



2024:KER:56994

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

WEDNESDAY, THE 3<sup>RD</sup> DAY OF JULY 2024 / 12TH ASHADHA, 1946

WP (C) NO. 31882 OF 2022

PETITIONER:

SANEESHA M S  
AGED 35 YEARS  
W/O VISHNUDAS, MANALIL HOUSE, PARAVOOTHARA MAKKANAY,  
MANNAM P O, PARAVOOR TALUK, ERNAKULAM DISTRICT REP BY  
POWER OF ATTORNEY HOLDER SAJEEVAN M K, AGED 63 YEARS,  
S/O KAKKARA, MANALIL HOUSE, PARAVOOTHARA MAKKANAY,  
MANNAM P O, PARAVOOR TALUK, ERNAKULAM DISTRICT, PIN -  
683520

BY ADVS.

P.K.SREEVALSAKRISHNAN  
S.UNNIKRISHNAN (NELLAD)  
K.R.PRATHISH  
MANASI.M  
GIFFIN SHALOO

RESPONDENTS:

- 1 THE VILLAGE OFFICER  
VILLAGE OFFICE, KOTTUVALLY N. PARAVUR TALUK, ERNAKULAM,  
PIN - 683519
- 2 SUB REGISTRAR  
SUB REGISTRY OFFICE NORTH PARAVUR, ERNAKULAM,  
PIN - 683513
- 3 M/S SHRIRAM TRANSPORT FINANCE CO.LTD  
HAVING ITS REGISTERED OFFICE AT BUILDING NO.XXI/41 J  
1ST FLOOR AQUARIUS EDIFICIO, REPUBLIC ROAD, OPP.VIJAYA  
BANK NORTH PARAVUR REP BY ITS AUTHORISED OFFICER,  
PIN - 683513
- 4 SOORAJ P C  
PANDARAPARAMBIL (H), KIZHAKKEPARAM PARAVUR LITTLE HEARTS  
SCHOOL PARAVUR, ERNAKULAM, PIN - 683513
- 5 BEENA CHIDAMBARAN  
PANDARAPARAMBIL (H), KIZHAKKEPARAM PARAVUR LITTLE HEARTS  
SCHOOL PARAVUR, ERNAKULAM, PIN - 683513

BY

ADV. C.Harikumar - for R3  
ADV. N.K.SHYJU - for R4 & R5  
ADV. SANDRA SUNNY (K/926/2020)  
ADV. ARUN KUMAR M.A (K/1197/2021)  
ADV. GIREESH PANKAJAKSHAN (K/692/2009)



2024:KER:56994

W.P. (C) .No. 31882 of 2022

..2..

OTHER PRESENT:

SRI. AJITH VISWANATHAN- GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN COME UP FOR HEARING ON 03.07.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



"C.R."

J U D G M E N T

*Dated this the 3<sup>rd</sup> day of July, 2024*

Petitioner approached this Court challenging Ext.P2 order of attachment passed by the Arbitrator, essentially on the premise that, the petitioner is not a party to the arbitration, wherefore, his property cannot be attached by virtue of an order like Ext.P2. Petitioner seeks to quash Ext.P2 and also a further direction to the Sub-Registrar and the Village Officer, to remove the entries with respect to the above referred attachment, vide Ext.P2 order.

2. Heard the learned counsel for the petitioner, learned counsel for the 3<sup>rd</sup> respondent and learned Government Pleader on behalf of the respondents 1 and 2. Though, notice was issued to respondents 4 and 5, they have chosen not to enter appearance.



W.P. (C) .No. 31882 of 2022

..4..

3. Learned counsel for the petitioner submits that, inasmuch as the petitioner is not a party to the arbitral proceedings, his property is not liable to be attached. Secondly, it was pointed out that, the provisions of Order XXXVIII Rule 5 of the Code of Civil Procedure, cannot be imported to the instant facts, since the subject property was not 'owned' by the respondent in the arbitral proceedings, as on the date of attachment. Instead, the petitioner was the owner of the property as on that date, wherefore, the requirements of Order XXXVIII Rule 5, is not satisfied. Learned counsel would submit that, consent, either express or implied, is pivotal to confer jurisdiction to the Arbitrator, which is conspicuously absent in the instant case. A decision of the Hon'ble Supreme Court in State Bank of India v. Ericsson India Private limited and Others [2018 (16) SCC 617], is relied upon by



W.P. (C) .No. 31882 of 2022

..5..

the learned counsel for petitioner as one rendered on identical facts.

