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"C.R"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR. A.J. DESAI

&

THE HONOURABLE MR. JUSTICE V.G. ARUN

TUESDAY, THE 31ST DAY OF OCTOBER, 2023 / 9TH KARTHIKA, 1945

WA NO. 1628 OF 2023
[AGAINST THE JUDGMENT IN W.P.(CRL.) NO.1196/2022 DATED 21-08-2023 OF THE HIGH COURT OF KERALA]

APPELLANTS/PETITIONERS/ACCUSED 1 & 3:

1 ALFA ONE GLOBAL BUILDERS PVT. LTD.,
BUILDING NO. TV-33/363S, IV FLOOR GRAND PLAZA,
FORT ROAD KANNUR, KERALA - 670001.
REPRESENTED BY ITS MANAGING DIRECTOR, MR. LUTHUFUDEEN PUTHIYAKKUTTY MAPPILAGATH.

2 LUTHUFUDEEN PUTHIYAKKUTTY MAPPILAGATH,
ZAINABA MANZIL, P.O. MUNDIYAD, KANNUR, KERALA - 670597.

BY ADVS. SRI. ATUL SOHAN
SRI. BIBIN JOHN
SRI. R. REJI (ATTINGAL)
SRI. SREEJA SOHAN K.
SRI. K.V. SOHAN

RESPONDENTS/COMPLAINANTS & RESPONDENTS 2 & 4:

1 NIRMALA PADMANABHAN, AGED 55 YEARS,
W/O. RAGHUNATHU T. PILLAI, "DEEPAM HOUSE",
COLONY ROAD, MOORIKKOVVAL, THAYINERI,
PAYYANNUR VILLAGE, PAYYANNUR P.O., KANNUR, KERALA,
NOW RESIDING AT "POUMAMI", THRIPERUMTHURA P.O.,
CHENNITHALA, MAVELIKKARA, ALAPPUZHA,
KERALA - 690105.

2 M/S. THANA SQUARE,
THANA SQUARE MALL, 5TH FLOOR, THANA,
KANNUR, KERALA - 670012.
REPRESENTED BY ITS MANAGING PARTNER
MR. KANIYARAKKAL SOOPPIKKANTAVIDA ABDUL SATHAR.

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3 KANIYARAKKAL SOOPIKKANTAVIDA ABDUL SATHAR,
S/O. IBRAHIM HAJI, BUSINESS BY PROFESSION,
RESIDING AT "SHAJJAS" CHOVVA P.O., KANNUR,
KERALA - 670006.

BY ADVOCATE GENERAL SRI. K. GOPALAKRISHNA KURUP
BY ADVS. SRI. PRAMOD M.,
SRI. SHYJU C.T. (K/001197/2020)
SRI. SAGITH KUMAR V. (K/2137/2019)
SRI. DEVAPRIYA S. (K/2928/2023)

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 17-10-2023, THE COURT ON 31-10-2023 DELIVERED THE FOLLOWING:

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JUDGMENT

A.J. Desai, CJ

The present appeal has been filed by the original petitioners of W.P.(Crl.) No. 1196 of 2022, challenging the judgment dated 21.08.2023, by which, the learned single Judge has refused to entertain the writ petition seeking to quash all the proceedings in C.C. No.290/2022 on the files of Judicial First Class Magistrate Court - I, Chengannur, alleging that the court has no jurisdiction to entertain the complaint filed by the original respondent No.3 and such other consequential reliefs.

2. The Bench raised a query about the maintainability of the present appeal, which has been filed under Section 5 of the Kerala High Court Act, 1958, in view of the prayers made and the contentions raised in the writ petition.

3. Mr. K.V. Sohan, learned Advocate for the appellants/ original petitioners, would submit that the petitioners filed the writ petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973, raising an issue concerning the maintainability of a complaint preferred by respondent No.3 and jurisdiction of the Magistrate before whom the complaint has been preferred. He would submit that when such an issue was raised before the learned single Judge, the writ court could exercise its powers under Section 482 of the Cr.P.C. and issue appropriate writ or direction. Therefore, when the petitioners have invoked the original jurisdiction of a learned single Judge under Article 226 of the Constitution of India, the appeal is maintainable under Section 5 of the Kerala High Court Act.

4. The learned Advocate for the appellants would further submit that a Hon'ble Division Bench of this Court dealing

with the issue regarding the maintainability of an appeal under Section 5 of the Kerala High Court Act, in **State of Kerala and Others** v. **C.P. Mohammed and Others** [2019 (3) KLT 793], has held that appeal would be maintainable. He would also submit that though a preliminary objection was raised by the other party about the maintainability, it has been held that such an appeal would be maintainable against the order passed in the writ petition filed under Article 226 of the Constitution of India.

