renal disease.

WWW.LEGALERAONLINE.COM

29. The parties went to trial. The respondent produced and marked Exts.A1 to A5 in evidence. The petitioner got himself and two other witnesses examined as DWs 1 to 3 and marked Exts.B1 to B33 series in evidence.

30. The court below, by the impugned order, concluded that the petitioner has the means to pay the award amount.

31. It is assailing the said order that the present civil revision petition is filed under Section 115 CPC.

32. Recently, in **Frost (International) Ltd. v. Milan Developers & Builders (P) Ltd.**, [(2022) 8 SCC 633], while considering the power and scope of Section 115 of CPC, the Honourable Supreme Court held thus:

> "29. In this regard, we could also usefully refer to the following decisions:
>
> 29.1. Gajendragadkar, C.J., in a judgment passed by the five-Judge Bench of this Court in *Pandurang Dhondi Chougule* v. *Maruti Hari Jadhav* [*Pandurang Dhondi Chougule* v. *Maruti Hari Jadhav*, AIR 1966 SC 153] dealt with the question of jurisdiction under Section 115CPC, as follows : (AIR p. 155, para 10)
>
> "*10*. The provisions of Section 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under Section 115, it is not competent

WWW.LEGALERAONLINE.COM

to the High Court to correct errors of fact however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the court to try the dispute itself. As clauses (*a*), (*b*), and (*c*) of Section 115 indicate, it is only in cases where the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court under Section 115."

LEGAL MEDIA GROUP BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

29.2. Nariman, J. while discussing Section 115CPC and proviso thereto held that revision petitions filed under Section 115CPC are not maintainable against interlocutory orders in *Tek Singh* v. *Shashi Verma* [*Tek Singh* v. *Shashi Verma*, (2019) 16 SCC 678 : (2020) 2 SCC (Civ) 753] . The following observations were made in the said case : (SCC p. 681, para 6)

"*6*. Even otherwise, it is well settled that the revisional jurisdiction under Section 115CPC is to be exercised to correct jurisdictional errors only. This is well settled. In *D.L.F. Housing & Construction Co. (P) Ltd.* v. *Sarup Singh* [*D.L.F. Housing & Construction Co. (P) Ltd.* v. *Sarup Singh*, (1969) 3 SCC 807] this Court held : (SCC pp. 811-12, para 5)

WWW.LEGALERAONLINE.COM

> '*5*. The position thus seems to be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. Clauses (*a*) and (*b*) of this section on their plain reading quite clearly do not cover the present case. It was not contended, as indeed it was not possible to contend, that the learned Additional District Judge had either exercised a jurisdiction not vested in him by law or had failed to exercise a jurisdiction so vested in him, in recording the order that the proceedings under reference be stayed till the decision of the appeal by the High Court in the proceedings for specific performance of the agreement in question. Clause (*c*) also does not seem to apply to the case in hand. The words "illegally" and "with material irregularity" as used in this clause do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with.' "

33. Keeping in mind the above legal principles, this Court considers the challenge.

34. The cardinal contentions argued by Sri. T.Krishnan Unni, the learned Senior Counsel appearing for the petitioner, are:

(i) The respondent company cease to exist;

WWW.LEGALERAONLINE.COM

(ii) The petitioner does not have the means to pay the decree amount and suffers from a severe illness.

(iii) The court below had erroneously permitted the respondent to cure the defects in the time-barred application filed under Order 21 Rule 11A CPC, even though Section 5 of the Limitation Act is not applicable.

35. In order to substantiate the first contention, the petitioner produced Exts.B1 to B14 documents and examined DWs 1 and 2.

36. It is contended that in an enquiry conducted by a private entity named 'Info-Clipper', it was revealed that the respondent's name had been struck off from the Register of Companies by the State of Monaco. Although an attempt was made to transfer funds to the respondent's bank account, the amount could not be remitted. Thus, it is proved beyond any semblance of doubt that the respondent is non-existent. Hence, the execution petition is not maintainable in law.

WWW.LEGALERAONLINE.COM

37. It is on record that the petitioner made a similar attempt by filing E.A. No.114 of 2018 before the court below, questioning the maintainability of the execution petition on the ground that an imposter filed the execution petition. The said application was dismissed, and the order has attained finality. After that attempt, the petitioner has come up with the present contention that the respondent is non-existent.