4. Per contra, learned counsel for the 3<sup>rd</sup> respondent would submit that, based on the judgment of the Hon'ble Supreme Court in Cox and Kings Ltd. v. SAP India Private Ltd. and another [2023 SCC OnLine SC 1634], arbitration proceedings can be initiated against a person, who is not a signatory to the agreement, on the principle of constructive/implied consent. Learned counsel invited the attention of this Court to paragraph no.224, wherein, the doctrine of Group of Companies was adopted to hold that a non-signatory affiliate or a sister or parent company can be a party to an arbitration agreement, if there is mutual intention of the signatories and non-signatories to this effect. It was emphasized that, non-signatory's causal connection with the negotiation and execution of the contract is a



W.P. (C) .No. 31882 of 2022

..6..

factor to determine the mutual intent to arbitrate. Relying upon paragraph no.225 of Cox and Kings (supra), it was pointed out that, the expression "claiming through or under" employed in Section 8 and 45 are concerned with the instances of succession and derivative rights. It is the specific contention of the learned counsel for the 3<sup>rd</sup> respondent that, the petitioner claims title through the party respondent in the arbitration proceedings and therefore, the impugned Ext.P2 order can be sustained by importing the principles discussed in paragraph no.225 of Cox and Kings Ltd. (supra). The learned counsel then invited the attention of this Court to paragraph No.159 of the said judgment, to ascertain whether the non-signatory is a veritable party to the arbitration agreement. Finally, it was pointed out that, interference under Article 226 of the Constitution is not possible against Ext.P2 order, as it may derail the entire arbitral process, as held by the



W.P. (C) .No. 31882 of 2022

..7..

Hon'ble Supreme Court in Deep Industries Limited v. Oil and Natural Gas Corporation and another [2020 15 SCC 706]. It is the specific contention urged by the learned counsel for the 3<sup>rd</sup> respondent that, the petitioner has a statutory remedy under Section 37 of the Arbitration Conciliation Act, which should necessarily be exhausted, instead of approaching this Court under Article 226 of the Constitution. On facts, it was pointed out that, the property attached was purchased by the petitioner only after issuance of notice to the vendor/party respondent in the arbitral proceedings. Though notice was served on the vendor, the factum of sale in favour of the petitioner was not brought to the notice of the Arbitral Tribunal, is the final submission.

5. Having heard the learned counsel appearing for the respective parties, this Court finds that Ext.P2 order cannot be sustained. Primarily, it is



W.P. (C) .No. 31882 of 2022

..8..

noticed that the petitioner is not a party to the arbitral proceedings. The arbitral proceedings stems from a hire purchase agreement in respect of a vehicle purchased by respondents 4 and 5 herein, from the 3<sup>rd</sup> respondent and upon committing default in the matter of repayment of the loan. As rightly pointed out by the learned counsel for the petitioner, the present property was not specifically made a security for the said transaction. The petitioner purchased the said property as per Ext.P1 sale deed dated 25.03.2022. Attachment before the judgment as contemplated in Order XXXVIII, Rule 5, presupposes that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property. Therefore, it is a pre-requisite to invoke Order XXXVIII, Rule 5 that the property sought to be attached should be in the name of the defendant in the suit. In the instant case, the





W.P. (C) .No. 31882 of 2022

..9..

property, which was attached, was in the name of the petitioner, as on the date of attachment. This Court also takes into account the mandate under Order XXXVIII, Rule 10 that, an attachment before judgment cannot affect the rights of strangers, to which category, the petitioner fits in, as on the date of attachment. The issue was squarely dealt with by the Hon'ble Supreme Court in State Bank of India (supra). The relevant observations contained in paragraph no.6 is extracted herebelow:

"6. There can be no dispute that the Arbitral Tribunal has no jurisdiction to affect the rights and remedies of the third party - secured creditors in the course of determining disputes pending before it. Moreover, the impugned order does not comply with the mandate of R.5 and R.10 of Order XXXVIII CPC. Thus, the impugned orders cannot be sustained and are accordingly set aside."