5. The learned Advocate for the appellants also relied on the decision of a Hon'ble Division Bench of this Court in **Fr. Sebastian Vadakkumpadan** v. **Shine Varghese and Others** [2018 (3) KLT 177] and submitted that the said decision already covers the issue raised by the court.

6. The learned Advocate also relied on the order dated 23rd March, 2018 passed by a Hon'ble Division Bench of this

Court in W.A. No. 628 of 2018, wherein it was held that the appeal is maintainable under Section 5 of the Kerala High Court Act, 1958, if the learned single Judge has dealt with the petition under Article 226 of the Constitution of India. He would submit that the appeal is maintainable and, therefore, the same may be dealt with on merits.

7. We have sought the assistance of the learned Advocate General, Mr. K. Gopalakrishna Kurup, regarding the issues raised and accordingly, he has assisted the Court by placing certain decisions for perusal. He has placed the decisions of a Hon'ble Division Bench of this Court in **K.S. Das** v. **State of Kerala** [1992 (2) KLT 358]; **Narayana Reddiar** v. **Rugmini Ammal** [2000 (3) KLT 301]; and **State of Kerala and Others** v. **C.P. Mohammed and Others** [2019 (3) KLT 793]. However, he would submit that there is no decision regarding the maintainability of an appeal when a combined petition under

Article 226 of the Constitution of India read with Section 482 of the Cr.P.C. is dealt with by a learned single Judge.

8. We have heard Mr. K.V. Sohan, learned Advocate for the appellants, and Mr. K. Gopalakrishna Kurup, learned Advocate General.

9. We have gone through the memorandum of the writ petition. Perusal of the same would show that the petition has been filed under Article 226 of the Constitution of India, read with Section 482 of the Cr.P.C., raising an issue about the jurisdiction of the Magistrate before whom the complaint has been preferred under the provisions of the Negotiable Instruments Act, 1881. After raising certain grounds, the original petitioners have made the following prayers:

(i) Quashing all proceedings in C.C. No.290/2022 on the files of Judicial First-Class Magistrate Court, Chengannur, which lacks jurisdiction to entertain Exhibit-P3 Complaint.

(ii) Declare that the jurisdiction to entertain the complaint under Sec. 138 of the Negotiable

Instruments Act, 1881 is a Special Jurisdiction conferred by Sec. 142 of the NI Act, notwithstanding anything contained in the Criminal Procedure Code, must be strictly construed, and only the Court specified in Sec. 142(2) alone shall have the jurisdiction to entertain the complaint.

(iii) Declare that the dispute between the complainant, writ petitioners and respondents 2 & 3 are civil disputes arising out of Exhibit-P2, the agreement for the Specific Performance of construction of a commercial building in immovable property and the delay in performing the act agreed will only entail the civil consequences.

(iv) Declare that the liability under the cheque and NI Act proceedings taken over by the contracting parties, respondents 2 & 3, and the proceedings against the petitioners, who are erstwhile partners, is not maintainable.

(v) That by virtue of the agreement between the complainant and the accused, mediation and Arbitration are provided in the agreement and criminal prosecution is not contemplated with respect to any dispute arising and incidental to the rights arising under the agreement.

10. Learned single Judge, having considered the submissions advanced by the learned counsel on both sides, statutory provisions, and the decisions relied on, dismissed the writ petition by the impugned judgment.

11. Section 5 of the Kerala High Court Act reads as under:

> **"5. Appeal from judgment or order of Single Judge**. -
>
> An appeal shall lie to a Bench of two Judges from –
>
> (i) A judgment or order of a Single Judge in the exercise of original jurisdiction; or
>
> (ii) A judgment of a Single Judge in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of original jurisdiction by Subordinate Court."

12. It is the case of the appellants/writ petitioners that the appeal would be covered under Section 5(i) of the Kerala High Court Act since the learned single Judge has failed or refused to exercise the original jurisdiction under Article 226 of the Constitution of India.

13. Now, considering the prayers referred to herein above, it is clear that the original petitioners have requested the writ court to exercise its inherent powers under Section 482 of the Cr.P.C. and sought to quash the criminal case filed against them before the court below.

14. Section 482 of the Cr.P.C. reads as under:

> "**482. Saving of inherent powers of High Court**
>
> Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

15. In our opinion, though the appellants have filed the writ petition under Article 226 of the Constitution of India, seeking to quash the proceedings in C.C. No.290/2022 on the files of JFMC, Chengannur, without praying for issuance of any writ under Article 226, it cannot be said that the learned single Judge has exercised its original jurisdiction.

16. It has been specifically held by the Hon'ble Supreme Court in **Pepsi Foods Ltd. and Another** v. **Special Judicial Magistrate and Others** [(1998) 5 SCC 749] that the nomenclature of filing the proceedings is not relevant. It was

further held that the Court is supposed to look into the prayers made by the petitioner and if the High Court, after going through the contentions raised in the memorandum of the petition, finds that the case may fall either under Article 227 of the Constitution of India or under Section 482 of the Cr. P.C., it is required to be accordingly dealt with.

17. We have also gone through the decision of a Hon'ble Division Bench of this Court in **Abubacker Kunju** v. **Thulasidas** [1994 (2) KLT 987], wherein it has been specifically held that no appeal would lie against the order passed by a learned single Judge under Section 482 of the Cr.P.C.

18. Insofar as the decisions relied on by the learned Advocate for the appellants regarding the maintainability are concerned, we have gone through the facts of each case in which the Court has held that appeal, arising from the judgment/order passed by the learned single Judge, dealing

with different types of criminal matters, would lie under Section 5 of the Kerala High Court Act.

19. In the case of **Fr. Sebastian Vadakkumpadan** (cited supra), the Division Bench was dealing with an appeal arising from the judgment of a learned single Judge, wherein it was held that police authorities were not registering an F.I.R and investigating the offences in which the Court has exercised its original jurisdiction directing the authority to lodge an F.I.R. In such circumstances, it has been held therein that, when the Court is exercising its original jurisdiction, an appeal would lie under Section 5 of the Kerala High Court Act.

20. The decision in **K.S. Das** (cited supra) is with regard to entertaining an appeal under Section 5(i) of the Kerala High Court Act against an interlocutory order passed in a writ petition. In the said decision, it has been held that an appeal would lie if an order has been passed without jurisdiction,

contrary to law or perverse and would cause serious prejudice to the parties.

21. In the case of **Narayana Reddiar** (cited supra), the Hon'ble Division Bench entertained an appeal under Section 5 of the Kerala High Court Act, when the learned single Judge passed an order under Section 340 of the Code of Civil Procedure directing initiation of proceedings which, in our opinion, is the original jurisdiction exercised by the High Court and not inherent powers.

22. In the case of **C.P. Mohammed** (cited supra), the writ petition was filed for transfer of investigation from a particular police station to the Special Investigation Team. In our considered opinion, when such prayers have been made, the Court is exercising its original jurisdiction and not inherent powers provided under Section 482 of the Cr.P.C. It is also pertinent to note that the writ appeal was entertained on the

ground that the learned single Judge had not granted sufficient opportunity to the State authorities to file counter affidavit in response to the prayer for transfer of investigation to the CBI. There is much difference in the prayers made in the subject writ petition and the issue involved in the said decision.

23. Apart from the above aspect, in **Abubacker Kunju** (cited supra), the Hon'ble Division Bench has held that no appeal would lie under Section 5 of the Kerala High Court Act against an order passed by the learned single Judge under Section 482 of the Cr.P.C. We are in complete agreement with the ratio laid down by the Hon'ble Division Bench in **Abubacker Kunju** (supra). In the present case, the appellants have requested the writ court to exercise its inherent powers under Section 482 of the Cr.P.C, which has not been accepted,

and therefore, refusal of the same would not be appealable under Section 5 of the Kerala High Court Act.

24. The Hon'ble Supreme Court, in the case of **Pepsi Foods Ltd.** (cited supra), has, in unequivocal terms, held that, when the High Court is dealing with a petition for quashing of criminal proceedings, the nomenclature under which the case is filed, whether it be under Article 226/227 of the Constitution or Section 482 of the Cr.P.C, would not be relevant. In the present appeal, what is relevant is the prayer sought by the appellants, i.e., to quash the proceedings in C.C. No.290/2022, pending on the files of JFMC, Chengannur.

25. Considering the above-referred decisions of the Hon'ble Division Bench of this Court as well as the Hon'ble Apex Court, we are of the view that appeal would not lie against the impugned judgment where the learned single Judge has refused to exercise the inherent powers under

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Section 482 of the Cr.P.C for quashing of a criminal case filed against the appellants. Hence, the appeal is dismissed only on the ground of maintainability. It is made clear that we have not examined the merits of the case at all.

Sd/-
A.J. Desai,
Chief Justice

Sd/-
V.G. Arun,
Judge

krj/

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P.A. TO C.J.