38. Exts.B1 to B14 documents allegedly sent by 'Info-Clipper' have not been proved by the person who sent it; instead, they have been marked through DW2 – the petitioner's General Manager. Moreover, the documents do not contain the certification contemplated under Section 65 B of the Indian Evidence Act.

39. As rightly contended by the learned counsel appearing for the respondent, the name of the respondent differs from the name shown in Exts.B1, B4, B5, B7, B9, B11, B12, and the name of the respondent is also conspicuously absent in Exts.B6 & B8 documents. It is also noticed that

WWW.LEGALERAONLINE.COM

the account number furnished in Ext.B14 document differs from the account number shown in Ext.B13 letter.

40. In **Vijay Karia v. Prysmian Cavi E Sistemi SRL,** [(2020) 11 SCC 1] the Honourable Supreme Court has propounded the one bite at the cherry doctrine rendering it impermissible to challenge a foreign award on a piecemeal basis.

41. It is also apposite to refer to the observations of the Honourable Supreme Court in **LMJ International Ltd. v. Sleepwell Industries Co. Ltd.,** [(2019) 5 SCC 302], which reads thus:

> **"17.** Be that as it may, the grounds urged by the petitioner in the earlier round regarding the maintainability of the execution case could not have been considered in isolation and *dehors* the issue of enforceability of the subject foreign awards. For, the same was intrinsically linked to the question of enforceability of the subject foreign awards. In any case, all contentions available to the petitioner in that regard could and ought to have been raised specifically and, if raised, could have been examined by the Court at that stage itself. **We are of the considered opinion that the scheme of Section 48 of the Act does not envisage piecemeal consideration of the issue of maintainability of the execution case concerning the foreign awards, in the first place; and then the issue of**

WWW.LEGALERAONLINE.COM

enforceability thereof. Whereas, keeping in mind the legislative intent of speedy disposal of arbitration proceedings and limited interference by the courts, the Court is expected to consider both these aspects simultaneously at the threshold. Taking any other view would result in encouraging successive and multiple round of proceedings for the execution of foreign awards. We cannot countenance such a situation keeping in mind the avowed object of the Arbitration and Conciliation Act, 1996, in particular, while dealing with the enforcement of foreign awards. For, the scope of interference has been consciously constricted by the legislature in relation to the execution of foreign awards. Therefore, the subject application filed by the petitioner deserves to be rejected, being barred by constructive res judicata, as has been justly observed by the High Court in the impugned judgment".

42. On a conspectus of the findings rendered above and the law laid down in Vijay Karia and LMJ International Ltd (supra), this Court is of the definite view that the contention raised that the respondent is non-existent is meritless and is advanced with the sole intention to procrastinate the final determination of the execution proceedings.

43. Coming to the second contention regarding the means of the petitioner to pay the award amount.

WWW.LEGALERAONLINE.COM

44. As already discussed, in Ext.A6 counter affidavit filed by the petitioner to O.P (Arb) No.324/2012 before the court below, he empathically stated that he has been in the cashew business/export for the past several years, that he has enjoyed an export limit of Rs.30/- Crore for the year from 28.06.2012, that he has a turnover of 32/- Crore, that he is operating several cashew factories in the State and providing employment to thousands of workers, that he has the financial liquidity and that it is illogical to put forth the theory of alienation.

45. Subsequently, in O.P (C) No.223/2013 filed by the respondent before this Court, the petitioner has, in explicit terms, undertaken that he would not encumber his properties until further orders.

46. Similarly, in O.P (Arb)No.1/2013 filed under Section 34 of the Act and in Ext.A3 affidavit dated 21.05.2018, the petitioner has proclaimed his affluence and wealth in line with Ext.A6 counter affidavit.

WWW.LEGALERAONLINE.COM

47. It is after the foreign award was found to be enforceable and when the respondent sought the personal execution of the petitioner, that the petitioner has advanced the plea of no means and feigned illness.

48. In addition to the undertaking made by the petitioner before this Court in O.P (C) No.223/2013, this Court also directed the petitioner to furnish security for the decree debt to the satisfaction of the court below while granting a conditional order of stay in Arbitration Appeal No.54/2017. The court below, by order dated 23.09.2017 in E.A No.267/2016, on noticing that the property offered as security was mortgaged with the Bank, had directed the petitioner to furnish fresh security. Admittedly, the order has not been complied with.

