

## **THE HIGH COURT OF ANDHRA PRADESH**

Civil Revision Petition Nos. 331 and 1441 of 2002

Decided On: 09.09.2002

Appellants: **International Investor KCSC**

**Vs.**

Respondent: **Sanghi Polyesters Ltd.**

**Hon'ble Judges:**

J. Chelameswar, J.

**Counsels:**

For Appellant/Petitioner/Plaintiff: P. Sri Raghuram, Adv.

For Respondents/Defendant: K. Raghuvveer Reddy, Adv.

**Subject: Arbitration**

**Catch**

**Words:**

Appointment of Arbitrator, Arbitral Award, Arbitral Proceeding, Arbitral Tribunal, Arbitration Agreement, Arbitration Clause, Arbitration Law, Arbitration Proceeding, Arbitrator's Fee, Award is Valid, Cause of Action, Chamber of Commerce, Claims and Counter-Claim, Commercial Court, Conciliation, Conditions for Enforcement, Conflict of Law, Constitution of India, Convenience, Convention Award, Counter-claim, Defined Legal Relationship, Domestic Arbitration, Enforceability, Enforcement of Award, Enforcement of Foreign Award, Execution Proceeding, Final Arbitral Award, First Schedule, Foreign Award, Fraud, Geneva Convention Award, ICC Arbitration, International Chamber of Commerce, International Commercial Arbitration, Irregularity, Jurisdiction, Legal Relationship, Lex Fori, Litigation, Natural Justice, Objection, Onus of Proof, Prejudice, Question of Fact, Recognition and Enforcement, Reference, Setting Aside, Settlement, Statement of Objects and Reason, Submission to Arbitration, Suspension, Unless otherwise Agreed

**Acts/Rules/Orders:**

Arbitration and Conciliation Act, 1996 - Sections 31(7), 44, 48 and 48(1); Civil Procedure Code (CPC) - Order 21, Rule 41

**Cases**

**Referred:**

Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., AIR 2001 SC 2293; Bhatia International v. Bulk Trading S.A., [2002] 4 SCC 105; Renusagar Power Co. Ltd. v. General Electric Co., AIR 1994 SC 860; Ascherberg v. CAJA Musical, [1971] 1 WLR 173 (CA); Gujarat Water Supply & Sewerage Board v. Unique Erectors Gujarat (P.) Ltd. [1989] (1) SCR 318, AIR 1989 SC 973; Jagdish Rai & Bros. v. Union of India, [1999] 3 SCC 257

**Case**

**Note:**

**Arbitration – enforcement of foreign award - Section 31 (7), 44, 48 and 48 (1) and Order 21 Rule 41 of Code of Civil Procedure, 1908 – revision against Order of District Judge directing petitioner to file separate execution proceeding after holding the award as enforceable – District Judge while making award as rule of Court or decree converted amount of award in American Dollars into Indian currency – no need to file separate execution application after award made rule of Court – amount received by respondent can be allowed to be recoverable in original currency of award.**

## **ORDER**

**J. Chelameswar, J.**

1. These two civil revision petitions under Article 227 of the Constitution of India are filed challenging the order of the learned Principal District Judge, Ranga Reddy District made in O.P. No. 437 of 2000 on 25th September, 2001. Civil Revision Petition No. 1441 of 2002 is filed by the respondent in the above mentioned O.P., while the Civil Revision Petition No. 331 of 2002 is filed by the petitioner in the said O.P.

2. The impugned order is passed under Section 48 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act').

3. For the sake of convenience the parties are referred to as they are arrayed in the court-below.

The parties herein entered into an agreement called 'Estisna Purchase Agreement' on 2-5-1995, by which the petitioner agreed to extend pre-export finance facility to the respondent and advanced an amount of US \$5 Million. The respondent agreed to produce and deliver Polyester filament Yarn by 4-11-1996.

4. As per the terms of the above mentioned agreement, the stocks so supplied by the respondent were to be sold by the petitioner to a company known as 'Sanghi Industries Limited', which is an associate company of the respondent for a price of US \$ 5,668,750. It was further agreed that the amount of US \$ 688,750 from out of the sale price to be paid by the above mentioned Sanghi Industries Limited would be the profit accruing to the petitioner.

