

K.N. Pradeep Vs. The Station House Officer and Anothers

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Court : Kerala

Decided On : Mar-16-2016

Judge : A. Muhamed Mustaque

Appeal No. : WP(C). Nos. 38725 of 2015, 39542 , 4325, 4333, 7435, 7932, 8667, 9660, & 10044 of 2016 (M)

Appellant : K.N. Pradeep

Respondent : The Station House Officer and Anothers

Judgement :

1. The common question of law in all these writ petitions is regarding enforcement of the interim order issued under Section 17 of the Arbitration and Conciliation Act, 1996 (Act 26 of 1996) as amended by the Act 3 of 2016, by the Arbitral Tribunal.
2. The writ petitioners have availed vehicle loans from finance companies, which have been arrayed as party respondents in the writ petitions. They have approached this Court raising a grievance to the effect that the interim order passed by the Arbitral Tribunal is enforced/being attempted to be enforced without putting the orders for enforcement, following the procedures under the Code of Civil Procedure, before the Principal Civil Court.
3. Before proceeding to consider the questions that have arisen for consideration, it is appropriate to refer the power of this Court to interfere with an order passed by the Arbitral Tribunal. The Constitution of the Arbitral Tribunal is referable to a

Contract. The jurisdiction, therefore, is based on a Contract. The Arbitration and Conciliation Act, 1996 is enacted essentially for the recognition of the award and its enforcement.

4. The jurisdiction of this Court invoking power of Article 226 of the Constitution cannot be used directly to interfere with the interim order or award as the Arbitral Tribunal cannot be considered as a State within the meaning of Article 12 of the Constitution nor the award can be subjected to a judicial review. Further, the Arbitral Tribunal is not a Tribunal within the meaning of Tribunal as referred under Article 227 of the Constitution (See judgment of this Court in *Daison v. Varghese Jose* [2016 (1)KLT 612]. However, when an order/award issued by the Arbitral Tribunal impinges the fundamental rights of a citizen in the colour of exercise of the authority stemmed from the Statute, certainly, this Court can step into, to restore the rights of the citizen to the limited extent to restore the right which has been taken away by enforcing of an order/award without any authority.

5. Before the amendment to the Arbitration Act, 1996 which came into effect from 23/10/2015 inserted by Act 3 of 2016, the interim order passed by the Arbitral Tribunal could not be enforced as an order of the civil court. Prior to the substitution of Section 17, the Arbitral Tribunal had also power under Section 17 to order interim measures. However, wider power was conferred on the civil court to pass orders for interim measures before or during arbitral proceedings or at any time after making of the arbitral award under Section 9 of the Act 26 of 1996. However, substantial changes have been made after amendment Act 3 of 2016 crippling the power of the civil court to pass an interim order by inserting sub-section 3 to Section 9. Under Section 9(3) the Court can entertain an application for interim measures only if the Court finds that circumstances exist which may not render remedy to grant interim orders by the Tribunal efficacious. After the amendment by Act 3 of 2016, under Section 17, the Arbitral Tribunal is conferred with an enormous power which otherwise is conferred with a Civil Court to pass order for interim measures. In terms of Section 17(2) of the amended Act, these interim orders are also enforceable in the same manner as if it were an order of civil court. Section 17(2) reads as follows:

17(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were an order of the Court.

6. In *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.* [(2004) 9 SCC 619], it was held by the Hon'ble Supreme Court that no power was conferred on the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereon. In *Sri Krishan v. Anand* [(2009) 3 Arb LR 447 (Del)], the Delhi High Court held that any persons failed to honour an interim order of the Arbitral Tribunal deemed to be making any other default or guilty of contempt to the Arbitral Tribunal during the conduct of the proceedings in terms of section 27(5) of Act 26 of 1996. Faced with dilemma on account of lack of provisions to enforce interim orders, the Law Commission suggested for making provisions to provide teeth to the orders of the Arbitral Tribunal by incorporating measures for enforcement. The Law Commission was of the view that the judgment of the Delhi High Court in *Sri Krishan's* case (*supra*) is not a complete solution. The Commission made the following suggestions:

The Commission has, therefore, recommended amendments to section 17 of the Act which would give teeth to the orders of the Arbitral Tribunal and the same would be statutorily enforceable in the same manner as the Orders of a Court. In this respect, the views of the Commission are consistent with (though do not go far as) the 2006 amendments to Article 17 of the UNCITRAL Model Law.

