Application Nos.1599, 1600 and 1397 of 2015

in

Application No.721 of 2015 and Application No.721 of 2015

R. MAHADEVAN, J.

The application in A.No.721/15 was filed for a direction to the respondent to prohibit the 2nd and 3rd respondents from paying Rs.6,54,96,217/- contending that the 1st respondent to whom a tender was awarded by the 2nd respondent for installation and commissioning of underground sewerage scheme in Tiruchirappalli City and the 1st respondent in turn entered into a sub-contract agreement dated 23.05.2003 for executing the works and also entered into an another agreement on 12.12.2003 whereby the applicant was liable to maintain the system for a period of one year. The work was completed in march 2008 and the applicant had maintained the works for one year free of costs till march 2009 and also for further one and a half year.

2. Despite the same, the 1st respondent has not cleared the dues totalling to Rs 6,54,96,217/- on the ground that the 2nd and 3rd respondents are about to make final payment to the 1st respondent for the tender work and therefore, the applicant approached this court to secure the amount pending arbitration proceedings.

3. On being satisfied with the prima facie case, this court issued a prohibitory order against the garnishees on 06.02.2015 restraining them from paying

any amount or a sum of Rs 6,54,96,217/- to the 1st respondent. Notice was also ordered.

4. Upon receipt of the notice, the first respondent has come with an application in A.No.1397 of 2015 contending that the applicant was mentioned as a sub-contractor in the tender itself and hence, a part of the main contract was given to the 2nd respondent.

5. According to the first respondent, the work was to be shared by the applicant with the 1st respondent and Gondwana Engineers Pvt Ltd, Nagpur. Further as per the agreement, the applicant had to maintain the works for a period of 5 years and for the first year the maintenance work to be done at free of cost.

6. The 1st respondent has further pleaded that the applicant has used substandard materials, which has resulted in blocks in the sewerage lines and the applicant was forced to redo the work.

7. The 1st respondent has also contended that despite agreeing to maintain the works for 5 years, the applicant has maintained the sewerage works only for two and half years. The applicant has spent more than Rs 2.54 crores out of their pocket towards repair and maintenance and suffered huge loss. It is only because of the substandard materials used by the applicant, the 1st respondent has withheld the payment to the tune of Rs 1,65,01,494/- till the 48th bill and the applicant is entitled to get Rs 15,26,801/- in the 50th bill and that the applicant is liable to make good the loss

suffered by them. According to 1st respondent the amount due to be received from the 3rdrespondent is Rs 4,51,29,817/-.

8. Under the above circumstances, the 1st respondent has approached this court to vacate the prohibitory order. Based on the contentions in the affidavit in A.No 1397/215, the applicant has subsequently filed the two applications for directions to the 1strespondent to pay the accepted sum of Rs 1,80,28,295/-in A.No 1600/15 and for a direction to the 2nd and 3rd respondents to produce the entire bill extract in A.No 1599/15.

9. The 1st respondent has contended in their counter to the above applications that the 1st respondent has a counter claim against the applicant in view of the loss suffered by them and that if at all any sum is payable, it is only the applicant and therefore, these are all the issues to be decided by the arbitral tribunal and such issues cannot be decided by this court in an application under section 9 of the Arbitration and Conciliation Act.

10. By consent all the applications are taken together and heard both sides.

11. The Learned counsel for the applicant emphasizing the contentions in the rejoinder affidavit contended that since they are the sub-contractors, the applicant cannot be treated as a party to the main contract. The learned counsel also relying upon the agreement dated 23.05.2003 and the supplementary agreements contended

that there is no clause to the effect that the applicant must maintain the works for 5 years and in spite of the same, the applicant without any payments has maintained the works for two years in addition to the free maintenance for one year.

12. The learned counsel also insisted that the 1st respondent must be directed to pay the accepted sum of Rs 1,80,28,295/- immediately as the claim of damages will have to be established and only then the right to claim would accrue. The learned counsel also pointed out that the terms of the agreement do not specify the standard materials to be used.