5. As the respondent could not fulfil his obligations as per the terms of the above-referred agreement to deliver the goods by 4-11-1996, the time was extended to 9-12-1996 by a further agreement. In view of the rescheduling the respondent agreed to pay an amount of

US \$611,111.11. Subsequently on 13-2-1997, the respondent in fact paid an amount of US \$ 458,333.33 to the petitioner in partial fulfilment of the above mentioned undertaking. The balance amount was withheld, it appears, on the ground that the approval of the Ministry of Finance is required under the provisions of the Income-tax Act. The respondent could not deliver the goods even as per the re-scheduled date of 9-12-1996, therefore a further agreement dated 9-12-1996 was entered into between the parties extending the period by 17 more months subject to various conditions (which may not be necessary for the purpose of the present order). All the three agreements referred to above contained 'arbitration clauses'. The details of which will be referred to later in this order.

6. It appears on 16-12-1996, the respondent applied to the Reserve Bank of India for the approval of the new delivery schedule. The Reserve Bank of India by its proceedings dated 28-2-1997 rejected the request of the respondent and directed the respondent to pay the petitioner an amount of US \$ 5 Million initially advanced by the petitioner.

In the above mentioned background, the petitioner sent a legal notice dated 23-4-1997 wherein the respondent was informed that the contract was terminated and made a demand for the payment of an amount of US \$ 5,501,192.87 with future accrual of damages at the rate of US \$ 1320.00 per day till the date of the actual payment. By a reply dated 12-5-1997, the respondent admitted his liability to repay the amount actually received by them i.e., US \$ 5 Million, but disputed rest of the claim of the petitioner.

7. In the background of the above mentioned facts, the petitioner invoked the arbitration clause in the agreement dated 9-12-1996. The total amount claimed by the petitioner is US \$ 6,017,291.80 as per the arbitration agreement. The matter was referred to the International Chamber of Commerce for arbitration. The arbitrator pronounced the arbitration award on 1st March, 1999 and the same was communicated to the respondent on 8-3-1999. The relevant portion of the said award reads as follows:

"Now, the Tribunal, having considered the written submissions and written evidence and having listened to the arguments of Counsel on all issues of the dispute makes the following award.

1. The Defendant is ordered to pay U.S. \$ 5,000,000.00 to the Claimant.
2. The Claimant is authorized to retain and appropriate U.S. \$ 458,333.00 already paid by the Defendant to the Claimant as damages.
3. The Defendant is ordered to pay a further U.S. \$ 152,778.00 to the Claimant as the balance for damages.
4. The Claimant's Claim for U.S. \$ 610,902.77 (increased in extremism the Claimant's final submission to U.S. \$ 482,222.00) is dismissed.

5. The Defendant is ordered to pay U.S. \$ 10,218.76 to the Claimant as out-of-pocket expenses.

6. The Defendant is ordered to pay to the Claimant all the arbitration costs amounting to U.S. \$ 26,230.00 as administrative expenses, and U.S. \$ 61,317.00 as arbitrator's fees, in addition to U.S. \$ 2,444.00 as arbitrator's expenses, totalling U.S. \$ 90,000.00, and the normal legal costs of U.S. \$101,798.51, according to the proportion set out in Section X above.

7. The Tribunal further orders that the Defendant, who has not paid the sum which he is required to have paid as an advance on ICC arbitration costs, shall reimburse the Claimant an amount of U.S. \$ 90,000.00.

8. All other Claims and Counter-Claims with regard to the present dispute are dismissed."

Apart from that the arbitration costs were also quantified under the award and the Tribunal held that the same should be borne fully by the respondent.

8. It appears that an application was filed by the respondent before the High Court of Justice, Queen's Bench Division, Commercial Court, London, UK, challenging the above mentioned award under Sections 68 and 69 of the English Arbitration Act, 1996. The said application was dismissed on 28-1-2000. Thereafter O.P. No. 437 of 2000 came to be filed by the petitioner for the enforcement of the award dated 1-3-1999.

9. By the order dated 25-9-2001 which is the impugned order in these two civil revision petitions, the learned District Judge, Ranga Reddy District formulated seven points for the consideration of the Court on the basis of the pleadings placed before him. These seven points read as follows :

"(1) Whether the foreign award, dated 1-3-1999, has to be enforced as a decree of this Court?

