(2020) 12 KL CK 0001

In the High Court Of Kerala

Case No : Arbitration Appeal No. 30 Of 2020

K.K. Ibrahim APPELLANT

Vs

Cochin Kagaz Ltd (Ckl) RESPONDENT

Date of Decision : 01-12-2020

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 9(3), 17
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Securities Interest Act, 2016 — Section 14

Citation : (2020) 12 KL CK 0001

Hon'ble Judges : T.V. Anilkumar, J

Bench : Single Bench

Advocate : Ajith Viswanathan, S. Easwaran

Final Decision : Dismissed

Judgement

1. O.P.(Arb)No.169/2019 filed under Section 9 of the Arbitration and Conciliation Act, 1996(for short, 'the Act') seeking an order of attachment of

petition schedule 19.787 Ares of land and machineries therein, was dismissed by the Additional District Court, North Paravur. The impugned order

dated 25.02.2020 refusing attachment is challenged by the petitioner through this appeal.

2. The respondent/company agreed to sell scrap and machineries to appellant under Memorandum of Understanding(MoU) dated 31.01.2017. The

appellant purchased the goods and paid substantial amounts. Some more amount is still outstanding towards the balance purchase price. The appellant

claims that he entered into an agreement with third parties to sell the goods purchased from the respondent. According to the appellant, some of the

goods sold and kept in the petition schedule land are yet to be removed by him. But, the respondent by its high-handed action has withheld the goods and proposed to sell them along with the petition schedule land. It is stated that the appellant suffered huge loss on account of the alleged breach of

contract committed by the respondent. The stand taken by the respondent/ company is that all the goods purchased by the appellant were already

removed from the premises and some amount towards value of goods is outstanding due. It set up a rival claim of loss and sought damages from the

appellant.

3. As per the relevant clause in MoU dated 31.01.2007, arbitral disputes to be resolved by the Arbitral Tribunal arose between parties. The contention

of the appellant in O.P. (Arb)No.169/2019 is that until the claim for damages is determined by the Arbitral Tribunal, the petition schedule land,

machineries etc. have to be kept intact and if the immovable property and assets are transferred in the meantime, the appellant may not be in a

position to recover the loss from the respondent. It is with this object, interim measure of protection by way of attachment of immovable property was

sought.

4. The respondent filed counter and opposed the prayer for attachment contending that appellant has not made out any prima facie case. The court

below dismissed the O.P.(Arb) on the ground that the material facts were suppressed by the appellant.

5. I heard the learned counsel for the appellant and respondent.

6. Even if appellant is assumed to have made out a prima facie case in support of claim for damages also, I do not consider that attachment of land as

sought by the appellant could be granted at present. Petition schedule land has already become the secured asset of M/s.Edelweiss Asset

Reconstruction Company, Mumbai. Under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities

Interest Act,2016[SARFAESI Act], the physical possession of the property was already taken over by Chief Judicial Magistrate, Ernakulam. Pursuant

to physical possession having been taken, the respondent approached another Bench of this Court seeking liberty to be reserved with it for sale of the

property for settling its liabilities.

7. In paragraph No.18 of the judgment dated 28.06.2019 in W.P.(C)No.8663/2018, this Court permitted the respondent to take necessary steps to

settle its liabilities by resorting to private sale or such other effective methods with the consent of Assets Reconstruction Company[ARC]. So long as

this judgment is in force, no order of attachment could be passed in respect of the very same property since it would only run counter to this Court's

own direction. Therefore, I am of the opinion that no order of attachment could be granted at present.

8. The learned counsel for the appellant submitted that the respondent is going ahead with steps for sale of scrap and machineries purchased by him

and kept in the property. On the other hand, the contention of the respondent is that the goods sold to the appellant were already removed and nothing

remains in the possession of the respondent.

9. The learned counsel for the respondent, Adv.Sri. S. Easwaran, however, conceded that, if at all any part of the goods sold to the appellant remains

in the premises, the company has no objection to the appellant removing the same, provided the same are properly identified.

10. The learned counsel for the appellant submitted that the court below refused to grant reliefs in respect of the scrap and machineries only for the

reason that they were not scheduled in the petition and according to the learned counsel, this order is erroneous. He relied on two decisions reported in

Albert Judah Judah v. Rampada Gupta and Anr.[AIR 1959 CALCUTTA 715] andT ata Chemicals Ltd. v. M/s. Kshitish Bardhan Chunilal Nath and

Ors.[AIR 2019 CALCUTTA 353]and contended that description of properties in the schedule was not essential to invoke the power of the court for

an order of injunction.

11. I am of the opinion that unless the property in respect of which the relief is sought could be well identified, especially in the light of the

respondent's contention that all the scrap and machineries have been removed by the appellant, an effective order of injunction restraining the

company from alienating the goods is incapable of being granted. When this position was put to the appellant's counsel, he submitted that the matter

may be remitted back to the court below and appellant may be given an opportunity to incorporate the property schedule in the original petition.

12. The learned counsel for the respondent opposed the prayer for remand and contended that sole Arbitrator has already been appointed after the

impugned order was passed, there is a legal bar under Section 9(3) of the Act which precludes the court below from granting any interim measure of protection. I am also of opinion that the contention raised by the learned counsel for the respondent merits consideration.

13. In view of appointment of sole Arbitrator, it is up to the learned Arbitrator to consider the question as to whether appellant would be entitled to

claim any interim measure of protection under Section 17 of the Act.

14. The learned counsel for the appellant submitted that he will take all necessary steps for identifying the scrap and machineries sold to him by the

respondent and remaining in the property. In that event, it will be open to the appellant to approach the learned Arbitrator and canvass appropriate

interim reliefs in accordance with the provisions of the Act. In short, I do not find any reason to interfere with the impugned order passed by the court

below.

In the result, appeal fails and it is dismissed, subject to the appellant's right to approach the Arbitral Tribunal and seek interim measure of protection

having due regard to the facts and circumstances of the case.

All pending interlocutory applications will stand closed.