13. The learned counsel also contended that there is no privity between the applicant and the 2nd and 3rd respondents and the applicant is not a signatory to any of the agreements between applicant and the 2nd respondent. The learned counsel contended that the contractor is only the 1st respondent and the liability at any stage cannot be passed on to the sub-contractor. The learned counsel also referred to the letter dated 25.02.2015, wherein the applicant has appointed Hon'ble Mr. Justice A.S.Venkatachalamoorthy as an arbitrator on their part and called upon the 1st respondent to nominate their arbitrator so as to enable both of them to appoint the third arbitrator in terms of the arbitration agreement.

14. The learned counsel has also relied upon the judgments reported in 2002 (2) CTC 238, 2014 (1) LW 888, 2011 (2) MWN (civil) 604, O.S.A No 60 to 63 of 2014 and 1959 (3) LW 45 in support of his contentions and insisted for a direction to pay the admitted outstanding amount.

15. Per Contra, the Learned Senior counsel refuting the contentions of the counsel for the applicant vehemently contended that the counter has to be read as a whole and the acceptance of the non-payment would not amount to accepting the liability. The Learned Senior counsel also contended that the sub-contractor agreement has to be read along with the main contract agreement between the 1st respondent and the 2nd respondent and the TWAD Board regulations.

16. Relying upon para 4 of the agreement, the Learned Senior Counsel contended that the applicant was aware of the fact that they have to maintain the works carried out by them for five years and that was the reason even after the free maintenance period, the applicant had maintained the works for nearly two years and now they cannot go back and contend that it is not specified in the contract.

17. The Learned Senior Counsel also contended that though the applicant is a sub-contractor, they were engaged to carry out specific works with the consent of the 2nd respondent and the same is evident from the agreement between the 1st respondent and the 2nd respondent. The Learned Counsel also contended that the applicant had also executed bank guarantee in favour of TWAD and therefore the applicant cannot now plead that there is no privity.

18. The Learned Senior counsel also contended that the applicant had used substandard materials and poor workmanship and as a result of which there were blocks and leaks in many areas during the maintenance period and the public were put to many hardships. With no other alternative, the 1st respondent had terminated the sub-

contract agreement. In view of the shabby work, the 1st respondent suffered heavy loss as they had to redo the work and the bank guarantee to the tune of Rs 16,00,000/- furnished by the 1st respondent was also forfeited.

19. The Learned Senior Counsel also contended that the present claim of Rs 6,54,96,217/- is without any basis and not supported by any evidence. The Learned Senior Counsel contended that the applicant is liable to make good the losses suffered by the 1st respondent and hence at this stage, the payment to the 1st respondent cannot be prevented and the applicant cannot conduct a pre-trial in section 9 application.

20. The Learned Senior Counsel also submitted that the final statement of accounts reflecting the cost and the work carried out during the period of contract as certified by the Assistant Executive Engineer of the TWAD Board.

21. Relying upon the judgments in 2014 (2) CTC 639, 2012 (4) CTC 465, 2014 (3) CTC 792, 2008 (2) SCC 302, O.S.A No 279 and 280/09 and 2007 (7) SCC 125, the Learned Senior counsel sought the prohibitory order to be vacated and the dismissal of the applications filed by the applicant.

22. I have considered the aforesaid submissions and perused the documents.

23. Both the learned counsels have relied upon many documents in which the claim regarding poor materials, maintenance, outstanding and counter claim have been raised. The applications are only under section 9 of the Arbitration and Conciliation Act, 1996, which was enacted for the purpose of granting some relief of

interim protection, pending arbitration proceedings. Hence, this court cannot go deep into the claims and rival claims of the parties but is constrained to look into the prima facie case, balance of convenience and irreparable injury.

24. The Learned Senior Counsel for the 1st respondent has strongly objected to grant prohibitory order on the ground that the prohibitory order is in the nature of attachment before judgment and therefore, it cannot be granted unless sufficient pleadings supported by evidence are placed before the court.

25. In support of his contentions, the Learned Senior Counsel has relied upon the following judgments:

26. In ***2007 (7) SCC 125 (Adhunik Steels Ltd vs Orissa Manganese And Minerals)***, the Hon'ble Supreme Court has ruled as under:-

> *"It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in, the concept of 'just and convenient' while*

speaking of passing any interim measure of protection. The concluding words of the Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

The approach that at the initial stage, only the existence of an arbitration clause need be considered is not justified. In The Siskina [1979] AC 210, Lord Diplock explained the position:

"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

He concluded:

"To come within the sub-rule the injunction sought in the action must be part of the substantive relief to which the plaintiff's cause of action entitles him; and the thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by a final judgment for an injunction."