(2) Whether the said Arbitration Award, dated 1-3-1999, cannot be enforced, as claimed by the respondent?

(3) Whether the respondent should be directed to make payment to the petitioner, a sum of US \$ 5,444,795.27 i.e., Rs. 23,95,70,991.80 only, that is, at the rate of US \$ 44, as on the date of the filing of the O.P., but, subject to change in any policy rates, in full and final settlement of the said Arbitral Award, dated 1-3-1999?

(4) Whether the respondent shall be directed to disclose of its moveable and immoveable properties by way of an Affidavit?

(5) Whether all, or, any moveable, or immoveable, properties, if any, so disclosed, as well as, the moveable and immoveable properties, of the respondent, situate at Sanghi

Nagar, R.R. District, State of A.P., are to be attached and directed to be sold towards full satisfaction of the monies covered by Point No. 3, supra?

(6) Whether the O.P., is not maintainable at Law?

(7) To what reliefs?"

10. The learned Judge held that the foreign award dated 1-3-1999 has to be enforced as the decree of the Court and repelled the submission of the respondent that the award cannot be enforced.

Coming to Point No. 3, the learned Judge held as follows :

"Consequent to my findings On Point No. 2, supra, it, factually and legally, ipso facto, follows, that, the petitioner will be entitled to a sum of rupees US \$ 5,444,795.27, that is Rs. 23,95,70,991.80 ps., at the rate of U.S. dollar prevailing, as on the date of such payment, or, payments." [Emphasis supplied]

Insofar as the Point No. 4 is concerned, the learned District Judge held that the petitioner is not entitled for a direction to the respondent to disclose all his movables and immovables by way of an affidavit or otherwise.

On Point No. 5, the learned Judge observed that the petitioner could take recourse if so advised to execution proceedings under the Code of Civil Procedure for the enforcement of the foreign award.

On Point No. 6, the court-below held that the O.P., is maintainable.

11. Finally, the learned Judge held that in view of the conclusions reached by him on the first six points, held as follows on the seventh point framed by him.

"Consequent to my findings on Point Nos. 1 to 6, supra, this Court doth hereby adjudicate upon the O.P., as it did on Point Nos. 1 to 6, supra, and granting costs of the O.P., to the petitioner, and fixing the Advocate Fee, for each side, at Rs. 5,000, and giving liberty to the petitioner, to take separate Execution Proceedings, if so advised, for realization of the monies covered by the present Orders."

Though there was a specific claim for interest at the rate of 15% per annum with quarterly rests from the date of the award till the date of the actual payment, the learned Judge did not record any specific finding in this regard.

In the background of the above mentioned findings of the learned Judge, these two civil revision petitions are filed by the petitioner and the respondent respectively.

12. The grievance of the petitioner is in four fold :

(1) that the learned District Judge erred in directing the petitioner to file a separate execution petition whereas in view of the law laid down by the Supreme Court in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* AIR 2001 SC 2293, the learned District Judge should have proceeded to enforce the award without any further application by the petitioner for the execution of the foreign award.

(2) that the learned District Judge erred in converting the amount awarded and expressed in terms of the American Dollars into Indian Currency.

(3) that the learned District Judge failed to give any categorical direction regarding the payment of interest from the date of the foreign award till the date of its realization.

(4) that the learned District Judge erred in declining to give directions to the respondent to disclose its assets notwithstanding the provisions of Order 21 Rule 41 of the Code of Civil Procedure.

13. On the other hand, the respondent's grievance is (1) that the finding of the learned District Judge that the award is enforceable is contrary to Section 48(1)(a) of the Arbitration and Conciliation Act, 1996 inasmuch as that the agreement between the parties which is the subject-matter of arbitration is a void agreement under the Law of Shari'a. (2) that the respondent was denied a reasonable opportunity to defend his case before the arbitrator and hence the award is unenforceable in view of Section 48(1)(b).

