

IN THE COURT OF THE ADDITIONAL DISTRICT JUDGE-VII, ERNAKULAM

Present:

Sri. V P M Suresh Babu, Additional District & Sessions Judge VII.

Wednesday, the 14th day of August, 2024/23rd Sravana, 1946.

**I.A.No.10/2024 in
C.M.A(Arb) No. 1355/2023**

Petitioner :

Jacob Mathew, S/o. Late. V C Mathew,
Vadakkayil House, Vadakodu P O, East End Kochi,
Kangarapady, Kochi, Kerala – 682021

By Adv. K P Aravindakshan

Respondents :

1. M/s. Hedge Finance Limited,
Hedge House, Mamangalam, Palarivattom,
Ernakulam, Kochi – 682025
represented by its Power of Attorney Holder
Mr.Madhu E, S/o Kelappan,
Venkallullathil House, Meppayur, Calicut.

2. AL LAMAH Gold India Private Limited, Rodricks Opticians,
Fourth Floor, Capital Towers, General Hospital Road,
Manjalikkulam, Thiruvananthapuram District, Pin-695001.
Represented by its Director Rajan M, Thongal Vila Veedu,
Nellimoodu P.O., Thiruvananthapuram district, Pin- 695524

3. Rajan M, S/o. M Madhavan Nadar,
Thongal Vila Veedu, Nellimoodu P.O.,
Thiruvananthapuram - 695524.

4. Rashid Azhikkodantekath, S/o Abdul Latheef Mukkoth,
Azhikkodantekath House, Chalil, Pappinissery,
Kannur district, Pin-670561.

R1 - By Adv. Shiju Varghese
R2 to R4 - No Vakalath

Petition filed under Sec.151 of CPC.

The petition coming up for hearing on 08.07.2024 and the Court on 14.08.2024 passed the following :

ORDER

Application filed by the fourth respondent claiming a right over the property attached and taken possession by the petitioner in CMA (Arbitration) No. 1355/23. dated 02.09.2021.

2. Brief facts :- Petitioner is a stranger to the proceedings. He was impleaded as the fourth respondent. The petitioner's family consists of himself, mother and younger brother. They have an ancestral property in Re.Sy. No. 66/3 in Thrikkakara North Village with a building numbered as 716(B), 717(B), 718(B), 718(B1) of Kalamassery Municipality. The building is let out to respondents 2 and 3 on 27.07.2022 on a monthly rent of ₹3,05,500/-. They paid rent only up to March 2022. When they defaulted, they were directed to pay the rent or vacate the building. The tenant vacated the building, surrendering the lock and key on 03.08.2023 without making payment of areas of rent. As on

10.08.2023, a sum of ₹32,39,432/- was due.

3. As security for areas of rent, they have entrusted a generator, 62.KVA DG Set TMPL engines, Model 881 TTS,(herein after referred as DG set) and some other equipment belonging to them as part payment towards the rent. The generator and other equipments were kept outside the building and some other items are kept inside the building. After respondents vacated the premises, the shop room remained vacant. Meanwhile, in 2023, the first respondent filed a CMA(Arbitration) 920/2023 before the Hon'ble Additional District Court No. VI with an application to appoint an Advocate Commissioner to take possession of the generator set referred above. The petitioner, along with his Advocate and Advocate Commissioner, made an attempt to take away the DG set. The petitioner obstructed the attempt. The petitioner filed an application to get impleaded in CMA (Arbitration) No. 920/2023, which was allowed. Thereafter, the first respondent herein "not pressed" the CMA and it was dismissed as not pressed.

4. Subsequently, the first respondent filed a CMA (Arbitration) 1355/23 for the same relief, suppressing the dismissal of the earlier CMA (Arbitration) No. 920/2023. He got another order to take possession. The first respondent made a second attempt to take away the DG set. Though the petitioner herein obstructed, they come with police force and severed the generator and took possession.

5. The CMA presently filed is not maintainable under Order 23

Rule 1(3)(b) of the CPC. The first respondent is guilty of suppressing material facts before the court and filed the CMA suppressing the dismissal of CMA 920/2023. The respondent took possession of the machine by defrauding the court by misrepresentation. Therefore, the petitioner pray for re-possession of the DG set taken possession pursuant to the order of this court.

6. The other respondent did not appear. The first respondent in CMA filed a counter-affidavit denying all the averments and the support of the application. According to the first respondent there is no merit in the application. The petitioner has no locus standi to get impleaded in the suit and raise a claim petition. A separate application is already filed as I.A. 9/2024 to set aside the order by which the petitioner was impleaded as the fourth respondent in the CMA.

7. The petitioner has no right over the moveable. The moveable DG set was hypothecated to the respondent by the other respondents and the interim protection order passed by the court is perfectly legal. The relief sought by the petitioner are beyond the jurisdiction of the court and application is made only for delaying arbitral proceedings. The arbitration proceedings are already initiated.

8. The Advocate Commissioner was manhandled by the petitioner, who is an Advocate. He could have approached the court without obstructing the Commissioner. As reported by the Commissioner about 40 police personnel reached the spot to assist

her considering the physical threat advanced by the claim petitioner. The original respondents has to be heard first before hearing the petitioner. The application is improper form and against the rules. The petitioner has no right to approach the court both on legal and factual basis. Therefore the claim petition may be dismissed.

9. On the side of the petitioner Ext. A1 to A3 were marked and on the side of the first respondent Ext. B1 to B4 were marked.

10. Heard both sides.

11. The following points are raised for consideration:-

- 1) Whether the claim petition filed by the petitioner is sustainable?
- 2) Whether the first respondent obtained an order for repossession of the DG set by practicing fraud on court ?
- 3) What order as to relief and costs ?

12. **Point Nos. 1 and 2** :- The learned Advocate for petitioner argued that generator set was installed in the building by the tenant respondents No 2 to 4. They vacated the building by keeping huge rent in arrears. Towards the arrears of rent due, they have entrusted the machinery to the landlord. The first respondent herein filed CMA(Arbitration) No. 920/2023 before the Additional District Court No.VI. The first respondent got an order for the possession the DG set. The petitioner obstructed the same and he also got impleaded in that CMA. Then the first respondent herein not pressed the CMA and it was dismissed. The present CMA is filed

without disclosing the said fact. Since no liberty was granted by the court while dismissing the CMA (Arbitration) No. 920/2023, the present CMA (Arbitration) No. 1355/2023 is not maintainable. The present CMA was filed and order was obtained by practicing fraud on court.

13 The learned Advocate for the first respondent on the other hand submit that as per Ext. B1, the moveable DG Generator set are hypothecated to the first respondent. As per Clause No. 20 of Ext. B1, all disputes between the parties are liable to be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act. Therefore, the petitioner has invoked the remedy under Section 9 of the Arbitration and Conciliation Act. Ext. B1 also shows that the DG set is hypothecated to the first respondent.

14. According to the learned Advocate, a third party has no right to even enter the court to participate in a proceedings under Section 9 of the Arbitration and Conciliation Act. To support the argument, the learned Advocate relied on the decision of the Hon'ble Supreme Court in *Ashok Traders v. Guru Das Salooja*. The Hon'ble Supreme Court held that, a person not party to an arbitration agreement cannot enter the court for protection under Section 9. This has relevance only to the locus standi as an applicant.

15. The learned Advocate further argued that a claim petition has to be in accordance with Rule 324 of the Civil Rules of Practice filed in Form No. 55. The petitioner filed the application

under Section 151 CPC which is not maintainable. It is argued by the learned counsel that the petitioner being a stranger cannot approach the court seeking the remedy. He has no interest in the property. He is not an assignee from the original owners of the property, that is respondents Nos. 2 to 4. According to the learned Advocate, any number of application can be filed under Section 9. Order 23 rule 1(3)(b) has no application to an application filed under Section 9. Therefore, the present CMA filed by the first respondent is legal. The petitioner has no right to claim any right over the immoveables possessed by the first respondent, which is the subject matter of hypothecation agreement. Therefore, the learned counsel prayed to dismiss the application.

16. It is by keeping in view the submission of the learned Advocate for the petitioner and the first respondent, I proceed to consider whether the application filed by the petitioner is legally maintainable. According to the learned Advocate for the first respondent, except the parties to the agreement, no other person has any right to enter the court in an application under Section 9 of the Arbitration and Conciliation Act. Based on the ratio of the decision referred to by the learned Advocate, I do not find any merit in the said contention. In the decision referred to by the learned Advocate, what is held by the Hon'ble Supreme Court is that “ *a person not a party to an arbitration agreement, cannot enter the court for protection under Section 9. This has relevance only to his locus standi as an applicant* “.

17. Take a case where the property which does not belong to the parties to the arbitration agreement is sought to be attached as an interim measure under Section 9 of the Arbitration and Conciliation Act, certainly, the remedy of that party is to appear in the proceedings and claim his right. A person aggrieved by an order passed under Section 9 of the Arbitration and Conciliation Act, can certainly approach the court to establish his legal right. The further observations of the Hon'ble Supreme Court in the decision referred to by the learned Advocate for first respondent shows that the court is conferred with the same power of making the specified orders as it has for the purpose and in relation to any proceedings before it though the venue of proceedings in relation to which the power under Section 9 is sought to be exercised is the Arbitral Tribunal.

18. Apart from that, if a fraud is practiced upon the court, the principle of locus standi has no application. When a fraud is practiced upon the court and it has affected a party, certainly that party is entitled to come to the court to point out that a fraud is practiced on the court. The principle of locus standi has no relevance therein.

19.. It is relevant in this context to note the decision of the Hon'ble Supreme Court in *Krishna Duruka v. State of Odisha* 2024 SCC Online SSC 56. The Apex Court observed “ About three decades ago, the court in *Chandra Shaskshi v. Anil Kumar Varma* (1995) (1) SCC 421 was faced with a situation where an attempt

was made to deceive the court and interfere with the administration of justice. The litigant was held to be guilty of contempt of court". Several other decisions was also referred to by the Hon'ble Supreme Court. It is observed in ***Dilip Singh v. State of UP (2010)(2) SCC 114*** the Hon'ble Supreme Court observed "For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of justice delivery system which was in vogue in pre- independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. (undelining by me) Therefore, when a party approaches a court alleging that a fraud is practiced upon the court

by a litigant, the principle of locus standi has no relevance.

20. In ***S.P. Chengal Varaiya Naidu v. Jagannath and Ors.***, AIR. (1994) Supreme Court 853, the Hon'ble Supreme Court quoted, *"fraud avoids all judicial acts, ecclesiastical or temporal. Observed Chief Justice Edward Coke of England, about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decreed by the first court or the highest court has to be treated as a nullity by every court whether superior or inferior. It can't be challenged in any court even in collateral proceedings".*

21. The next aspect to be considered is whether actually a fraud is practiced on court by filing CMA 1355/2023. If one go through the entire pleading in CMA 1355/2023, there is no whisper regarding CMA No. 920/2023 and the interim order obtained in the said proceedings. The relevant documents are now before the court produced by the petitioner. They are marked as Ext. A1 to A3. Ext. A1 is the certified copy of the application filed under Section 9 of the Arbitration and Conciliation Act by first respondent as CMA 920/2023 along with a copy of the affidavit in support of the application. Ext. A2 is the copy of the not pressed memo filed by the first respondent in CMA 920/2023. Ext. A3 is the order passed by the court pursuant to the same. The order reads "It is noted that the petitioner in CMA 920/2023 and the I.A. 6/2023 represented. Not pressed 3memo filed. CMA is dismissed as not pressed". The order

was passed on 21.12.202. The affidavit of the petitioner clearly shows that the first respondent has obtained an interim protection order in CMA 920/2023 and took steps to possess the very same moveable which are now possessed as per the order in CMA 1355/2023. The petitioner herein has also got impleaded in CMA 920/2023. Thereafter, that CMA was not pressed. It clearly shows that the first respondent is was fully aware of the fact that the petitioner raised a claim with respect to the moveables sought to be repossessed by the order in CMA 920/2023. The moveables were not taken possession in the said CMA though an order was obtained from the court. It was simply not pressed on 21.12.2023.