"No special condition is contained in Section 9 of the Act. No special procedure is indicated. In American Jurisprudence, 2nd Edition it is stated: "In judicial proceedings under arbitration

statutes ordinary rules of practice and procedure govern where none are specified; and even those prescribed by statute are frequently analogous to others in common use and are subject to similar interpretation by the courts."

It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject matter of an arbitration agreement. According to learned counsel for Adhunik Steels, the subject matter of the arbitration agreement in the case on hand, is the mining and lifting of ore by it from the mines leased to O.M.M. Private Limited for a period of 10 years and its attempted abrupt termination by O.M.M. Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of O.M.M. Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission made on behalf of the Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by O.M.M. Private Limited or the termination of the contract by O.M.M. Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case.

27. The Hon'ble Apex Court in ***2008 (2) SCC 302 (Raman Tech. & Process Engg. Co. & ... vs Solanki Traders)*** has observed as under:-

"The object of order 38 rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words `to obstruct or delay the execution of any decree that may be passed against him' in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5CPC. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case."

28. In an unreported decision of the Division Bench of this court in **M/s. Quickjet Cargo Air lines (P) vs. M/s. Bharat Aviation Private Ltd. (O.S.A 279 and 280 of 2009, Delivered on 2.9.2009),** their Lordships have observed as under:-

"15. Apart from this, by invoking Section 9, the party who seeks the relief of interim injunction must show a prima-facie case

and also irreparable injury as per the settled position of law. In the instant case, the contention putforth by the appellant side that the financial position of the appellant company is so sound cannot be disputed in view of the only available materials namely an averment in the affidavit that it is the only property available in the hands of the appellant company. Under such circumstances, the injunction has got to be granted. The Court is unable to see that there is any prima-facie case made out in the face of the agreement entered into between the parties on 06.12.2008 whereby the parties have to decide their dispute before the arbitral proceedings in respect of the rest of their claim.

16. Added further, in the instant case, what is necessary for the grant of interim order is irreparable injury, which the Court is unable to notice. Added circumstances are, in the instant case, the respondent having failed to take any steps to initiate arbitral proceedings have come under Section 9 stating that the property must be secured. Both the parties have got their respective claim. It is clear that all the claims are yet to be decided. For this, as understood between the parties, they must go before arbitral proceedings. Under such circumstances, in the considered opinion of the Court, it is not a fit case to grant interim injunction as one done.

17. Added further, in the instant case, what was sought for was only an interim injunction which requires not only a prima-facie case, but also irreparable injury. As pointed out earlier, the respondent has not proved the same. Apart from that, now the learned Single Judge, while vacating the interim injunction has modified the relief by directing the appellant to place bank guarantee for Rs.1.50 crores, which finally was allowed to continue till the disposal of the entire claim before the arbitral proceedings."

29. The learned Single Judge of this Court in ***2014 (2) CTC 639 (S.Sidharth Vs P.Lalitha kumari & Ors.) h***as observed as under:-

"13. The next fold of submissions is that the first respondent by entering into a Joint Development agreement with the developer, is disposing the 1/3rd share of her husband in the second item of the suit schedule property in order to delay or obstruct the execution of the decree that may be passed against the respondents. But, on a perusal of the records, I find that the first respondent's husband along with three other persons entered into a joint development agreement with the developer viz., Suddharth Foundations and Housing Limited through M/s.Peraveen M.Jain and Naresh M.Jain as early as on 25.7.2007, i.e., much earlier to the filing of the suit. Pursuant to the said agreement, the property was developed and the flats were constructed in the second item of the suit schedule property and the respondents along with the co-owners started to sell her 1/3rd share in the flats to the respective purchasers. Therefore, it is incorrect to state that after filing of the suit, with an intention to delay or obstruct the execution of the decree that may be passed against the first respondent, the first respondent started to sell her 1/3rd share. Unless it is established that the respondents started to sell the property after filing of the suit with an intention to obstruct or delay the execution of the decree that may be passed against them, in my considered opinion, order of attachment cannot be passed. In this regard, a reference could be placed in the judgment relied upon by the learned counsel appearing for the respondents reported in 2009-5-L.W.510 M.K.Hariprasad & another v. Uma Keshav, wherein, the Division Bench of this Court has held as follows:-