14. Now I shall deal with the submissions:

As already noticed, the impugned order was passed in O.P. No. 437 of 2000 filed under Part II of the Arbitration and Conciliation Act, 1996. Chapter I of Part II of the said Act deals with the New York Convention Awards and Chapter II deal with the Geneva Convention Awards. Admittedly, the award in question is a foreign award governed by the New York Convention. For the purpose of Chapter I, the expression 'foreign award' is defined under Section 44 of the Arbitration Act. Section 44 reads as follows :

"44. Definition - In this chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of a legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960,--

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in First Schedule applies; and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

15. Section 49 of the Arbitration and Conciliation Act, 1996 stipulates that where the Court is satisfied that a foreign award is enforceable under Chapter I the award shall be

deemed to be decree of that Court. Section 36 of the Act provides that an award shall be enforced in the same manner as if it were a decree of the Court and shall be enforced under the provisions of the Code of Civil Procedure. However, in the case of a foreign award before the Court decides to enforce the award it must be satisfied that the foreign award is an enforceable award. The parameters to decide whether a foreign award is enforceable or not are prescribed under Section 48 of the Act. Section 48 is couched in negative language in the sense that it only indicates that the grounds on which the enforcement can be refused. The section further obligates that the party against whom enforcement of a foreign award is sought to be made must prove that for one or some of the reasons contemplated under Section 48 the award is unenforceable. Section 48 reads as follows :

"48. Conditions for enforcement of foreign awards - (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that,--

(a) the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the court finds that,--

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation :- Without prejudice to the generality of Clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or effected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Clause (e) of Sub-section (1) the court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

16. The respondent's case is that the award is unenforceable for the reason that the transaction i.e., the 'Estisna agreement' out of which the whole litigation arises is a transaction of money lending and that the petitioner in substance seeks to recover interest from the respondent for the amount advanced by him. Such recovery of interest is prohibited by Shari'a Law- the Law applicable to the said agreement as provided in Clause 6(1) of the agreement, which reads as follows :

"This EPA, and the construction, performance and validity thereof, shall be governed in all respects of the laws of England.

Except to the extent such laws conflict with the Islami Shari'a, to which case the latter shall prevail."

Thereby attracting the application of Section 48(1)(a) of the Act.

17. The learned counsel for the petitioner on the other hand submitted that the agreement referred to under Section 48(1)(a) of the Act is not the 'Estisna agreement' between the parties, but the agreement to have the disputes arising out of such 'Estisna agreement' referred to arbitration. The learned counsel further submitted that though the agreement for arbitration is also made part of 'Estisna agreement' it is in fact a separate agreement. The learned counsel in this context referred to the provisions of Section 7 and 44 of the Arbitration and Conciliation Act, 1996 to substantiate his submission. The relevant portion of which reads as follows :

"7. Arbitration agreement- (1) In this part "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement."

18. The learned counsel further submitted that though the section indicates that such a definition is made only for the purpose of Part I of the Act in view of the judgment of the



Supreme Court in *Bhatia International v. Bulk Trading SA*. [2002] 4 SCC 105 the provisions of Part I are also applicable to the provisions of Part II of the Act wherever Part II is silent.

"32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

There is nothing in the arbitration agreement by which the operation of Part I is excluded.

19. The learned counsel further argued that on a combined reading of Section 7 and Sections 44 and 48 of the Act the expression 'agreement' occurring under Section 48(1)(a) of the Act is only an agreement of arbitration which is in the form of an arbitration clause in the 'Estisna agreement' and therefore it is not open for the respondent to question the validity of the 'Estisna agreement' in the proceedings under Section 49 of the Act.

20. The submission of the learned counsel for the respondent that the expression "agreement" occurring under Section 48(1)(a) of the Act is to be understood as the 'Estisna agreement' entered into between the parties herein, in my view, cannot be accepted, but must be understood to mean only the arbitration agreement which is in the form of the arbitration clause in the 'Estisna agreement'. The reason is that the language of Section 48(1)(a) categorically refers to the agreement referred to in Section 44 of the Act. Section 44 defines a 'foreign award', to mean, an arbitral award 'in pursuance of an agreement in writing for arbitration' on differences between the persons arising out of legal relationship. The only agreement contemplated under Section 44 is the agreement in writing for arbitration. The section further clarifies that such a legal relationship may either be contractual or otherwise. Therefore if the submission of the respondent is accepted, in all those cases where the differences arise between parties not out of any contractual relationship, but out of legal relationship arising out of the operation of law, and the parties agree to have the differences settled by some process of arbitration, and even if such an arbitration agreement is contrary to the proper law applicable to the said agreement the party against whom the award of such arbitration is sought to be enforced cannot object to it by invoking Section 48(1)(a). A result, which is plainly inconsistent with the Scheme and language of the Act and the provisions of Part II.