49. The contention of the learned Senior Counsel for the petitioner that on the date the award became enforceable, the petitioner became a pauper is unsustainable in law. I say this because it is borne out from Exts.B15, 17 to 19 documents that the petitioner had, in

WWW.LEGALERAONLINE.COM

flagrant violation of his undertaking made before this Court, transferred Rs.6,60,81,475.50 to a company owned by his wife.

50. Similarly, the contention of the learned Senior Counsel that the petitioner's means has to be looked into only from the date of Section 48 declaration and not from the date of the foreign award is also unacceptable.

51. Unlike the Arbitration Act, 1940, the Courts are not called upon to make the award the rule of the court under Section 49 of the Act. Once the award is found to be enforceable, it is deemed to be a decree of the Court from the date of the foreign award and not from the date of the order passed under Section 48 of the Act. In addition to the above, the petitioner's undertaking before this Court renders the above contention inconsequential.

52. In **Fuerst Day Lawson v. Jindal Exports Ltd** (supra), the Honourable Supreme Court held as follows:

> "**31.** Prior to the enforcement of the Act, the law of arbitration in this country was substantially contained in three enactments, namely, (*1*) the Arbitration Act, 1940, (*2*) the Arbitration (Protocol

and Convention) Act, 1937, and (*3*) the Foreign Awards (Recognition and Enforcement) Act, 1961. A party holding a foreign award was required to take recourse to these enactments. The Preamble of the Act makes it abundantly clear that it aims at consolidating and amending Indian laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The object of the Act is to minimize supervisory role of the court and to give speedy justice. In this view, the stage of approaching the court for making the award a rule of court as required in the Arbitration Act, 1940 is dispensed with in the present Act. If the argument of the respondent is accepted, one of the objects of the Act will be frustrated and defeated. Under the old Act, after making award and prior to execution, there was a procedure for filing and making an award a rule of court i.e. a decree. Since the object of the Act is to provide speedy and alternative solution to the dispute, the same procedure cannot be insisted upon under the new Act when it is advisedly eliminated. If separate proceedings are to be taken, one for deciding the enforceability of a foreign award and the other thereafter for execution, it would only contribute to protracting the litigation and adding to the sufferings of a litigant in terms of money, time and energy. Avoiding such difficulties is one of the objects of the Act as can be gathered from the scheme of the Act and particularly looking to the provisions contained in Sections 46 to 49 in relation to enforcement of a foreign award. In para 40 of *Thyssen* [(1999) 9 SCC 334] judgment already extracted above, it is stated that as a matter of fact, there is not much difference between the provisions of the 1961 Act and the Act in the matter of enforcement of foreign award. The only difference as found is that while under the Foreign Awards Act a decree follows, under

the new Act the foreign award is already stamped as the decree. 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/decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting in multiplicity of litigation. It is also clear from the objectives contained in para 4 of the Statement of Objects and Reasons, Sections 47 to 49 and the scheme of the Act that every final arbitral award is to be enforced as if it were a decree of the court. The submission that the execution petition could not be permitted to convert as an application under Section 47 is technical and is of no consequence in the view we have taken. In our opinion, for enforcement of a foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the court or decree and the other to take up execution thereafter. In one proceeding, as already stated above, the court enforcing a foreign award can deal with the entire matter. Even otherwise, this procedure does not prejudice a party in the light of what is stated in para 40 of *Thyssen* [(1999) 9 SCC 334] judgment".

WWW.LEGALERAONLINE.COM

53. The allegation that the petitioner suffers from a severe ailment is unsubstantiated and without any material.

54. Furthermore, the contention that the respondent was permitted to cure the defect in the application filed under Order 21 Rule 11A CPC is without any substance, given the findings above that only the broader principles of CPC apply to Part II of the Act.

55. The court below has, on a threadbare analysis of the pleadings and materials on record, found that the petitioner has the means to pay the decree amount, and the feigned illness is untenable in law. I do not find any illegality, irregularity or impropriety in the impugned order warranting interference by this Court by invoking its revisional jurisdiction.

56. Both sides are playing the blame game for the delay in the culmination of the execution petition. The fact remains that a decade-old foreign award remains unexecuted. Obviously, this is not the aim of the legislation and the interpretations of Part II of the Act. This case should

WWW.LEGALERAONLINE.COM

be an awakener to the stakeholders to plug the lacuna in the legislation and the loopholes in the procedure.

The revision petition fails and is hence dismissed.

SD/-

C.S.DIAS,JUDGE

Sks/07.2.2023

LEGAL ERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE