



2026:KER:58587

OP(C) NO. 815 OF 2026

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE EASWARAN S.

MONDAY, THE 3RD DAY OF AUGUST 2026 / 12TH SRAVANA, 1948

OP(C) NO. 815 OF 2026

(AGAINST ORDER DATED 21.2.2026 OF THE COMMERCIAL COURT-III,
ERNAKULAM IN MA (Arb) No.366/2025)

PETITIONER/APPELLANT/1ST RESPONDENT:

DLF SOUTHERN TOWNS PVT. LTD.
HAVING ITS OFFICE AT 1ST FLOOR DLF GATEWAY TOWER,
R BLOCK DLF CITY, PHASE 3, GURUGRAM, HARYANA -
122002 AND HAVING ITS ZONAL OFFICE AT DLF OFFICE
COMPLEX, OPPOSITE DOODARSHAN KENDRA SEAPORT
AIRPORT ROAD, KAKKANAD P.O. ERNAKULAM REPRESENTED
BY ITS AUTHORIZED REPRESENTATIVE- ANTHONY GEORGE,
PIN - 682037

BY ADVS.
SHRI.M.GOPIKRISHNAN NAMBIAR
SHRI.K.JOHN MATHAI
SRI.JOSON MANAVALAN
SRI.KURYAN THOMAS
SHRI.PAULOSE C. ABRAHAM
SHRI.RAJA KANNAN
SHRI.DOMINIC ANTONY
SHRI.IZHAR MOHAMMED

RESPONDENTS/RESPONDENTS/CLAIMANTS:

1 ADITYA DEO
AGED 57 YEARS, S/O VASANT D. DEO DLF FLAT NO.
E093D, NEW TOWN HEIGHTS SEAPORT AIRPORT ROAD,
CSEZ P.O KAKKANAD, ERNAKULAM, PIN - 682037



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2 ARATHI ADITYA DEO
AGED 53 YEARS, W/O ADITYA DEO DLF FLAT NO. E093D,
NEW TOWN HEIGHTS SEAPORT AIRPORT ROAD, CSEZ P.O
KAKKANAD, ERNAKULAM, PIN - 682037

BY ADVS.
SHRI.M.RISHIKESH SHENOY
SMT.SUSY GEORGE
SRI.GEORGE POTHAN POOTHICOTE
SHRI.KURIAN GEORGE POOTHICOTE
SMT.GAYATHRI JAYAKUMAR
SHRI.ANIL XAVIER (SR.)

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 16.07.2026,
THE COURT ON 03.08.2026 DELIVERED THE FOLLOWING:

OP(C) NO. 815 OF 2026

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“C.R”

EASWARAN S., J.-----
OP(C) No.815 of 2026
-----**Dated this the 3rd day of August, 2026****J U D G M E N T**

The first respondent in an arbitration proceeding has come up with the present original petition challenging Ext.P8 order dated 21.2.2026 passed by the Commercial Court-III Ernakulam in MA(Arb) No. 366/2025.

2. Brief facts necessary for the disposal of the original petition are as follows:

Petitioner is the first respondent in an arbitration proceedings initiated before the sole arbitrator. Ext.P1 memorandum of claim submitted before the arbitrator, shows that the respondents herein (claimants) have sought for a direction to the petitioner herein to convey the undivided share of land calculated in the ratio which the super area of the claimants' Apartment No.E 093 D measuring to 317.52 square meters bears to the total super area of all the apartments in the said building and the undivided proportionate share in the common land area admeasuring to the extent of 24.63



acres situated in Kakkanad Village, Kanayannur Taluk and also consequential damages and compensation. According to the claimants, the dispute arose since the respondents failed to convey the entire extent of property as agreed in the agreement of sale. The sale deed in question was executed on 12.10.2017. Before the execution of the sale deed, a draft maintenance agreement was entered into between the parties, which was preceded by an Apartment Buyer's Agreement. Since there was an apparent conflict with regard to the extent of the property agreed to be sold to the claimants, they raised a dispute before the arbitrator stating that the petitioner herein is bound by the terms and conditions of the agreement. An objection was filed to the claim statement, contributing the various contentions and also questioning the entitlement of the claimants to seek appropriate reliefs in the arbitration proceedings. Pending the claim, Ext.P3 application was preferred by the claimants seeking an order to appoint an Advocate Commissioner to report on the various points raised therein. The petitioner herein filed Ext.P4 objection stating that the claimants are not entitled to prefer such an application before the arbitrator and that the arbitrator lacks jurisdiction to entertain the



claim for appointment of an advocate commissioner in view of the bar contained in Sections 26 and 27 of the Arbitration and Conciliation Act, 1996. Overruling the objection, Ext.P5 order dated 9.10.2025 was passed by the arbitrator appointing an advocate commissioner and directing him to report on various matters specified in the application. Aggrieved, the petitioner herein invoked the statutory remedy under Section 37 of the Arbitration and Conciliation Act, 1996 by filing MA (Arb) No.366/2025. The Commercial Court-III, Ernakulam dismissed the appeal by judgment dated 21.2.2026 (Ext.P8) and affirmed the order of the arbitrator and hence the original petition.

3. Heard Sri.Joson Manavalan, the learned counsel appearing for the petitioner, and Sri.Anil Xavier, the learned Senior Counsel, assisted by Sri.M.Rishikesh Shenoy, appearing for the respondents/claimants.

4. Sri. Joson Manavalan, the learned counsel appearing for the petitioner, submitted that in view of the bar contained under Sections 26 and 27 of the Arbitration and Conciliation Act, 1996, the arbitrator could not have exercised his power to grant interim measures. Though the petition is filed under Section 17, the power



exercised by the arbitrator is one under Sections 26 and 27 of the Act. It is pointed out that the materials before the arbitrator are sufficient to decide the claim and that he cannot collect the evidence to decide the lis between the parties. The arbitrator has by virtue of the impugned order directed the measurement of entire 24.63 Acres of land. This act of the arbitrator is without jurisdiction inasmuch as the attempt is nothing but to collect evidence to decide the case. It is further pointed out that the first appellate court (Commercial Court-III, Ernakulam) failed to exercise its powers under Section 37 of the Arbitration and Conciliation Act, 1996 and failed to comprehend the real dispute in the case. Though, the Act provides that no further appeal can be filed against an order passed under Section 37, that will not preclude this Court from exercising its powers under Article 227 of the Constitution of India.

5. *Per contra*, Sri.Anil Xavier, the learned Senior Counsel, assisted by Sri.M.Rishikesh Shenoy, appearing for the respondents/claimants, pointed out that the bar under Sections 26 and 27 is not applicable when an interim measure is considered by the arbitrator under Section 17 of the Arbitration and Conciliation Act,



1996. He further pointed out that the arbitrator has got every power to look into the real dispute and decide the matter. In the present case, what is sought for by the claimants is whether the petitioner/1st respondent has transferred the entire right over 24.63 Acres of land to other claimants or whether a series of patterns is adopted by them to deny the rightful claim of the allottees in respect of the multi-storied residential complex. He further pointed out that there is no prejudice caused to the petitioner herein if the commissioner inspects the property and files a report. The conclusion still rests with the arbitrator and the present order is only an aid in furtherance of the endeavour of the arbitrator to decide the lis. He further pointed out that there is a clear bar for this Court entertaining an original petition under Article 227 of the Constitution of India. In support of this contention, relied on the decision of the Supreme Court in ***Manash Kamal Bezboruah v. Bokahola Tea Company Private Limited and Others [2026 SCC OnLine SC 1330]***.

6. I have considered the rival submissions raised across the bar, perused the impugned order as well as the order passed by the arbitrator.



7. Based on the rival submissions raised across the bar, this Court finds that it needs to resolve two issues.

(a) Whether the original petition is maintainable?

(b) Whether the arbitrator has got the power to appoint an advocate commissioner?

8. The question of maintainability of the original petition assumes significance since, according to the learned Senior Counsel, an original petition challenging an order passed in an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is not maintainable. In order to test this argument, one needs to closely decipher the true purport of Section 37 of the Arbitration and Conciliation Act, 1996. Section 37 reads as under:

“37. Appealable orders.—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a court from an order of the arbitral tribunal—



- (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
- (b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”

9. A cursory reading of the aforesaid provision shows that no further second appeal is provided against an order under Section 37 of the Act except to the Supreme Court. But the question before this Court is whether Section 37 can exclude the High Court from exercising the powers under Article 227 of the Constitution of India.

10. The power under Article 227 of the Constitution of India cannot be circumvented or restricted by any statutory provision. In other words, no statute could put a clog on the power of the High Court in exercising its powers under Article 227 of the Constitution of India. If that be so, this Court is of the view that the bar under Section 37 is not applicable to proceedings under Article 227 of the Constitution of India. The bar under Section 37, which prescribes that no second appeal shall lie from an order passed under Section 37, is not intended to operate in a case where the power is exercised by the District Court under Section 37.



11. In a given case where an appeal is preferred under Section 37 of the Act against an interim order of the arbitrator, the order so passed on such appeal is amenable for challenge in an original petition constituted under Article 227 of the Constitution of India. Accordingly, the objection raised by the respondents regarding the maintainability of the original petition stands rejected, and it is held that the original petition is maintainable.

12. The second question assumes significance on two counts.
(a) The power of the arbitrator to appoint an advocate commissioner for collecting evidence is circumscribed by the operation of Sections 26 and 27 of the Arbitration and Conciliation Act, 1996. Sections 26 and 27 read as under:

“26. Expert appointed by arbitral tribunal.—(1)
Unless otherwise agreed by the parties, the arbitral tribunal may—

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the



opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report.

27. Court assistance in taking evidence.—(1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.

(2) The application shall specify—

(a) the names and addresses of the parties and the arbitrators;

(b) the general nature of the claim and the relief sought;

(c) the evidence to be obtained, in particular,—

(i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;

(ii) the description of any document to be produced or property to be inspected.

(3) The Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.

(4) The Court may, while making an order under subsection (3), issue the same processes to witnesses as it may issue in suits tried before it.

(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.



(6) In this section the expression “Processes” includes summonses and commissions for the examination of witnesses and summonses to produce documents.”

13. In **Punarnava Ayurveda Hospital Pvt. Ltd. v. Arbitrator for NH 66 and District Collector [2023 KLT OnLine 2081]**, a single bench of this Court held that in the nature of the limited powers conferred on the arbitral tribunal for summoning of witnesses and production of documents, the arbitral tribunal on its own motion or a party to the arbitration proceedings with the approval of the tribunal may invoke the provisions under Section 27 to request the court for its assistance in taking evidence from witnesses required to be examined. It was further held that in the nature of the powers conferred under Section 26, the Tribunal is empowered to appoint an expert to report to it on specific issues to be determined by the tribunal. However, it was held that the appointment of an advocate commissioner cannot be entertained by the Arbitral Tribunal either under Section 26 or Section 27 of the Arbitration and Conciliation Act. The arbitrator thus overstepped his jurisdiction in not following a binding principle laid down by this court. As such his order qualifies as one rendered without Jurisdiction.



14. The learned Senior Counsel appearing for the respondents/claimants, however, pointed out that the arbitrator had exercised the powers under Section 17(1) of the Act and appointed the advocate commissioner and, therefore, the said order is immune from challenge.

15. In the considered view of this court, when Sections 26 and 27 prohibit an arbitrator from appointing an advocate commissioner for the purpose of collecting evidence and that this Court in **Punarnava Ayurveda Hospital Pvt. Ltd.** (supra) has held that the arbitrator does not have such a power to appoint an advocate commissioner, the bar cannot be circumvented by the arbitrator by taking recourse to the powers under Section 17(1) of the Act.

16. Merely because Section 17 provides power to the arbitrator to grant interim relief, he cannot bypass the prohibition under Section 26 and grant such relief in exercise of the power under Section 17. Thus, the power under Section 17 of the Act to grant interim relief is subject to the exceptions specified under Section 26. Therefore, this Court is of the view that the arbitrator does not have



any power to appoint an advocate commissioner except to appoint person(s) to solicit expert opinion.

17. In the nature of the contentions raised by the parties in the present case, it is evident that the attempt made by the claimants is not to solicit expert opinion but, in fact, to conduct a roving inquiry and to collect evidence for the purpose of adjudicating their claim, which is impermissible.

18. Lastly, it is pointed out that even if the arbitrator has passed a wrong order, the same is not amenable to challenge before this Court in an original petition under Article 227 of the Constitution of India. Reliance is placed on the decision of the Supreme Court in **Deep Industries v. Oil and Natural Gas Corporation Limited [(2020) 15 SCC 706]**.

19. On a cursory reading of the decision of the Supreme Court, it is clear that the matter arose from a challenge raised before the High Court against an interim order passed by the Arbitral Tribunal. It was in that context that the Apex Court held that the power under Article 227 cannot be invoked directly against the order of the Arbitral Tribunal except in cases of exceptional rarity.