21. The general principle of law with regard to the enforcement of foreign arbitral awards is stated in *Renusagar Power Co. Ltd. v. General Electric Co.* AIR 1994 SC 860 as follows ;

"33. Similarly in the matter of enforcement of foreign arbitral awards at common law a foreign award is enforceable if the award is in accordance with the agreement to arbitrate

which is valid by its proper law and the award is valid and final according to the arbitration law governing the proceedings. The award would not be recognized or enforced if, under the submission agreement and the law applicable thereto, the arbitrators have no justification to make it, or it was obtained by fraud or its recognition or enforcement would be contrary to public policy or the proceedings in which it was obtained were opposed to natural justice (See: Dicey and Morris, the Conflict of Laws, 11th Edn., Rules 62-64, pp.558 and 559 and 571 and 572; Cheshire and North, Private International Law, 12th Edn., pp. 446-447). The English Courts would not refuse to recognize or enforce a foreign award merely because the arbitrators (in its view) applied the wrong law to the dispute or misapplied the right law (See: Dicey and Morris, Conflict of Laws, 11th Edn., Vol. II, p. 565)" (p. 880)

It can be seen from the above passage the question that can be gone into is - whether the agreement to arbitrate is valid by its proper law and the award is valid and final according to the arbitration law governing the proceedings.

22. No doubt, the Supreme Court in *Renusagar Power Co. Ltd.* 's case (supra) was considering the enforceability of a foreign award in the context of the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention) Act (Act 6 of 1937). The Supreme Court took note of the fact, that both the above mentioned enactments were made in order to give effect to the obligations arising under the Geneva Convention of 1927 and New York Convention of 1958. The Supreme Court further observed at paragraph 34 as follows :

"...It was, however, felt that... The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards...." (p. 880)

The Supreme Court further held on an analysis of the provisions of the New York Convention that none of the provisions of the Convention postulates a challenge to the award on merits.

23. In fact, the provisions of the New York Convention are embodied in Schedule I of the Arbitration and Conciliation Act, 1996. Articles II and V, read as follows :

#### "Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

#### Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that,--

(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that-

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of the country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country."

A comparison of these two articles and the Scheme of Sections 44 and 48 and the language of Sections 44 & 48 of the Arbitration and Conciliation Act, 1996, which are substantially a reproduction of articles II and V of the New York Convention, makes it

clear that the Parliament while enacting Sections 44 and 48 of the Act virtually was giving effect to the provisions of the above mentioned two articles of the New York convention and leaves no further doubt in my mind that the agreement contemplated under Section 48(1)(a) of the Act is only the agreement to have the disputes resolved by arbitration.

24. Even for the sake of argument the respondent's submission that agreement referred to under Section 48(1)(a) of the Act is the primary agreement which created the legal relationship between the parties thereto i.e., 'Estisna agreement' in the present case and that such an agreement is contrary to the Islamic Law of Shari'a is to be accepted, the respondent must have proved before the court-below what exactly is the Islamic Law of Sharia and how it invalidates the 'Estisna agreement'. The principle in Private International Law is that the foreign law is a question of fact (See: Dicey & Morris the conflict of Laws, 13th Edition page 221). The general rule is that if a party wishes to rely on a foreign law, he must plead it in the same way as any other fact - See: Ascherberg v. CAJA Musical [1971] 1 WLR 173, 1128 (CA) and prove it. The same principle is embodied in Section 48 of the Act of 1996 which is already extracted earlier.

25. Coming to the mode of proof, the well-settled principle in English Law is that it may be proved by expert evidence and from the impugned order it does not appear that the respondent discharged the onus of proof by examining any expert. Therefore, even on this count the submission of the respondent must be rejected.