" 9. It is not that whenever any claim for recovery of money is made before a Court of civil law, every application filed for attachment before judgment should be ordered. It is well settled proposition of law that in a given case, asking for a direction to the defendants to furnish security and in default an order of attachment is an extraordinary remedy. It is also settled proposition of law that in a given case if the allegations are bald, the Court has no option than to deny the relief. What is all mentioned in paragraph 11 of the affidavits in support of the applications is as follows;

"11. I reliably understand that the 2nd respondent herein is making hectic efforts to dispose of the land to keep it out of the reach of the creditors and particularly me. I have come to understand that the real estate agents in the area have been pressed into service for the purpose and this fact is known to the people stationed locally. If the second respondent is allowed to sell the property, I would be left with no remedy to recover my suit claim and any decree that may be passed would only be on paper, incapable of execution. This would lead to great hardship and loss and could well result in serious

miscarriage of justice also."

10. The very reading of the above would clearly indicate that the allegations are bald. There is no specific averment or allegation made. In the absence of any specific allegation, it is well settled by the Apex Court and also by this Court that this extraordinary remedy should not be granted. It is true that the Court is vested with powers to exercise under Order 38 Rule 5 of CPC. But, it remains to be stated that if it is a fit case, it should be exercised. The learned single Judge in order to dismiss the applications fortified the decision of the Apex Court reported in (2008) 2 MLJ 1058 = 2008-3 L.W. 744 (SC) (Raman Tech & Process Engg. Co. and another Vs. Solanki Traders) wherein the Apex Court has held as follows:

"5. The power under Order 38 Rule 5 C.P.C. is a drastic and extraordinary power. Such power should be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs, by obtaining orders of attachment before judmgnet and forcing the defendants for out of Court settlements, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the Court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 C.P.C. Courts should also keep in view the principles relating to grant of attachment before judgment (see Prem Raj Mundra Vs. Md.Maneck Gazi, AIR 1951 Cal. 156, for a clear summary of the principles)."

11. It would be quite clear that either filing of a suit for recovery of money or the averment in the affidavit cannot by itself suffice for granting the relief of attachment before judgment. In order to get the relief of direction for furnishing security or in default, attachment before judgment, the plaintiff who seeks the remedy must make a specific averment which would warrant for getting such *a relief. In the case on hand, it is quite absent in the considered opinion of the Court. It is a drastic and extraordinary power vested in the hands of the Court under Order 38 Rule 5 of CPC. The Court need not go into at this stage whether the claim is barred by limitation or not. So long as ground is not made out for exercising the powers of the Court under Order 38 Rule 5, the learned single Judge was perfectly correct in dismissing the applications. Both the appeals do not require admission. Accordingly, they are dismissed...... "*

A reading of the dictum laid down in the above judgment would show that the power under Order 38 Rule 5 C.P.C. is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for asking. That has to be used sparingly and strictly in accordance with the Rules. In the instant case, during the life time of the husband of the first respondent, he himself entered into a Joint Development Agreement with the builder for disposing his 1/3rd share in the second item of the suit schedule property. After his demise, pursuant to the said agreement, the respondents are disposing the 1/3 share devolved upon them on the demise of the first respondent's husband along with co-owners of the property to the prospective purchasers of the flats. An order of attachment could be considered, only when the respondents started to dispose the property after filing of the suit with an intention to delay or obstruct the execution of the decree that may be passed against them. But, in the instant case, I do not find such a situation. In fact the first respondent herself entered into the Joint Development Agreement with the developer even before the date of alleged loan. Hence, I am of the opinion that the materials placed before this Court are not sufficient for granting an order of attachment before judgment."