6. Coming to the submissions made by the learned counsel for the 3<sup>rd</sup> respondent, this Court notice that, the concept and the premise discussed in Cox



and Kings Ltd. (supra) is based on the doctrine of Group of Companies and that too, in the context of Section 45 of the Arbitration and Conciliation Act. Section 45 deals with the power of the judicial authority to refer parties to arbitration, as per which, the judicial authority is competent to refer, not merely the parties to the agreement, but also any person claiming through or under him. The situation will be different altogether, if a third party, like the petitioner, has already been referred to arbitration, pursuant to which an order like Ext.P2 has been passed. The situation in the instant facts is different, since the petitioner is a complete stranger. He is not privy to or have any connection with the basic contract between the 3<sup>rd</sup> respondent and respondents 4 and 5. He came into picture in an event much subsequent to the contract, when he purchased the property from respondents 4 and 5. Insofar as the basic



W.P. (C) .No. 31882 of 2022

..11..

contract is concerned, the petitioner has absolutely no role, whatsoever. Needless to say that, the petitioner is not a guarantor, wherefore, the concepts which has been discussed and pressed into service in Cox and Kings (supra), will not come to the aid of the 3<sup>rd</sup> respondent herein. This is for the reason that, the concept of constructive consent based on the doctrine of Group of Companies cannot apply to the instant facts. Nor would the expression employed in Section 45 namely "claiming through or under" aid the 3<sup>rd</sup> respondent in sustaining an order like Ext.P2, which was issued to a third party.

7. Coming to the jurisdiction of this Court under Article 226, it is true that, in Deep Industries (supra) the Hon'ble Supreme Court cautioned as regards the interference by Writ Courts under Article 226 in the arbitral process. Section 5 of the Arbitration Act also provides that, no



W.P. (C) .No. 31882 of 2022

..12..

Judicial Authority shall intervene, except as provided in the Act, in the arbitral process. However, in the instant case, this Court notice that, Ext.P2 order is wholly without jurisdiction, inasmuch as, the petitioner is not a party to the arbitration. If the order impugned is wholly without jurisdiction, interference under 226 is quite justified and alternate remedy, if any, will not stand in the way. As regards alternate remedy also, this Court notice that, Section 17 speaks of the right of a "party" to seek interim measure and Section 37 confers a right of an appeal. Ordinarily, such right is available only to a party to the proceedings, wherefore, the question as to whether the appellate remedy under Section 37 is available to the petitioner, a third party, itself is doubtful.

8. In the light of the above discussion Ext.P2 order will stand quashed. There will be a further



W.P. (C) .No. 31882 of 2022

..13..

direction to respondents 1 and 2, to delete entries with respect to Ext.P2 from the respective records maintained by the said respondents.

9. It was pointed out by the learned counsel for the 3<sup>rd</sup> respondent that, an application to implead the petitioner has been filed before the Arbitrator. It is clarified that, the observations contained in this judgment, will not impinge on the said proceedings and the same will proceed, untrammelled by any of the findings contained in this judgment, in accordance with law.

The Writ Petition (Civil) is disposed of accordingly.

Sd/-  
C. JAYACHANDRAN  
JUDGE

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2024:KER:56994

W.P. (C) .No. 31882 of 2022

..14..

APPENDIX OF WP(C) 31882/2022

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF THE SALE DEED NO.1159/2022  
OF NORTH PARAVUR SUB REGISTRAR OFFICE  
DATED 25.03.2022 EXECUTED BETWEEN  
PETITIONER AND RESPONDENT NO.4
- Exhibit P2 TRUE COPY OF THE INTERIM ORDER OF SOLE  
ARBITRATOR IN IA NO.350A/2022 IN AC  
NO.350 OF 2022 DATED 26.03.2022
- Exhibit P3 TRUE COPY OF THE ENCUMBRANCE  
CERTIFICATE DATED 06.07.2022 IN SY  
NO.152/4-7-2 IN KOTTUVALLY VILLAGE,  
PARAVUR TALUK, ERNAKULAM DISTRICT