26. Coming to the second objection of the respondent that the respondent was denied a reasonable opportunity to defend his case, the same objection was raised by the respondent before the Queen's Bench Division where the award was challenged by the respondent. In this context, the Court held as follows :

"The meaning of "serious irregularity" is set out in Section 68(2). SPL complains generally under Section 68(2)(a) that the arbitrator was in breach of general duties under Section 33(1)(a) and Section 33(2) to act fairly and impartially and to give each party a reasonable opportunity to put his case and deal with that of his opponent and Section 33(2). There is no suggestion in this case that the arbitrator declined to give the parties the opportunity to present their case and, as appears above, each side provided its own Shari'a law expert as well as conferring particular power upon the arbitrator."

A submission which was rejected by the competent court which had the jurisdiction to set aside the award if it were convinced otherwise. In my view the respondent cannot raise the same issue again in the proceedings for the enforcement of the award on the principle of 'res judicata'.

For the above mentioned reasons, I must hold that the award in question is clearly enforceable.

27. Then I shall examine the grievances of the petitioner. The impugned order of the learned District Judge holding that the petitioner is required to file a separate execution petition for the enforcement of the award in question is clearly wrong in view of the law laid down by the Supreme Court in Fuerst Day Lawson Ltd.s 'case (supra). In the said case, their Lordships held that there is no need to take separate proceedings, one for deciding of the enforceability of the award and the other to take up the execution thereafter.

"...The only difference as found is that while under the Foreign Award Act a decree follows, under the new Act the foreign award is already stamped as the decree. Thus, in our view, a party holding 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 proceedings 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 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 as 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 objectives contained in para 4 of the Statement of Objects and Reasons, Sections 47 to 49 and 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 foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make 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..." (p. 2303.)

28. The next submission of the learned counsel for the petitioner that the learned District Judge in converting the amount awarded and expressed in terms of American Dollars into Indian currency is not contested by the learned counsel for the respondent. The learned counsel for the petitioner argued that the respondent having received the amount in the American currency he is bound to repay the amount determined by the arbitral Tribunal in the American currency. Therefore the submission is accepted.

29. The next submission made by the learned counsel for the petitioner is regarding the interest from the date of the award till the date of its realization. It must be mentioned here that the learned District Judge while answering Point No. 6 made a vague reference to the interest and that the decree drafted pursuant to the order is absolutely silent about the said interest. The learned counsel for the petitioner argued once again relying on the Renusagar Power Co. Ltd. 's case (supra) and Jagdish Rai & Bros. v. Union of India [1999] 3 SCC 257 that interest from the date of the award must follow as a matter of course.

30. The Supreme Court in Renusagar Power Co. Ltd. 's case (supra) dealt with on that aspect in paragraphs 134 to 137, which read as follows :

"134. In an international commercial arbitration, like any domestic arbitration, the award of interest would fall under the following periods:

- (i) period prior to the date of reference to arbitration;
- (ii) period during which the arbitration proceedings were pending before the arbitrators;
- (iii) period from the date of award till the date of institution of proceedings in a court for enforcement of the award;
- (iv) period from the date of institution of proceedings in a court till the passing of the decree; and
- (v) period subsequent to the decree till payment.

135. The interest in respect of the period covered by item (i), namely, prior to the date of reference to arbitration would be governed by the proper law of the contract and the interest covered by items (ii) and (iii), i.e., during the pendency of the arbitral proceedings and subsequent to the award till the date of institution of the proceedings in the court for the enforcement of the award would be governed by the law governing the arbitral proceedings. These are matters which have to be dealt with by the arbitrators in the award and the award in relation to these matters cannot be questioned at the stage of enforcement of the award. At that stage the court is only required to deal with interest covered by items (iv) and (v). The award of interest in respect of these periods would be governed by *lex fori*, i.e., the law of the forum where the award is sought, to be enforced. According to Alen Redefern and Martin Hunter 'once an arbitral award is enforced in a particular country as a judgment of a court, the arbitral post-award interest rate may be overtaken by the rate applicable to civil judgments'. (See: Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 2nd Edn., p. 406).

136. Moreover, Section 4(1) of the Foreign Awards Act lays down that the foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India. The provisions of the Arbitration Act, 1940 would, therefore, apply in the matter of enforcement of awards subject to the provisions of the Foreign Awards Act. With regard to interest, the following provision is made in Section 29 of the Indian Arbitration Act:

'Interest on Awards - Where and in so far as award is for the payment of money the Court may in the decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree.'