30. In ***2014 (2) LW 372 (R.Ramesh Vs R.Raveender)***, *the author of this order had an occasion to observe as* under:-

"13. A reading of the above provisions would make it clear that the court is empowered to either direct the defendant to furnish security or show cause as to why such direction should

not be given. If only the defendant fails to show cause or furnish security, attachment can be ordered exercising the powers granted under Rule 6. But attachment is not automatic. The word "may" employed in Sub-clause (1) of Rule 6 would imply that the Trial Court is bound to conduct an enquiry and apply its mind before ordering attachment. The powers conferred under Order XXXVIII Rules 5 and 6 to direct the defendant to either furnish security or order attachment is a discretionary relief. The discretion has to be carefully exercised. The court must take into account not only the statement in the affidavit but also consider the possibility of the correctness of the statement in corroboration with specific particulars in the affidavit or documents filed in support of the affidavit. When the allegations in the affidavit that the defendant is attempting to alienate the whole or portion of the property or that the defendant is attempting to remove the property from the jurisdiction of the court are vague, unspecific and not supported by any proof, the courts must be hesitant in attaching the property of the defendant.

14. In the present case, the Trial court seems to have been carried away with the fact that the appellant, instead of furnishing security, has filed the counter and sought for the dismissal of the application. It is the right of a defendant to file a counter and point out that the contentions in the affidavit are false. The affidavit filed by the respondent in support of the application reads as under:

3. I submit that the Respondent herein is having only immovable property detailed in the petition. I state that the Respondent is making hurried attempts to dispose off the property detailed in the Petition to the third parties with a view to defeat and deprive off my right as well the decree that may be passed in my favour, against the Respondent/defendant. If the Respondent succeeds in his attempt to dispose off the property detailed in the petition, I will be left with no other relief whatsoever to recover the huge amount outstanding from the Respondent."

4. Unless this Hon'ble is pleased to direct the respondent to furnish the adequate security for the suit claim, failing which order the attachment of the property detailed in the petition, I will be put to irreparable loss and hardships."

31. Per contra, the Learned Counsel appearing for the applicant has relied upon the following judgments contending that the principles laid down in C.P.C for grant of interim relief cannot be applied to an application under Section 9 and prima facie case is sufficient for grant of interim relief:

32. In ***1959 (13) LW 45 (Alsidass Kaverlal vs J. Hiriya Gowder),*** the learned Single of this Court has observed as under:-

> "As pointed out in Mulla's Civil Procedure Code, 12th Edition page 822, even where a debt is being attached, it is not necessary that the exact amount of the debt should be stated, provided there is a debt actually due at the time of the attachment."

33. The Division Bench of this Court in ***2002 (2) CTC 238 (Ganesh Benzoplast Ltd., Mumbai, vs Sundaram Finance Ltd., Chennai)***, has held as under:-

> *"13.Here again what the above provision contemplates is that the court has to satisfy by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award or that speedy execution of the award is just and necessary. Both the provisions Order 38, Rule 5 C.P.C as well as Section 18 of the Arbitration Act, 1940 contemplates the satisfaction of the court by the affidavit or otherwise.*
>
> *14.When those provisions have been considered by this court and various other courts as well as the Apex Court, the courts have held*

that the mandatory requirements of the provision have to be strictly complied with. In order to satisfy the said requirement, it is for the party who claims interim order of attachment or any garnishee order to aver in the affidavit filed in support of such application that the debtor is aiming to delay or defraud the creditor. The non compliance would disentitle the party who seeks prohibitory order against the garnishee or attachment order from seeking such relief.

16.A perusal of Section 9 would make it clear that it is neither similar to Order 38 Rule 5 nor Section 18 of the Arbitration Act, 1940. When that be so, the bulk of the judgments relied upon by the learned senior counsel for the appellants is of no assistance to decide the issue in this appeal.

34. In ***2011 (2) MWN (Civil) 604 (Perim Janardhana Rao vs M.Balaji),*** the Division Bench of this Court has observed as follows:-

" 12. Therefore, the plaintiff has established prima-facie case for the purpose of passing an interim order in his favour. As regards the provisions of Order 38 Rule 5 CPC, we have to see the reasons enunciated in the said role. According to Rule 5(1) of Order 38 of CPC, if the defendants are with an intention to obstruct or delay the execution of any decree that may be passed against them or about to dispose the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court can pass suitable orders of furnishing security and in default to attach the property. Therefore, any one of the two contingencies mentioned in Order 38 Rule 5(1) CPC should be present for passing an order of furnishing security. As regards this case, the plaintiff had furnished in his affidavit that the defendants are selling the property in order to evade payment of the decree amount likely to be passed in this case. It is also fairly admitted that the Power Agents of the defendants are doing all the mischieves and it has to be verified by the defendants as to whether all the properties sold are part of the properties mentioned in the schedule of Judges Summons and thereafter only the remaining schedule of property unencumbered may be furnished to the Court. In the said circumstances, the Court can presume that the