7. Thus, the above suggestions itself make it clear that the Legislature never had intended the Arbitral Tribunal's order to be enforced by the Tribunal itself. The intention behind is only to ensure that the order is enforced in a manner provided under the Code of Civil Procedure, enforcing an order of such court.

8. It is to be noted that the legislature used enforcement interchangeably in the context of different provisions of the Act 26 of 1996 as amended by the Act 3 of 2016. In terms of Section 17(2), enforcement means causing implementation of the order. The enforcement of an interim order under Section 17(2) is on account

of disobedience to the interim order. Therefore, it need not follow the same procedure as contemplated in execution . It can be implemented in a like manner as the Court exercises its power under Section 27(5) of the Act 26 of 1996. It is also appropriate to refer Section 94 of the Code of Civil Procedure for the Court to enforce such orders. Section 94 of the Code of Civil Procedure provides as follows:

94. Supplemental Proceedings.-In order to prevent the ends of justice from being, defeated the Court may, if it is so prescribed,-

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him so the civil prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.

9. It is to be noted that nowhere in Section 17(2) of the Act 26 of 1996, Legislature mandated to follow the procedure of execution to implement the interim order.

10. The civil court while enforcing interim order of the Arbitral Tribunal has to treat the order as if it were issued under the Code of Civil Procedure. Section 2(14) of the Code of Civil Procedure Code defines order as follows:

(14) order means the formal expression of any decision of a Civil Court which is not a decree. Thus, the court while considering an application under Section 17(2) of the Act 26 of 1996 shall resort to Section 94 of the Code of Civil Procedure to

enforce the interim order of the Arbitral Tribunal and need not require to follow any procedure as contemplated for execution under the Code of Civil Procedure.

11. However, enforcement of the final award under Section 36 of the Act 26 of 1996 is like an execution of the decree. The execution arises in the context of non compliance of the award which is distinct from disobedience to honour an interim order. The court has to follow the procedure for execution of the decree. The enforcement in relation to foreign award under Section 48 of the Act 26 of 1996 is a prerequisite satisfaction for execution of the foreign award. It is only after satisfying that the award is enforceable, the court can proceed further for execution. Thus, it has to be understood that the Legislature has given a different meaning to enforcement under Section 17, 36 and 48 of the Act 26 of 1996.

12. There cannot be any doubt that after amendment, the Arbitral Tribunal would possess the same power for making orders as the Court had before the amendment for the purpose of, and in relation to, any proceedings before it. The Arbitrator also can order repossession of the vehicle. But the question is, when an order is not obeyed or honoured by the parties, can the order be enforced like an order of the civil court, by the Tribunal or by the party.

13. Enforcement is defined under the Blacks law dictionary as follows:

Enforcement. The act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or command.

Enforcement implies a force to implement. The law enforcement is a Sovereign and State function. The nature of the Arbitral Tribunal s composition emanates from a contract though, the powers of the Arbitral Tribunal is governed by the Statutory provisions. Nevertheless, it confers no power on the Tribunal to enforce its own order. Conferring the power of the Civil Court to the Tribunal for passing an interim order does not mean that the Tribunal is conferred with the power of enforcement. The Tribunal, by its constitution or creation, inherently lacks power to deal with any sovereign function or public law in the sense that their authority is founded in a contract and power is regulated by the statute.

14. The nature of the power vested with the Arbitral Tribunal is also discernible from Section 27 of the Act 26 of 1996. The Arbitral Tribunal has to apply to the Court for assistance in taking evidence. It is for the Court to ensure that such request is implemented by passing appropriate orders. In Daison's case, this Court held at para.26 as follows:

26. The test evolved by the Supreme Court may be applied to the case under consideration. Has the arbitral tribunal constituted under the Arbitration and Conciliation Act 1996 the trappings of a court. The Act contains no provision empowering the tribunal to compel witnesses to appear before it. If it wants to compel appearance of witnesses, it has to take the assistance of a court as provided in Section 27 of the Act.