22. The present CMA is filed by the first respondent on 22.12.2023, that is, two days after the dismissal of earlier CMA as not pressed. However, significantly, there is no averment at all in the said application. It is discernible from the proceedings paper that the CMA came up for hearing on 06.01.2024 and adjourned to 08.01.2024. On 08.01.2024 the hearing was adjourned to 16.01.2021. On 16th January, the petitioner got an order from the court to repossess the D.G. set. The first respondent, who is well aware that there is a claim, whether it is right or wrong, in respect of the hypothetical asset, and after the petitioner herein get impleaded as fourth respondent, not pressed C.M.A. on 21.12.2023 without getting any adjudication. The Interim Order was also not enforced. Thereafter, suppressing the filing of that CMA, another CMA was filed and it happened to be transferred to another court

and obtained an ex-parte order. If the first respondent has stated anything regarding the not pressing of CMA 920/2023 in the present CMA or he impleaded the present petitioner, there would have been merit in the contention that any number of petitions can be filed under Section 9 of the Arbitration and Conciliation Act.

23. A litigant cannot take advantage of a legal provision by concealing facts from the court. This is a case wherein the petitioner has clearly practiced a fraud on the court. The question whether after the dismissal of one petition under Section 9, another petition under Section 9 can be filed does not arise for consideration when there is a fraud practiced upon the court. I am of the view that this is a clear case where the petitioner has committed act of fraud by concealing material facts and abused the process of the court. The Advocate who filed both the applications are one and the same. This is a case in which the litigant M/s Hedge Finance has practiced a fraud on the court, which even amounts to a contempt on the part of the litigant. It appears from Ext. A1 to A3 and Ext. B1 that the same Advocate filed both applications. It cannot be stated that the Advocate is not aware of the memo filed by him, not pressing the one application before the other court and thereafter filing another application under Section 9 before another court. Therefore, I am of the view that the order dated 16.01.2024 to take possession of the moveable is obtained by way of practicing a fraud on the court, which is clear from Ext. A1 to A3 marked on the side of the petitioner. Both the points are found in favour of the petitioner.

24. **Point No.3** :- . In view of the finding on point No. 1 and 2, the order is obtained by fraud is set aside and the first respondent is directed to hand over the moveables obtained possession by practicing fraud on court to the petitioner within 10 days from the date of this order. I am exercising a judicial restraint for not initiating any contempt action against the first respondent.

Dictated to the Confidential Asst., typed and transcribed by her, corrected and pronounced by me in the open court on this the 14th day of August, 2024.

Sd/-

V P M Suresh Babu

Addl. District & Sessions Judge- VII

Appendix

Petitioner's Exhibits :

- A1 – 08.09.2023 - Certified copy of CMA (Arb) No: 920/2023 filed before the Hon'ble District Court, Ernakulam.
- A2 – 21.10.2023 - Certified copy of memo filed by the counsel for the petitioner in the CMA (Arb) No: 920/2023 to dismiss the CMA (Arb) as not pressed.
- A3 – 21.12.2023 - Certified copy of the Order of the Hon'ble District Court, Ernakulam on the withdrawal petition.

Respondent's Exhibits :

- B1 - 09.01.2023 - True copy of Hypothecation Agreement
- B2 - 25.11.2023 – Copy of Statement of Account
- B3 - True copy of Power of attorney.
- B4 - True copy of the invoice of the hypothecated asset.

Sd/-

Addl. District & Sessions Judge- VII

(By Order)

///True copy///

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Order in
I.A.No.10/2024 in
C.M.A(Arb) No. 1355/2023
dtd 14.08.2024