defendants through their Power Agents cannot control the sale of the property as it was executed by the Power Agents themselves and therefore, the properties belonging to the defendants are being sold even after filing of the suit. If all the properties of the defendants have been sold nothing would be available for the decree amount likely to be passed and this case will be defeated. In the facts and circumstances of the case, we can find a prima-facie case regarding the sustenance of the suit claim and the compliance of the provisions of Order 38 Rule 5 CPC have been satisfied and the opportunities given to the defendants have not been availed and therefore, it has become necessary for this Court also to confirm the order passed by the learned single Judge in directing the defendants to furnish security for the principal sum of Rs.79,00,000/-. Accordingly, the order passed by the learned single Judge is confirmed and the appeal is liable to be dismissed. However, the time limit granted by the learned single Judge to furnish security has been lapsed since the appeal has been preferred. Therefore, we are inclined to grant three weeks time for furnishing security as per the direction of the learned single Judge from the date of receipt of a copy of this order.

35. There cannot be any quarrel with regard to the tests to be followed while granting interim reliefs. The applicant cannot merely rely upon a statement in the affidavit. The judgments relied upon by the learned counsel for the applicant are no longer good law in view of the subsequent judgments relied upon by the Learned Senior counsel for the 1st respondent.

36. Moreover, the facts of the case are completely different. In the judgment relied upon by the learned counsel for the appellant in 2011 (2) MWN 604, the defendants had sold certain portions of the properties pending suit through their power agents and the same was not disputed. There is no similar evidence or admission in the present case. The power under section 9 akin to the power under Order 38 Rule 5 C.P.C. must be exercised sparingly. Even while granting an order of interim protection under

section 9 of the Act, this court is bound to follow the tests laid down for granting interim relief. The ratio laid down by the Apex Court in 2007 (7) SCC 125 and the judgment of the Division Bench of this Court in O.S.A 279 & 280/09 settles the issue.

37. Upon considering the pleadings and the documents and also the judgments relied upon the Learned Counsels appearing on either side, this court is of the view that a prima facie case has been established by the applicant to make a claim. However, as pointed out by the learned senior counsel, the applicant has not made out a case warranting prohibitory orders. There is a counter claim by the 1st respondent in the nature of damages. The validity of the claim and the counter claim have to be decided only by the Arbitral Tribunal. The claim of damages has to be substantiated and proved. But, a portion of the claim of the applicant has been admitted with certain reservations by the 1st respondent.

38. Initially, this court has passed an exparte interim prohibitory order on 06.02.2015 having found prima facie case in the claim of the applicant. Subsequently, the 1st respondent has approached this court contending that they have made counter claim amongst various others things. The 1st respondent has accepted that they had withheld the payments to the tune of Rs 1,80,28,295/- as the applicant used the substandard materials and poor workmanship and hence to mitigate the loss, the above sum is withheld. Based on the above admission, the applicant has filed the A.No 1600/2015 for a direction to pay the admitted amount, pending arbitration proceedings. However, the claim has been resisted by the 1st respondent contending that they have a counter claim which is much more than the withheld amount.

39. In support of his claim, the learned counsel for the applicant has relied upon the judgment reported in ***2014 (1) LW 888,(M/s.L&T Finance Ltd., Vs M/s.J.K.S.Constructions Pvt. Ltd.,)***in which this Court has held as under:-