15. The issue in this context has arisen from the orders passed by the Arbitral Tribunal under Section 17 of the Act 26 of 1996. Some of the interim orders are reproduced hereunder.

16.i. The Arbitral Tribunal in the order on I.A.No.50 of 2015 in Arbitration Case No.112 of 2015 (produced as Ext.P4 in W.P.(C). No.4325/2016) held at para.7 as follows:

7. Therefore as measure of protection of this subject matter of loan and secured asset, I hereby order the respondents to handover the secured asset vehicle namely, Hyundai Verna VTVT bearing Reg.No.KL-07/BZ- 4575, to the Advocate Commissioner appointed herein for placing and preserving the secured asset in the yard of the claimant. For the purpose I hereby appoint Adv.Sri.Sangeeth.C.U., 23/1122, Palluruthy, P.O., Kochi-682 006 an Advocate as Advocate Commissioner to take possession of the above referred vehicle from the possession of the respondents and place the vehicle in the yard of the claimant for preservation, maintenance and safe custody of the vehicle until further orders. Commission batta is fixed as Rs.1000/-. I also direct the Station House Officer, concerned Police Station to render necessary protection/assistance to the Advocate Commissioner for this purpose.

16.ii. The Arbitral Tribunal in the order on I.A.No.535 of 2015 in Arbitration Case No.611 of 2015 (produced as Ext.P5 in W.P.(C). No.39542/2015) held at para.7 as follows:

7. Therefore as measure of protection of this subject matter of loan and secured asset, I hereby order the claimant to take possession of the secured asset vehicle namely MARUTI SUZUKI ERTIGA VDI bearing Reg.No.KL/37-B-6390, respondents or from whomsoever the vehicle is found and order the respondents to handover the said secured vehicle to the claimant for placing and preserving the secured asset in the yard of the claimant. Advocate Commissioner appointed herein may report the process to this Tribunal. For this purpose, I hereby appoint Adv.Sri.Sangeeth.C.U., 23/1122, Palluruthy, P.O., Kochi-682 006 as Advocate Commissioner for reporting to this Tribunal the process of taking over of possession of the secured vehicle by the claimant from the respondents or from whomsoever the vehicle is found and as to the placing the vehicle in the yard of the claimant for preservation, maintenance and safe custody of the vehicle till further orders. Commission batta is fixed as Rs.2500/-. Of course, the Advocate Commissioner and claimant are entitled to seek the assistance of the Station House Officer of the concerned Police Station, if there is any threat to their person or life in the process of the claimant taking repossession of the vehicle.

17. The interim orders in all these writ petitions are in the nature of appointment of an Advocate Commissioner/Receiver to repossess the vehicle either directly or with the assistance of police.

18. As has been adverted above, the enforcement itself signifies that there must be a force to put the order in motion, to ensure that the party bound by the order is complied with such order. The Arbitral Tribunal's by very nature of its composition cannot exercise any such power vested with the court, which discharges sovereign function.

19. To sum up the discussions as above, it has to be declared that the Arbitral Tribunal cannot pass an order to enforce its order by directing the Advocate Commissioner/Receiver to repossess the vehicle from the opposite party. It is made clear that the Advocate Commissioner or Receiver as the case may be, can

be appointed for any other purpose, but not to enforce an order of repossession passed by the Tribunal. Any order of repossession can only be enforced through a civil court.

20. The repossession of the vehicles by enforcing the order of the Arbitral Tribunal without the intervention of the civil court, therefore, has to be treated as violation of Article 21 of the Constitution of India. In the colour of statutory backing, the Tribunal's order has been allowed to be enforced without any statutory authority. The encroachment into a public law field in a private law remedy is nothing but a sheer abuse of process of law.

The citizen has to be safeguarded against such arbitrariness. Therefore, the writ petitions are maintainable to the extent nullifying an act done by encroaching into public law power, by exceeding power conferred under the private law. All the writ petitions, therefore, are disposed of in the light of the facts involved in each case.

21. W.P.(C).No.39542/2015:

In this case a vehicle has been seized pursuant to an interim order dated 11/11/2015 and sold in public auction. It is the case of the respondents that the vehicle has been surrendered by the writ petitioner voluntarily. It is submitted that the respondents did not enforce the order passed by the Tribunal. In such circumstances, this Court is of the view the disputed question of fact cannot be entered into by this Court under Article 226 of the Constitution. If the writ petitioner has a case that he has not surrendered the vehicle, he is at liberty to seek appropriate relief before the competent court or before the civil court, challenging the interim order as illegal repossession. With that liberty W.P.(C).No.39542/2015 is closed.