137. Unlike Section 34 of the Code of Civil Procedure, whereunder the Court can award interest for the period of pendency of the suit as well as for the period subsequent to the decree till realization. Section 29 of the Arbitration Act empowers the court to award interest from the date of decree only. It has, however, been held that while passing a decree in terms of the award, the Court can award interest for the period during which the proceedings were pending in the court, i.e., the period from the date of institution of proceedings for the enforcement of the award in the court till the passing of the decree in cases arising after the Interest Act, 1978. (See: Gujarat Water Supply & Sewerage Board v. Unique Erectors Gujarat (P.) Ltd. [1989] (1) SCR 318 at p. 328: AIR 1989 SC 973 at p. 978.)" (p. 910)

31. It was held in Jagdish Rai & Bros.' case (supra) as follows :

"...The courts have taken the view that the award of interest under Section 34 CPC is a matter of procedure and ought to be granted in all cases when there is a decree for money unless there are strong reasons to decline the same...." (p. 259)

32. Coming to the Arbitration and Conciliation Act, 1996, Section 31 of the Act deals with the form and content of the arbitral awards. Sub-section (7) thereof deals with the interest, which read as follows :

"(7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."

A reading of Sub-section (7)(b) of Section 31 of the Act makes it clear that the interest must be payable on the sum directed to be paid by arbitral award shall carry interest at 18 per cent per annum from the date of the award till the date of the payment unless the award itself expressly denies such interest. Therefore, Sub-section 7 of Section 31 of the Act becomes *lex fori* in the present case. Nothing is brought to my notice by the respondent whereby the award in question directed otherwise. Therefore, it must be held that the petitioner is entitled for the interest on the amounts so directed to be paid by the respondent by the award at 18 per cent per annum from the date of the award till the date of the actual payment.

33. The learned counsel for the respondent, however, submitted that in view of the prohibition by the Islamic Law of Shari'a about the collection of interest the petitioner is debarred from claiming the benefit of Section 31(7)(b) of the Act. Once again the same question arises as to what exactly the Islamic Law of Shari'a which prohibits collection of interest in any form including the post-decretal interest is required to be pleaded as if it

was a question of fact. No such proof is placed before the Court in this regard. Therefore, the submission of the learned counsel for the respondent is rejected.

34. Coming to the last submission made by the learned counsel for the petitioner regarding the refusal of directions to the respondent to disclose its assets, in my view, is plainly contrary to Order 21 Rule 41 of the Code of Civil Procedure, which reads as follows :

"41. Examination of judgment-debtor as to his property - (1) Where a decree is for the payment of money the decree-holder may apply to the Court for an order that-

(a) the judgment-debtor, or

(b) (where the judgment-debtor is a corporation), any officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

(2) Where a decree for the payment of money has remained unsatisfied for a period of thirty days, the Court may on the application of the decree-holder and without prejudice to its power under Sub-rule (1), by order require the judgment-debtor or where the judgment-debtor is a corporation, any, officer, thereof, to make an affidavit stating the particulars of the assets of the judgment-debtor.

(3) In case of disobedience of any order made under Sub-rule (2) the Court making the order, or any Court to which the proceeding is transferred, may direct that the person disobeying the order be detained in the civil prison for a term not exceeding three months unless before the expiry of such term the Court directs his release."

and therefore the Court-below should have issued a direction in this regard as prayed for.

35. In the result, the civil revision petition filed by the petitioner is allowed and the civil revision petition filed by the respondent is dismissed.

9th September 2002 :

36. After the judgment is delivered, the learned counsel for the petitioner - Sri P. Sri Raghuram submitted that during the pendency for both the O.P., as well as these civil revision petitions there was an interim direction to the respondent not to alienate the petition schedule property. This is not disputed by the learned counsel for the respondent. The learned counsel for the petitioner therefore submitted that in view of the judgment



pronounced now as the petitioner is entitled to proceed with the execution of the award in the same original petition, which is the subject-matter of the present civil revision petitions the interim orders granted earlier may be continued.

37. Heard the learned counsel for the respondent. Learned counsel for the respondent did not contest the prayer of the petitioner.

38. In the circumstances, there shall be an order directing the respondent not to alienate the petition schedule property pending a final decision in the O.P. No. 437 of 2000.