> *"12. Basically, the respondent borrower is opposing all the above applications, not on the ground that they never committed any default in payment of the instalments, nor on the ground that no amount is due and payable by them. Today, the respondent cannot also raise any dispute with regard to the liability under the arbitration awards, since the respondent has not brought up before me, till this date, any petition under Section 34 of the Act, challenging any of the four awards. Therefore, as on date, I have to proceed on the footing that there is no serious dispute about the liability of the respondent under the arbitration awards.*
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> *65. Curiously, the borrower does not have any dispute with regard to their liability to make payment. Today, even if they dispute their liability to make payment, I would not hear the borrower on that question, in view of the fact that arbitration awards had been passed on 3.7.2013. Till date, no petition under Section 34 of the Act, has so far been brought up before me for hearing. The borrower has been clever enough to file a petition under Section 34, but not to bring it up for hearing at all even for admission tii date.*
>
> *66. The applicant came up with better affidavits in all the applications, expressing apprehension that the borrower has secreted the equipment. In response to the better affidavits, the respondent filed additional common counter affidavit. In paragraph 3 (d) of the additional common counter affidavit, the respondent has admitted liability at least to the extent of Rs.1,07,51,115/-. After having admitted liability to that extent, the respondent has taken a curious stand that the said amount is payable only as per the award of the sole Arbitrator and that if the said award is set aside or held unenforceable, the respondent would not be liable to pay any money. Additionally the respondent has stated that they are entitled to recover damages on account of the applicant charging exorbitant rates of interest. Such an utterly dishonest stand taken by the borrower can hardly be appreciated especially at this distance of*

time. The contracts were entered into in 2010-2011. The respondent has come up with such a stand about exhorbitant rate of interest after having suffered arbitral awards. Therefore, the intention of the borrower to deprive the applicant of even the admitted liability is crystal clear.

68. As a matter of fact, after the appointment of an Advocate Commissioner by this Court and after he made an attempt to seize and possess the equipment, the borrower sent a letter dated 3.7.2013 to the applicant, agreeing to pay the outstanding balance amount under all the contracts, in a sum of Rs.1,43,42,840/-, on or before 15.7.2013. Along with the letter, the borrower also issued two cheques, one for a sum of Rs.20,00,000/- and another for a sum of Rs.17,16,482/-. For the balance amount, they issued two post dated cheques. But the cheque for Rs.1,05,00,000/- bearing No.120736 dated 18.7.2013 got dishonoured for insufficient funds. The borrower did not dishonour the cheque on the ground that there was no liability or on the ground that they had a claim due to exhorbitant rate of interest. This shows that even at that time, the borrower had no dispute about the liability. As I have pointed out earlier, in paragraph 3(d) of the common counter affidavit, there is an admission of liability to the extent of at least Rs.1,07,51,115/-. This common counter affidavit was sworn to on 2.12.2013. Despite this admission, the borrower has not exhibited any intention to make payment. On the contrary, the borrower has only indulged in a lot of legal research on how to defeat the claim of the creditor and how to deprive the creditor of their dues. It is true that in an adversarial system of litigation, the borrower has the right to do so. But the court has a different obligation. In such circumstances, I am of the view that there must be a prohibitory order, restraining the Garnishees from making payment of the amounts. I am conscious of the fact that it is a drastic order. I would not venture to pass such a drastic order, had the respondent-borrower had exhibited some element of fairness, by at least agreeing to make payment of the admitted liability in easy instalments. After having admitted liability to the extent of at least Rs.1.07 crores, the respondent does not have the mind even to pay this liability in easy instalments, which if asked for, would have been granted by me willingly. Today, the respondent wants the applicant to execute the award. But the respondent has already filed a original petition under Section 34, but has not numbered the same and brought it up for admission. Therefore, the intention of the respondent-borrower appears to be to deprive the applicant of their legitimate dues.

40. The learned counsel for the applicant has also produced the order passed by the Hon'ble Division Bench of this Court in O.S.A Nos.60 to 63/14, wherein the Division Bench has modified the relief based on the circumstances without disturbing the findings.

41. Per contra, the Learned Senior counsel has relied upon the judgment reported in ***2012 (4) CTC 465 (Owners and Persons interested in the Vessel M.V. GATI ZIPP Now lying at the Port of Chennai Vs Mars Petrochem Pvt. Ltd.)*** wherein the Hon'ble Division Bench of this Court has held as follows:-

"28. As per the above-cited decision, the presumption under Sections 118(a) and 139 of the Negotiable Instruments Act are rebuttable in nature. Simply because the six cheques have been issued by the appellant/defendant, which got dishonoured, it cannot lead to a presumption that the defendant has admitted its liability. The appellant/defendant also projected his defence by contending that in the absence of written contract, in the absence of production of books of accounts coupled with the fact that they have not admitted the invoice and that the cheques in question have been handed over to the plaintiff to secure the supplies effected, it cannot be said there was clear and unambiguous admission on its part to pay the sum of Rs.22,23,504/-, due and payable under the dishonoured cheques.