23. W.P.(C).No.4325/2016: In this case an interim order was passed for repossession of the vehicle. The case of the company is that the writ petitioner voluntarily brought the vehicle to the Palarivattom Police Station and parked in the said premises. It is further stated that since the petitioner did not turn up for collecting the vehicle, the company took possession of the vehicle from the station premises.

23.i. The facts as such would show that this plea has been raised, with an intention to justify repossession of the vehicle. It is apparent that the vehicle has been repossessed by enforcing the interim order, by the Advocate Commissioner. In such circumstances, the possession of the vehicle has to be restored to the petitioner, forthwith.

24. W.P.(C).No.4333/2016: In this matter, the vehicle has not been repossessed so far. Therefore, this Court is of the view that if the respondent-company is armed with any order passed by the Arbitral Tribunal, they are free to enforce such order through the civil court.

25. W.P.(C).No.9660/2016: In this case the vehicle has been repossessed by enforcing the order of the Arbitrator. Admittedly, the respondent-company did not approach the civil court to enforce the order. Therefore, this Court is of the view that the possession of the vehicle has to be restored to the petitioner forthwith.

26. W.P.(C).No.7932/2016: In this case, the vehicle has been seized pursuant to the interim order passed the Arbitrator. It is the case of the respondent-company that when the Advocate Commissioner went to the premises of the petitioner without police assistance, the Advocate Commissioner was threatened by the writ petitioner. Thereafter, the Advocate Commissioner with the assistance of Sub Inspector of Police, Kodanad Police Station went to the house of the writ petitioner and the petitioner's father voluntarily surrendered the vehicle without making any issue.

26.i. This Court is of the view there is nothing to show that the vehicle has been surrendered by the petitioner. The police acted on the interim order of the Arbitral Tribunal to enforce the order without any authority vested in it. Therefore, the possession of the vehicle has to be restored to the writ petitioner forthwith.

27. W.P.(C).No.8667/2016: In this case, the vehicle has been seized pursuant to the interim order of the Arbitral Tribunal. The respondents' case is that the petitioner had voluntarily surrendered the vehicle to the respondent-company. It is to be noted that nothing has been produced before this Court to show that the petitioner had voluntarily surrendered the vehicle to the respondent company.

Therefore, this Court is of the view that the possession of the vehicle has to be restored to the petitioner forthwith.

28. W.P.(C).No.7435/2016: In this case the vehicle has been seized pursuant to the interim order of the Arbitral Tribunal. The respondent-company justified seizing the vehicle stating that the Tribunal has the same power as that of the civil court, to enter into a building for taking possession of the vehicle of the subject matter. The possession of the vehicle has to be restored to the petitioner forthwith.

29. W.P.(C).No.10044/2016: In this case though an interim order has been passed for repossession, the vehicle is yet to be repossessed. Therefore, this Court is of the view that the respondents are free to enforce the interim order in accordance with Section 17(2) of the Act 26 of 1996, as amended by the Act 3 of 2016.

30. W.P.(C).No.38725/2015:

In this case the vehicle is yet to be repossessed based on the order passed by the Arbitral Tribunal. Therefore, the respondents are restrained from repossessing the vehicle otherwise than through the intervention of the civil court.

31. However, the petitioners to whom the possession of the vehicles have been restored pursuant to the direction of this Court, shall not transfer or alienate the vehicles. They shall make available the vehicles as and when demanded by the civil court. It is made clear that if any one of the writ petitioners alienate or transfer the vehicles after restoring possession, they would be doing it at their own risk warranting contempt of Court action by this Court.

32. The respondent-finance company are free to take measures for enforcement of Arbitral award in the light of the discussions as above with the intervention of the civil court. The Registry is directed to forward a copy of this judgment to the Director General of Police. The Director General of Police shall thereafter, issue a Circular to all the subordinates instructing not to provide assistance to enforce the order passed by the Arbitral Tribunal without the direction of the civil court. No costs.