20. This Court in **Purushothaman Thitta v. Pothan Rajan [2026 KHC OnLine 414]** considered this question and had specifically delineated the circumstances under which a petition under Article 227 of the Constitution of India will lie against the order of the arbitrator. But in this case, the petitioner, having exhausted his alternate remedy under Section 37 of the Act, is certainly empowered to approach this Court by way of this original petition.

21. That apart, the real dispute between the parties before the arbitrator is whether the claimants are entitled to transfer of undivided share over the entire extent of the land. For that purpose, appointment of an advocate commissioner for measuring out the entire extent of the property as well as the individual allotment of property is not required. The question before the arbitrator can very well be decided based on interpretation of the documents. If, on analysis of the various evidence adduced by the parties and also on interpretation of the agreement of sale and also the consequent transfer of right, title and interest of the property, if the arbitrator finds that there was in fact an agreement between the parties to transfer the undivided share of the entire extent of the land, the



consequences must follow. If not, the claim is liable to be dismissed. This being the position, the arbitrator went outside the scope of his powers under the Arbitration and Conciliation Act, 1996 and appointed an advocate commissioner to solicit material evidence as prayed for, which is impermissible under law. That being so, this Court is satisfied that the order passed by the Arbitrator and its affirmation by the Commercial Court is per se unsustainable.

Accordingly, the original petition is allowed by setting aside Exts.P5 order of the Arbitrator dated 9.10.2025 and P8 order of the Commercial Court-III, Ernakulam dated 21.2.2026. Ext.P3 application for appointment of an Advocate Commissioner before the Arbitrator will stand dismissed. The Arbitrator is free to proceed with the claim, in accordance with law.

Sd/-
EASWARAN S.
JUDGE



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APPENDIX OF OP(C) NO. 815 OF 2026

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF THE CLAIM STATEMENT DATED 27.01.2025 NUMBERED AS ARBITRATION CASE NO. 1 OF 2024 FILED BY THE RESPONDENTS HEREIN BEFORE THE HON'BLE ARBITRATOR (ALONG WITH THE ANNEXURES, IE. EXHIBITS C1 TO C13 PRODUCED ALONG WITH THE CLAIM STATEMENT) IN ARBITRATION CASE NO. 1 OF 2024
- Exhibit P2 TRUE COPY OF THE DEFENCE STATEMENT DATED 19.03.2025 FILED BY THE PETITIONER BEFORE THE HON'BLE ARBITRATOR IN ARBITRATION CASE NO. 1 OF 2024
- Exhibit P3 TRUE COPY OF THE COMMISSION APPLICATION, I.A. NO. 1 OF 2025 DATED 18.07.2025 FILED BY THE RESPONDENTS HEREIN BEFORE THE HON'BLE ARBITRATOR IN ARBITRATION CASE NO. 1 OF 2024
- Exhibit P4 TRUE COPY OF THE OBJECTION TO THE COMMISSION APPLICATION I.A. NO. 1 OF 2025 DATED 04.08.2025 FILED BY THE PETITIONER HEREIN BEFORE THE HON'BLE ARBITRATOR IN ARBITRATION CASE NO. 1 OF 2024
- Exhibit P5 TRUE COPY OF THE ORDER DATED 09.10.2025 IN I.A. NO. 1 OF 2025 IN ARBITRATION CASE NO. 1 OF 2024 PASSED BY THE HON'BLE ARBITRATOR
- Exhibit P6 TRUE COPY OF THE APPEAL MEMORANDUM DATED 17.10.2025 UNDER SECTION 37 OF THE ARBITRATION AND CONCILIATION ACT, 1996 FILED BY THE PETITIONER WHICH WAS NUMBERED AS MA (ARB) NO. 366 OF 2025
- Exhibit P7 TRUE COPY OF THE COUNTER AFFIDAVIT DATED 23.11.2025 FILED BY THE RESPONDENTS IN MA (ARB) NO. 366 OF 2025
- Exhibit P8 TRUE COPY OF THE ORDER DATED 21.02.2026 PASSED BY THE COMMERCIAL COURT III, ERNAKULAM IN MA (ARB) NO. 366 OF 2025



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RESPONDENT EXHIBITS

Exhibit R1	True copy of the aforesaid notice dated 04/03/2026 issued by the advocate commissioner
Exhibit R2	True copy of the order dated 25/02/2026 in Civil Appeal No. 8049 of 2023 of the Hon'ble Supreme Court of India