29. A perusal of some of the purchase orders would disclose that the payment is secured by means of post-dated cheques and with regard to the supply of Lubes effected at Colomby for the vessel MV Gati Prestige, e-mail communication emanated from the plaintiff would read that the defendant has to issue post-dated cheques as per the stand-by arrangement and after remitting the US Dollars, the cheques will be returned back to them.

30. As per Order XII Rule 6 of the Code of Civil Procedure, admission *on the part of the defendant should be clear, unambiguous, unconditional and unequivocal and the power to grant interim decree is a discretion vested in the Court and the plaintiff cannot claim interim decree as a matter of right.*

31. This Court, on a careful consideration and appreciation of the materials placed before it is of the view that there is no clear, unambiguous, unconditional and unequivocal admission on the part of the appellant/defendant admitting its liability to the tune of Rs.22,23,504/-. Though six cheques issued for the abovesaid sum got dishonoured, the presumption under Sections 118(a) and 139 of the Negotiable Instruments Act is a rebuttable one and it could be done only during the course of trial by letting in sufficient evidence. This Court, therefore, is of the considered opinion that the reasons assigned in the impugned interim decree are unsustainable in the light of the abovesaid legal position."

42. Upon carefully considering both the judgments, this court is of the view that judgments relied upon by the applicant is not applicable to the facts of this case. In that case, the claim arose out of finance for machinery and equipments and the respondents committed default in payment. There was already an award against the respondents. Therefore, the court had held that the liability could not be disputed and the respondent did not have any dispute with their liability to make the payment. However, in the present case, the 1st respondent has though admitted the withholding of payments, simultaneously claimed that the amount was withheld only to adjust against the loss suffered by them.

43. Therefore, the admission is not without any dispute. In the above circumstances, the ratio laid down by the Hon'ble Division Bench of this Court in 2012 (4) CTC 465 that the admission must be clear, unambiguous, unconditional and unequivocal is applicable. Further, this is an application under section 9 of the Arbitration and Conciliation Act. The provisions of Section 9 of the Act reads as under:-

"9. Interim measures, etc., by Court - A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely :- (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property on thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

44. As settled by various decisions, it is only an interim measure to protect the interest of the applicant pending arbitration proceedings. It is also settled that the provision can be invoked even after an award is passed but before execution. However, the section cannot be treated on par with Order 12 Rule 6 of CPC to direct payment as an interim award. Therefore, the relief sought for in A.No 1600/15 cannot be granted and is dismissed as it is beyond the scope of Section 9 of the Act. Section 9 of the Act empowers the court to grant such other interim measure of protection that may appear to be just.

45. Therefore, considering the facts and circumstances of the case, the prohibitory order dated 06.02.2015 is vacated with a condition that the 1st respondent shall furnish security to the tune of Rs 1,80,28,295/- within four weeks from the date of receipt of a copy of this order.

46. In so far as A.No 1599/15 is concerned, the applicant has sought for the entire bill extract to know the exact amount due from the 2nd and 3rd respondents to the 1st respondent. Since, this court has already decided to vacate the prohibitory order and modified the same as above, this court is not inclined to issue the direction as sought for by the applicant. Further, the 1st respondent has already furnished the final statement of accounts certified by the Assistant Engineer.

47. Moreover, this court is of the view that under Section 9 application, this court cannot be used as a tool for collecting evidence. The powers of the court under section 9 (c) is only to preserve the evidence and not to collect the evidence. It is

open to the applicant to approach the Tribunal for appropriate relief if there is any dispute with regard to the bills. Hence the relief is rejected.

With the above directions, the A.No 721/15 is disposed of. The application in A.No 1397/15 is partly allowed and the applications in A.No. 1599 and 1600/15 are dismissed. However, there will be no order as to costs.

rnb 27.4.2015

Index : Yes/No.
Internet :Yes/No

R. MAHADEVAN, J.

rnb

Pre Delivery Order in

Application Nos.1599, 1600 and 1397 of 2015
in

Application No.721 of 2015 and Application No.721 of 2015

Date : 27.4.2015